Neutral Citation Number: [2021] EWHC 1221 (QB)

Case No: QA-2020-000069, 000076

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
(His Honour John Hand QC, sitting as a Deputy Circuit Judge)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2021

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

JOHN READER	**Claimant**
- and -	
SPIE LIMITED	**Defendant**
- and -	
PAUL ANTHONY GARSIDE	**Third Party**

- -

Dale Martin QC (instructed by **Mayer Brown International LLP**) for the **Defendant**
David Cavender QC (instructed by **JMW Solicitors LLP**) for the **Third Party**

Hearing dates: 27, 28, 29 April 2021

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00 am on 11 May 2021.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. In 2014, the defendant, SPIE Ltd ("SPIE"), took over the business of Garside and Laycock Ltd ("G&L"). SPIE and G&L were then associated companies in an international corporate group ("the SPIE Group") headed by the French company SPIE SA, following the sale of G&L to SPIE (UK) Ltd ("SPIE UK") in July 2012 by its then owner, the third party, Paul Garside. The sale was pursuant to a Share Purchase Agreement dated 13 July 2012 ("the SPA"). It completed on 31 July 2012. The claimant, John Reader, was a senior manager employed by G&L whose employment contract transferred to SPIE in accordance with the Transfer of Undertakings Protection of Employment Regulations 2006 when SPIE took over G&L's business.

2. The County Court proceedings from which these appeals arose were brought by Mr Reader, claiming £136,635 as unpaid bonus for G&L's 2011/12 fiscal year (1 August 2011 to 31 July 2012). A term enhancing Mr Reader's 2011/12 bonus from what would have been £49,568, to £186,202, was part of the contract concluded between G&L (acting by Mr Garside) and Mr Reader on 11 September 2012 by which Mr Reader's terms and conditions of employment with G&L moved to those used as standard within the business division of the SPIE Group that G&L had joined. Mr Reader also brought an Employment Tribunal claim against SPIE for unfair dismissal. In respect of the County Court claim only, SPIE claimed that Mr Garside would be liable to it in respect of any liability it had for or reasonable settlement it might agree of Mr Reader's claim.

3. Under Clause 11.3 of the SPA Mr Garside had a potential liability if any of four key employees, Mark Parker (Commercial Manager), Mr Reader (Operations Manager), Dean Coyne (Office Manager) or Rachel Schofield (Company Secretary), did not sign up to SPIE Group employment terms, including bonus scheme, by 31 August 2012. It was appreciated on all sides at all material times that the SPIE Group bonus scheme would be less generous than the G&L bonus scheme those key employees enjoyed.

4. The term enhancing Mr Reader's 2011/12 bonus was part of a simple, one-page side letter agreed with his new SPIE group terms of service, to the effect that for 2011/12 he would be paid the bonus arising on Mr Parker's 2011/12 terms. An equivalent 'step up' enhancement was also agreed for Mr Coyne and Ms Schofield, in that their side letters provided that for 2011/12 they would be paid the bonus arising on Mr Reader's 2011/12 terms. The cost of the enhancement for Mr Coyne and Ms Schofield was an order of magnitude smaller, however, taking their bonuses from £37,176 to £49,568, an increase of £12,392. In the event, G&L did not pay Mr Coyne or Ms Schofield that enhancement and neither of them made any claim for it.

5. On 29 July 2016, Mr Reader and SPIE settled both of Mr Reader's claims for a payment of £50,000 by SPIE, with associated costs incurred by SPIE of £7,866.46. The County Court proceedings continued between SPIE and Mr Garside only, although Mr Reader still gave evidence, as a witness called by Mr Garside. The proceedings were conducted by the parties at extraordinary, disproportionate cost. SPIE's costs by the end of the proceedings were put at £413,845.95, and I was told that Mr Garside's costs were higher still. It was beyond the scope of the appeals to

explore how such grossly disproportionate cost came to be incurred in the modern era of costs and case management.

6. The trial was originally fixed to start on 30 January 2017 but was stood out by the court. The trial ultimately came on just over a year later, before His Honour John Hand QC, sitting as a Deputy Circuit Judge after retirement from the Circuit Bench. The trial occupied six days in February 2018, five days in June 2018, and two days in September 2018. Judgment, much delayed due to illness on the part of the judge and his wife, was handed down on 31 October 2019. Substantive orders were finally made after a further hearing on 31 January 2020.

7. The judgment concluded that as an incident of his fiduciary duty not to act in a position of conflict of interest, Mr Garside should have done more than he did to draw the enhanced bonus term for Mr Reader to the attention of Peter Young, the director of G&L joining from the SPIE Group when the SPA transaction completed by whom the decision was to be, and was in fact, made on what terms to grant to Mr Reader as the package by which he would move over to SPIE terms of service. For that breach of fiduciary duty, as the judge held it to have been, Mr Garside was held liable for such part of the cost of the compromise with Mr Reader as could reasonably be attributed to the settlement of the County Court claim based on the enhanced bonus term rather than the settlement of the unfair dismissal claim in the Employment Tribunal. The judge concluded that the compromise should be apportioned as to two-thirds to the settlement of the enhanced bonus claim.

8. Judgment for SPIE was therefore entered on 31 January 2020 for £38,577.64 (two-thirds of £57,866.46), plus interest. Rejecting arguments for SPIE (i) that it should have its costs on the indemnity basis generally and/or (ii) that orders under CPR 37.17(3)/(4) should be made ("Part 36 Consequences") because it had bettered an offer dated 12 January 2017 to settle for £10,000 plus costs ("the 2017 Offer"), and an argument for Mr Garside that the proper costs order overall was that SPIE should pay at least 75% of Mr Garside's costs, the judge ordered Mr Garside to pay SPIE's costs of the proceedings, to be assessed on the standard basis if not agreed, with a payment on account of £275,000.

Grounds of Appeal

9. The question of permission to appeal was considered by the judge, and in this court by Tipples J, DBE, on paper and Calver J at a renewal hearing. Calver J was persuaded to widen slightly the permission to appeal granted to Mr Garside by the judge in respect of liability, with the result that the parties had the following limited permission to appeal:

   (1) SPIE had permission to appeal "*in relation to the finding that the [2017 Offer] was not a valid Part 36 offer pursuant to CPR Rule 36.5*".

   (2) Mr Garside had permission to appeal on two of the grounds by which he wished to contend that the judge should have found that G&L gave informed consent such that he could not be liable.

10. As regards SPIE's appeal (QA-2020-000069), the judge held that the 2017 Offer was not an offer "*made less than 21 days before the start of a trial*" within CPR 36.5(2),

so it was required to conform to CPR 36.5(1)(c), and since it did not do so (as was and is common ground) no question arose of applying Part 36 Consequences. There was no permission to appeal, and therefore no appeal, against the judge's conclusion that compliance with CPR 36.5(1)(c), if applicable, was a pre-requisite for Part 36 Consequences to be available, or against his refusal, taking account of the 2017 Offer and all other matters relied on by SPIE, to order indemnity costs as a matter of discretion pursuant to CPR 44.2-44.3.

11. As regards Mr Garside's appeal (QA-2020-000076), at the hearing on 31 January 2020, proposed grounds of appeal were put forward in respect of the substantive judgment, going to breach (Ground 1, with five separate grounds raised), causation (Ground 2), and quantification of loss (Ground 3). These were set out in writing in a skeleton argument, to which the judge's order granting permission to appeal cross-referred. When the costs decision went against Mr Garside, to the extent it did, permission to appeal against that was also sought, but refused. The permission granted by the judge was limited to the second and fourth grounds raised under Ground 1 in the skeleton argument. The slight widening of the scope of permission to which I referred above, at the oral renewal hearing before Calver J, in effect added permission for what had been the fifth of the grounds under Ground 1 in the January 2020 skeleton argument, but limited to treating it as an aspect of the fourth ground under Ground 1 on which the judge had given permission.

12. As formulated in the January 2020 skeleton argument, and reiterated but with changes of formatting and numbering in the Appellant's Notice in this court, Mr Garside's grounds of appeal were a diffuse mix of grounds, argument and evidence in support. For example, as it appeared in that skeleton argument, the fourth ground under Ground 1 covered some 4½ pages. In my judgment, separating wheat from chaff, the grounds on which Mr Garside was granted permission to appeal may fairly be reduced to the following:

Ground I

The judge should have held that though there was a potential conflict of interest, there was implied informed consent in advance, and therefore no breach of fiduciary duty, in that:

(1) the potential for a conflict of interest existed because securing Mr Reader's agreement to SPIE service agreement terms from 2012/13 (including the SPIE bonus scheme) had the potential for Mr Garside to avoid liability under clause 11.3 of the SPA;

(2) that potential for conflict was implicit in the terms of the SPA, known to G&L (by *inter alia* Mr Young);

(3) G&L (by Mr Young) nonetheless consented to Mr Garside acting for it in negotiating with Mr Reader his new contract of employment, indeed required him so to act.

Ground II

The judge was wrong to hold that there was a duty on Mr Garside to do more to ensure that attention was drawn to the enhanced bonus provision, in that he should have held that G&L (acting otherwise than by Mr Garside, in particular acting by Mr Young) gave informed consent (within the meaning given by the Court of Appeal in *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83) to the signing of Mr Reader's new contract containing that provision, and/or sufficient disclosure was in fact given because:

(1) G&L (acting otherwise than by Mr Garside, in particular acting by Mr Young) was aware the new contracts, as proposed, were designed to deal *inter alia* with the bonuses previously paid to the senior employees, including Mr Reader, and that they were looking to be compensated for giving up the G&L bonus scheme in favour of the less generous SPIE bonus scheme;

(2) G&L (likewise acting otherwise than by Mr Garside, in particular acting by Mr Young) had all the information it needed and ample time to evaluate (including, if it wished, to take advice as to) the terms proposed for Mr Reader so as to decide whether to agree to them;

(3) the enhanced bonus term was clear, simple, prominent and highlighted;

(4) on 3 and 4 September 2012, Mr Garside made clear he was expecting G&L (acting by Mr Young and others) to check the proposed terms carefully and decide for itself whether or not to accept them;

(5) on 4 and 5 September 2012, G&L communicated to Mr Garside, in effect, that it had checked the proposed terms and was making its own decision about them.

13. Within what was the fourth ground under Ground 1, as put to the judge when obtaining permission, it was also said to be an error of analysis by the judge to approach the question of disclosure by Mr Garside on the basis that the enhanced bonus term was a (proposed) change to Mr Reader's existing terms of employment. But it plainly was, so I have not complicated what I have now called Ground II by that extra element. The basis for the contention to the contrary on behalf of Mr Garside was the fact that going over to SPIE terms was achieved by terminating the old employment contracts and putting new ones in place, and the enhanced bonus was (part of the) *quid pro quo* for going over to the SPIE terms. That is all true, but it does not stop the enhanced bonus term from having been, and it plainly (also) was, a variation, to the benefit of Mr Reader, of his (outgoing) terms and conditions of employment, as they applied to what thus became their final year of operation, 2011/12.

14. In any event, in my view the judge did not propose some different or special legal test for the disclosure required of a fiduciary where the matter calling for disclosure was by nature a variation of an existing contract. He merely drew attention to the fact that the enhanced bonus element of the *quid pro quo* altered an historic entitlement under the outgoing terms of employment rather than being one of the new terms of

employment. It was therefore a term of the package being agreed, and so had to be disclosed as part of the process of getting that package approved.

15. The question for the judge was whether, judged objectively, Mr Garside's communications disclosed the enhanced bonus term to G&L (acting by Mr Young). The question on appeal is whether the judge directed himself correctly as to that, and if so whether he came to a conclusion that was fairly open to him on the evidence in relation to it.

SPIE's Appeal

16. The 2017 Offer was made by solicitors' letter dated 12 January 2017, less than 21 days before the start of trial as it was then listed. It was made expressly on that basis, and on the basis, therefore, that the Part 36 Consequences would not apply unless SPIE made a successful application to the court to abridge "the relevant period". Thus, SPIE's solicitors wrote that "*... although we are now within 21 days of the start of the trial, if your client does not accept this Offer to settle and our client succeeds at trial, we will ask the court to use its wide discretion under CPR 44.2 to make a costs order in our client's favour in accordance with Part 36 principles, and to abridge the Relevant Period for the purposes of Part 36 to 14 days from the date of this letter.*"

17. Part 36 is, as CPR 36.1(1) says, a self-contained procedural code regulating offers made in accordance with its terms. It is also a complex code. But at any rate as between experienced litigation solicitors, as the 2017 Offer was written, it would not require further explanation that:

    (1) given the context, the "relevant period" was the period defined by CPR 36.3(g), i.e. the period specified under CPR 36.5(1)(c) (or such longer period as the parties might agree), in the case of an offer made not less than 21 days before a trial, and otherwise the period until the end of the trial;

    (2) CPR 36.5(1)(c) generally requires an offer to specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs if the offer is accepted (which will then be the relevant period, see (1) above), but, by CPR 36.5(2), not so for an offer made less than 21 days before the start of a trial (the relevant period in relation to which is not set by CPR 36.5(1)(c), see (1) above again);

    (3) by CPR 36.17(7)(c), as part of the consistent whole that is the Part 36 regime, an offer made less than 21 days before the start of trial (to which therefore CPR 36.5(2) applies, and for which the relevant period is the period to the conclusion of the trial), is an offer to which the Part 36 Consequences do not apply "*unless the court has abridged the relevant period*".

18. Those characteristics, with associated consequences, of an offer to settle stated to be made pursuant to Part 36 (else CPR 36.5(1)(b) will not be satisfied and no other Part 36 question need be addressed), must be capable of being judged by the parties, both offeror and offeree, when the offer is made. Parties must be able to take a view on whether to make, respectively accept, what purports to be a Part 36 offer, with certainty as to those matters. There is nothing in the language of the provisions of Part 36 leading to the conclusion, or even hinting at the possibility, that those

characteristics, and associated consequences, can change over time or upon some subsequent event.

19. The 2017 Offer asked Mr Garside's solicitors in terms to let SPIE's solicitors know by return "*If you consider this offer to be in any way defective or non-compliant of Part 36*". They did not do so, by return or at all. After judgment, however, Mr Vickers, trial counsel for Mr Garside, argued that because the trial was adjourned after the 2017 Offer was made, so that in the event the trial commenced at least 21 days (in fact some 13 months) after the offer, CPR 36.5(2) did not apply. In other words, although the language of 'validity' is not my preferred language in this context, the adjournment of the trial invalidated the 2017 Offer as a Part 36 offer.

20. The judge was persuaded by that argument, but I am not. In my view, the judge erred in law in that regard. The judge recorded the contrary argument of Mr Martin (as he was then) for SPIE as being that "*the validity of the offer must be considered at the time that the offer was made. What is at issue under CPR Part 36.5(1)(c) is the question whether or not CPR Part 36.17(4) will apply.*" I respectfully agree with both parts of that submission. As regards this aspect of the Part 36 regime, whether CPR 36.17(4) will apply is governed by CPR 36.17(7)(c), and it plainly refers back to CPR 36.3(g) and 36.5(2).

21. Mr Martin QC argued on appeal, as he did before the judge, that somehow the second part of his submission, as summarised in the above quotation, was unrelated to CPR 36.17(7), "*because that is dealing with a different chronological question*". CPR 36.17 deals with what happens when, after trial, it can be seen that an offer to settle has been bettered. But that does not mean that an offer that when made fell within CPR 36.3(g)(ii), and therefore CPR 36.5(2) and CPR 36.17(7)(c), can be re-characterised as an offer falling within CPR 36.3(g)(i) and therefore outside CPR 36.5(2) and CPR 36.17(7)(c).

22. The judge suggested that Mr Martin QC's argument on CPR 36.5(2) involved re-writing the rule: "*It seems to me his argument does not work unless one reads the words "before the start of a trial" as meaning "the date when the trial was due to start at the time the offer was made". I think all of those words whether in that order or in a different order, are necessary to encapsulate the interpretation that he wishes to achieve, and the very quantity of necessary additional words alone suggests to me that his construction is not correct.*" I respectfully disagree. The CPR 36.5(1)(c) requirement to state a period (except where the offer is made less than 21 days before trial) is fundamental to the Part 36 regime because it defines (with that exception) the "relevant period" and that is a basic concept with an importance, and operative effects, from the moment the offer is made and throughout the remaining life of the proceedings. It is therefore not a question of adding to or re-writing the language of CPR 36.5(2), it is simply a matter of recognising that the subject matter of CPR 36.5 is the required content, and effect, of an offer, if it is to be a Part 36 offer, when the offer is made. The insuperable difficulty with the judge's construction of CPR 36.5(2) is that it requires an offer, if it is to satisfy CPR 36.5(1) so as to be a Part 36 offer, to specify a period under CPR 36.5(1)(c) where no one applying their mind to CPR 36.5(1)/(2) when drafting the offer would conclude that that was required.

23. The judge concluded that "*the correct interpretation of CPR 36.5 and 36.17 is that the offer is not valid unless either a period of not less than 21 days is stipulated or the*

offer is made less than 21 days before the trial actually starts. To my mind this makes for certainty as to whether a party is at risk or not of Part 36 consequences." In my view, the instinct was correct that parties, especially offerees, should have as little uncertainty as possible over whether Part 36 Consequences will attach. But with respect, it is the judge's construction that introduces uncertainty, entailing that the applicability in principle of Part 36 Consequences cannot be judged with certainty when an offer is received, and may change over time. Likewise, Mr Martin QC's construction under which the "relevant period", as he submitted, can mean different things at different times in respect of the same offer.

24. It was to my mind a reflection of what the language of CPR 36.5 and 36.17 naturally conveys, and thus correct, for SPIE's solicitors to spell out as they did in the 2017 Offer that, given when it was made relative to trial (as matters then stood), Part 36 Consequences *could not apply without a successful application to abridge the "relevant period"*. If they had said nothing about that, and Mr Garside had sought advice, he should surely have been told the same thing: trial is less than 21 days away; CPR 36.3(g)(ii), 36.5(2) and (most importantly) 36.17(7)(c) therefore all apply; you will only be at risk of Part 36 Consequences if the court abridges the "relevant period".

25. It is not suggested that the relevant period was abridged by the trial court, or that any application for abridgement was made, unless it was made 'on the hoof' as part of Mr Martin's oral submissions on 31 January 2020, of which no record or note was included in the appeal papers. The judge's costs judgment does not refer to any such application being made as part of the argument. Mr Martin QC told me he believes he did make such an application and that his instructing solicitor has the same recollection.

26. Mr Martin QC submitted that an application for abridgement when the January 2017 trial listing was adjourned rather than simply the making of a fresh offer complying with CPR 36.5(1)(c) as would then have been required, would have been a disproportionate way of seeking to ensure that Part 36 Consequences were in play. I do not have the material to assess the relative monetary value to SPIE of those two options to say whether that submission is correct. What matters is the acknowledgment that even if a freestanding abridgement application would have been disproportionate, it was not SPIE's only means, the trial having been adjourned, by which to achieve the applicability of Part 36 Consequences. It does not explain why in fact SPIE chose to do nothing.

27. It was submitted with force that SPIE should not be criticised for failing to act as if the 2017 Offer had failed to comply with CPR 36.5(1), no point on that having been raised on behalf of Mr Garside until Mr Vickers raised it after judgment. But to my mind that misses the point, which is that on the face of the 2017 Offer (and as I have concluded, correctly), SPIE's position was that it would have to make an application for abridgement to bring Part 36 Consequences into play, but did not do so for over three years.

28. I do not think it would have been appropriate for the judge to abridge time retrospectively in those circumstances. The judge was not persuaded that it was just, in the exercise of his general costs discretion under Part 44, to order that any of SPIE's costs be assessed on the indemnity basis, taking account of the 2017 Offer (as

he was bound to do, on his finding that Part 36 Consequences did not apply to it: see CPR 44.2(4)(c)) and even though it did not stand alone as a potential basis for a finding that assessment on the indemnity basis for at least some of SPIE's costs might have been justified. In making that decision, the judge noted that the 2017 Offer was "*a hard offer, and it offered little incentive to the third party. That is not the same … as saying it was a requirement to capitulate or not a genuine offer at all. On the other hand it does not seem to me that if it was not a valid Part 36 offer, the third party can be axiomatically criticised for not accepting it.*"

29. Although Mr Martin QC could fairly submit, as he did, that the judge was not there asking himself whether to abridge the "relevant period" pursuant to CPR 36.17(7)(c), so as to render applicable Part 36 Consequences to which SPIE had not caused themselves to be entitled, to my mind that is a clear enough indication that if it required an exercise of the court's discretion to render Part 36 Consequences applicable, then it was not right to exercise such a discretion in SPIE's favour in this case (even though, as the judge properly noted elsewhere, had it been for Mr Garside to persuade the court to disapply Part 36 Consequences to which SPIE had presumptively entitled itself, that might have been a difficult burden to discharge).

30. In those circumstances, I am not prepared to exercise now in favour of SPIE a discretion to abridge the "relevant period", or to remit the case to the judge (even if he would still be available to hear it) for him to consider whether to do so. My conclusion on SPIE's appeal is that although the judge was wrong to accept the argument that CPR 36.5(2) did not apply to the 2017 Offer, the decision he reached that Part 36 Consequences did not attend SPIE's having bettered that offer by the result achieved at trial was correct. I shall therefore dismiss SPIE's appeal.

Mr Garside's Appeal

Introduction

31. In granting permission to appeal on what I have called Ground I, *viz.* that there was implied informed consent in advance to Mr Garside acting though he was in a position of potential conflict so there could be no breach of fiduciary duty, the judge said that "*Whether or not the point was articulated in this way at trial all the factual material upon which it rests has been decided and I regard it as arguable that if such a concept exists, … which … it [was] submitted is supported by [Medsted, supra], which could not be cited to me because it had not been decided, it is something I have not dealt with.*"

32. As a logically prior point, Mr Martin QC submitted that there should be no question of allowing Mr Garside's appeal on Ground I. The judge did not deal with the point, Mr Martin said, not because he was unaware of the Court of Appeal's decision in *Medsted*, but because the point was not pleaded. I think it correct that the point was not pleaded.

33. The pleadings were neither concise nor a model of clarity, thanks in large measure to the unhelpful method adopted by Mr Martin when pleading SPIE's Defence (which stood also as its Particulars of Claim against Mr Garside), in which:

(1) Paragraph 17 was in these terms:

"*As set out below:*

(a) the Claimant acted in breach of clause 3.1(a) and/or (b) of the Compromise Agreement; and/or

(b) the Claimant acted in breach of clause 4.3.1 and/or 4.3.3 of his service agreement …; and/or

(c) the Third Party acted in breach of clause 4.3.1-8 of his service agreement …; and/or

(d) the Claimant and/or the Third Party acted in breach of [his] obligation of good faith and/or fidelity; and/or

(e) the Claimant and/or the Third Party acted in breach of fiduciary duty; and/or

(f) the Claimant and/or the Third Party respectively induced each other to act in breach of their respective employment contracts; and/or

(g) the Claimant and/or the Third Party assisted or encouraged each other to act in breach of their fiduciary duty; and/or

(h) the Claimant and the Third Party, wrongfully and by unlawful means, conspired together, as set out below."

(2) Paragraphs 18 to 38 then set out a long narrative, unstructured save that it was mostly chronological, mixing factual events, allegations as to Mr Reader's or Mr Garside's state of knowledge or understanding, evidence and comment, under a compendious heading that these were SPIE's "**PARTICULARS OF BREACH OF CONTRACT AND/OR FIDUCIARY DUTY AND/OR TORT OF INDUCEMENT OF BREACH OF CONTRACT AND/OR CONSPIRACY AND/OR MISTAKE**" (the reference to mistake being because in the middle of these so-called particulars came, at paragraph 30, the plea that "*Alternatively, the Claimant and/or [G&L] entered into the contract [including the enhanced bonus] under a common mistake*").

34. The decision by SPIE to throw the kitchen sink at Mr Reader's claim, in the manner indicated by paragraph 17 of the Defence, I envisage was a major contributing cause to the scandalous cost of the proceedings. That decision having been made, however, it was more of a priority than ever that proper pleading discipline be maintained, not abandoned altogether as it was. That required careful analysis, separately for each cause of action alleged, of the ingredients of liability that had to be pleaded, so that clear, concise particulars could be set out for each cause of action structured by reference to that analysis.

35. That said, the only claim that arises for consideration now is the claim that there was a breach of fiduciary duty based on conflict of interest. On that, it was clear enough, despite the deficiency of the pleading, that the basis of the claim was the allegation, in paragraph 18 of the Defence, that:

(1) Mr Garside agreed (with Mr Reader) to present to Mr Young for authorisation a side letter (being one of the documents by which the transition to SPIE terms and conditions of service would be effected) "*that, instead of providing for payment to [Mr Reader] of his own bonus [for 2011/12], would instead provide for payment to [him] of Mark Parker's bonus, which was in excess of £100,000 higher*"; and

(2) Mr Garside's interests conflicted or might conflict with G&L's in relation to that because granting that enhanced bonus to Mr Reader "*would better enable [Mr Garside] to escape the need to make good on any indemnities under the SPA and would be of substantial financial benefit to [Mr Reader].*"

36. Paragraph 18 went on to make a further allegation, not proved at trial, namely that Messrs Reader and Garside acted against G&L's interests by agreeing that Mr Reader would delay claiming his enhanced bonus until after the two-year SPA warranty period elapsed.

37. The Defence served by Mr Garside, pleaded by Mr Vickers, gave a reasoned denial of the charge that any (actual or potential) conflict of issue had arisen. The judge held for SPIE on that issue and Mr Garside was thrice refused permission to appeal against that conclusion. The Defence responded, further or alternatively, with Mr Garside's competing detailed narrative account of how the enhanced bonus term came to be included in Mr Reader's transfer of terms package, and upon the basis of that account denied breach (if there had been a conflict) on the ground that G&L acting otherwise than by Mr Garside, in particular acting by Mr Young, authorised the final package in early September 2012 having been given disclosure of the enhanced bonus term as part of what it was asked to authorise and having been asked by Mr Garside to check for itself whether the contents were acceptable.

38. That was plainly enough a plea of fully informed consent, though that exact terminology was not used, based on what was said to be disclosure of the enhanced bonus term at the time when it came to be proposed. The plea of disclosure involved three elements:

(1) a claim that Mr Garside told Mr Young about the enhanced bonus term for Mr Reader by telephone on Friday 31 August 2012. In fact, the pleading put the alleged telephone call either on that evening or on the following day; but Mr Garside's evidence at trial narrowed the plea to the Friday evening. The judge rejected this claim on the evidence as it came out at trial;

(2) the claim that is now pursued as Ground II on appeal that there was disclosure by the correspondence through which Mr Young's authority for Mr Reader's package was sought and given;

(3) a specific claim, which in truth is but a point of emphasis within (2) above, that the enhanced bonus term was particularly highlighted in the document by which it was put in front of Mr Young for approval (it was, so Mr Garside alleged, "*clearly and obviously highlighted in bold lines (particularly emphasised when opened on screen as electronic documents)*"). The judge refused permission to appeal by reference to that claim, presented to him as a separate proposed ground of appeal. Calver J's slight widening of the

permission to appeal enjoyed by Mr Garside was to permit him to rely on this point of emphasis as part of (what I have now called) Ground II.

39. The claim now made, by Ground I on appeal, that there was consent by the very act of delegating the task to Mr Garside, knowing that he was in a position of (at least potential) conflict, and that that provided (implied) consent to all that followed, including the actual enhanced bonus arrangement later proposed, is different in kind. It was not pleaded, but plainly it should have been pleaded if it was thought to arise on the facts. The burden of establishing consent such that the fiduciary's acting or having acted when conflicted (actually or potentially) is on the fiduciary; and even if it was not, a case that there was consent would be a reason for denying breach that had to be pleaded though (on that hypothesis) the burden of negativing consent would be the principal's.

40. The complication of whether Mr Garside should be allowed to overturn the judgment on a point not pleaded, and as part of that a consideration of what impact, if any, the failure to plead had on the course of the trial or the matters of fact the judge was asked to consider, whether by way of primary fact-finding or by way of inference or evaluative assessment, does not arise when considering Ground II. The appeal on Ground II is an appeal against the judge's conclusion on the case put to him at trial. Therefore, though perhaps Ground I raises the prior point, logically as well as chronologically, I prefer to deal with Ground II first.

The Facts

41. I now summarise the material facts, as found by the judge, with one additional point not mentioned in the judgment. Most of the judgment comprises primary fact-finding, but not that many of the facts found matter for a review on appeal of the narrow ground of liability on which SPIE succeeded. I have in some places supplemented the facts as stated in the judgment by quoting or quoting more fully than the judge did from the documents he referred to.

42. G&L was founded in 1923 as JW Laycock & Son. Mr Garside joined as an apprentice plumber under the supervision of Mr Donald Laycock. Mr Garside left the business to set up on his own account in 1980 but came back in 1983 when Mr Laycock was suffering from ill health and wanted to step away. Mr Garside took the business over and renamed it Garside and Laycock Ltd.

43. By 2012, when Mr Garside was looking to sell the business, Mr Parker, Mr Reader, Mr Coyne and Ms Schofield were key managers enjoying significant bonus provision. Mr Reader in particular had worked with Mr Garside for very many years. They were friends, and Mr Reader's sons also worked for the business.

44. By mid-June 2012, the four had been identified, in the context of the potential sale of G&L to the SPIE Group, as key employees who needed to be retained if possible. The SPIE Group had identified that they enjoyed large bonuses that could swing substantially from year to year and wanted them to be 'normalised' to the SPIE Group discretionary bonus model with performance targets and bonuses capped at 15% or 20% of salary.

45. On 3 July 2012, at a meeting between the two sides to the putative SPA, it was made clear by the SPIE Group representatives, which included Mr Young, that compromises would need to be put in place for the four key G&L managers, that "*the issue cannot rest with SPIE*" but also that Mr Young would make a "*proposal for salary and remuneration packages*". A follow-up email from the SPIE Group to Mr Garside on 6 July 2012 setting out basic elements agreed in principle for the SPA stated on this point that "*Paul Garside will sort the 3 managers T & Cs and has agreed that warranty will be in place should there be any HR issues at a later date*." The judge was unable to say whether the reference to three rather than four managers whose terms and conditions needed to be sorted was a misunderstanding or a typographical error in the email; but in any event, he found, matters proceeded thereafter on the clear basis that this principle related to all four key employees.

46. The SPA was concluded on 13 July 2012, with completion set for 31 July 2012. The four key managers were the "*Bonus-earning Employees*", who it was envisaged might make a "*Bonus Claim*" leading to "*Bonus Damages*", where:

(1) Bonus Damages were defined as "*an award of damages by the Employment Tribunal or a Court in respect of a Bonus Claim*";

(2) a Bonus Claim was defined as "*a claim for either unlawful deductions from wages and/or breach of contract brought by a Bonus-earning Employee against [G&L] arising directly from and limited to [G&L] having changed the Bonus Scheme*"; and

(3) Clause 11 of the SPA was in these terms:

"*11.1 As soon as reasonably practicable following the date of this agreement, the Buyers shall provide drafts of the Service Agreements to Mr Garside.*

11.2 For the period commencing on the date of receipt of such draft Service Agreements and ending on the Completion Date, Mr Garside shall use his best endeavours to seek the execution of the Service Agreements with each relevant Bonus-earning Employee.

11.3 In the event that:

(a) the relevant Service Agreement is not agreed and executed with each Bonus-earning Employee prior to or on the Completion Date; or

(b) [G&L] having used its reasonable endeavours to assist in seeking the agreement and execution of the relevant Service Agreement with each Bonus-earning Employee during the period of one month following the completion date,

Mr Garside shall indemnify [G&L] and keep it fully indemnified against the Bonus Claim and/or Bonus Damages."

47. Clause 11.3 is not well drafted. The sense seems to be that Mr Garside was obliged to indemnify G&L in respect of any Bonus Claim or Bonus Damages where a Bonus-

earning Employee had not signed a new SPIE terms service agreement by a month after completion, i.e. by 31 August 2012, provided that G&L had used reasonable endeavours following completion to assist in seeking their agreement. The basis of the indemnity (else it makes no sense generally) appears to be that G&L would be imposing the less generous SPIE Group bonus scheme on the four key managers come what may, leading to the possibility of a Bonus Claim (as defined) if that was done unilaterally.

48. Clause 11.3 did not require Mr Garside to bear the cost of any compromise that might be agreed with any of the four managers, if they did sign up to a new service agreement, in other words any *quid pro quo* agreed with them for going over to the SPIE Group bonus scheme.

49. By 20 July 2012, Mr Garside had received drafts for new service agreements from the SPIE Group. They included, for Mr Reader and Mr Coyne, increases in salary (in Mr Reader's case, to give him parity with Mr Parker) proposed by Mr Garside in an email to Mr Young on 17 July 2012, given the intended change to their future bonus packages. Commenting on a meeting on 20 July 2012 with Mr Garside to review progress with the key managers, Mr Young stated in an email to Ellie Kenyon (later Armour), SPIE UK's HR Director, that "*Paul is looking to get each of the individuals to sign a compromise agreement as [they] sign any new agreement which I feel is appropriate.*"

50. Mr Young had a view throughout that the effect of Clause 11 was that the cost of any *quid pro quo* was for Mr Garside to bear. Clause 11 plainly did not say that. The judge found that "*if Mr Young had read the SPA at all (something which I think is open to doubt but is not something I need to resolve), either he had not read clause 11 of the SPA carefully or he had not understood its limitations*", with the result that "*Mr Young believed that the SPIE Group was not going to be liable for any costs incurred in getting the bonus earning employees to give up their existing terms and conditions and enter into new SPIE standard term contracts. Those costs would be borne by [Mr Garside] himself.*"

51. It is not easy to reconcile that finding with Mr Young's acceptance, without any suggestion that Mr Garside should pay for it, of salary increases for Mr Reader and Mr Coyne as part of the *quid pro quo*. But the finding is not challenged on appeal, nor is the related finding that Mr Garside "*understood that the SPIE group position was that if there was a price payable for the changeover from the old terms to the new, then he would have to pay for at least part of it*". The true position was, of course, that since there was nothing about that in the SPA, any proposal for Mr Garside to bear or contribute towards the cost of any *quid pro quo* was a matter for separate negotiation and agreement between him and SPIE UK as SPA counterparties.

52. The key managers' transition to SPIE terms and conditions was not concluded by 31 July 2012. Mr Garside's discussions with them, and correspondence with Mr Young, continued into August 2012. By mid-August, the mechanism was taking shape of (i) a new service agreement, taking effect from 1 August 2012, putting the key manager in question onto SPIE Group terms, and (ii) a short side letter setting out any additional terms agreed as part of the package.

53. On 19 August 2012, Mr Garside sent to Mr Young and to Kate Marchant (HR Practice Manager for SPIE UK) what he proposed for Mr Reader, Mr Coyne and Ms Schofield, saying that "*If we can agree these, I am confident that we can get them signed and put to bed (Subject to the bonus scheme KPI's [Key Performance Indicators] as requested from yourselves last week) . I think that they are fair and reasonable and I hope that you can see the same.*" Each draft side letter was a single page that included a two-paragraph provision dealing with "*Bonus*". In Mr Reader's case, that provision was the entire content of the draft side letter, which looked like this:

Our ref: PG/PY/KM 140812
Date: 14th August 2012

Mr John Reader
6 Formby Avenue
Fleetwood
Lancashire
FY7 8HZ

OPERATIONS MANAGER

Dear John

SUMMARY STATEMENT OF ADDITIONAL SUPPLEMENTARY TERMS AND CONDITIONS OF EMPLOYMENT

This side letter deals with elements in addition to your main terms and conditions of your employment	
Bonus	Bonus for financial year 1st August 2011 to 31st July 2012 will be paid in accordance with the terms of John Reader's Garside and Laycock Contract of employment, "WRITTEN STATEMENT of terms and conditions of employment given in accordance with the Employment Rights Act 1996 (as amended)", clause 5d, dated 5th March 2008 and the "Variation to Contract Terms" letter, dated 21st May 2008. From the 1st August 2012, bonus will have an award ceiling of 20% of salary. This will be subject to achieving certain business / personal targets, which have yet to be set and agreed by both parties which are as per the SPIE UK Executive and Senior Manager bonus scheme attached. These will be identified and will be measurable. These business targets may include EBIT, percentage of production secured, cash collection etc. the personal targets would invariably include Health and safety.

<Your name>
<Your position>

54. The "*Bonus*" provision in each of the draft side letters for Mr Coyne and Ms Schofield was the same, except that the "*award ceiling*" was 15% not 20%.

55. Thus, by the first paragraph of the "*Bonus*" provision in the draft side letters, for Mr Reader there was confirmation that his outgoing bonus terms would be honoured for 2011/12, whereas for Mr Coyne and Ms Schofield the equivalent provision was for them to be paid for 2011/12 an enhanced bonus, based on Mr Reader's outgoing bonus terms. Mr Garside did not draw specific attention to that distinction, or to the fact that in that respect an extra element of *quid pro quo* was being built in for Mr Coyne and Ms Schofield that had not been mentioned before.

56. There were negotiations between Mr Garside and Mr Young about an element of compensation for Mr Parker that Mr Garside had proposed, the eventual agreement being that £25,000 would be paid, to which Mr Garside would contribute £15,000. Mr Garside also agreed to give Mr Parker, and paid him, what was described as a gift, of £100,000. That and other payments by way of, or described as, gifts were explored at trial, but the judge found that they were known about and rejected the proposition that it was a breach of fiduciary duty, or part of a conspiracy, or any breach of contract or inducement to break any contract, that Mr Garside had given the gifts in question.

57. The £25,000 proposal for Mr Parker was made in an email from Mr Young to Mr Garside on 30 August 2012. They spoke the next day, Friday 31 August 2012, and as regards Mr Reader they talked only about the terms to be agreed with him in relation to his company car. That conversation followed an email from Mr Young saying that "*In respect of the Service Agreements I have asked for a breakdown of what you perceive are the outstanding issues as I understand from you that these are fundamentally in place.*" Mr Young reported to others after the call, by email, that he had "*asked Paul, repeatedly, to provide a schedule / list of the outstanding issues. I await this. These obviously need to be closed out and we will maintain the pressure that this is the case. As Colin (Scagell) pointed out yesterday we will have indemnities in place to ensure that Paul Garside completes these.*"

58. Later that afternoon, in an email from Mr Garside to Mr Young, copied to Ms Kenyon, Ms Marchant and one other, Mr Garside stated that Mr Parker, Mr Coyne and Ms Schofield were now to the best of his opinion happy with the proposed terms and saying in relation to Mr Reader that, "*Once I have met with John later today hopefully I can draft the final versions over the weekend and send them to you for your agreement prior to issue on Monday/Tuesday.*" That, it seems, is when the proposal for enhancement of Mr Reader's 2011/12 bonus came up, that is to say when Mr Garside went through things with Mr Reader later that day. As I mentioned above, Mr Garside advanced a case that the judge did not accept that he had a further telephone call with Mr Young that evening in which he informed Mr Young of it.

59. On Monday 3 September 2012, Mr Garside sent four separate emails, each addressed to Mr Young, Ms Kenyon, Ms Marchant and (in each case) one of the four key managers, copied to the solicitor advising them, attaching the "*Final Pack*" proposed for that key manager. The covering email was in each case in these terms:

> "*Could you please check and confirm that the contents attached are acceptable to all parties in preparation for tomorrows signing (subject to the independent solicitors recommendations)*
>
> *Compromise agreements are not yet completed.*"

60. The reference to compromise agreements was to agreements to be executed under which, in consideration of the new service agreements and side letter provisions, the employees waived any possible claims arising out of their terms being changed. Thus, the "*Final Pack*" in each case comprised simply final drafts for the side letter and new service agreement.

61. Each draft side letter was still a single page. Mr Reader's, reproduced at the end of this judgment, looked very different to the draft provided on 19 August 2012.

62. In particular, the provision concerning bonus for 2011/12, presented between bold tramlines on the page, now provided for Mr Reader to be paid a bonus by reference to Mr Parker's outgoing terms. That is the enhanced bonus term that gave rise to Mr Reader's claim and the finding of breach of fiduciary duty against Mr Garside.

63. Although not mentioned by the judge, by email on 4 September 2012 to Mr Garside, copied to Ms Kenyon and Ms Marchant, Mr Young told Mr Garside that he and Ms Marchant had reviewed the draft documents in respect of Mr Reader and commented on aspects of the side letter, but not the enhanced bonus term, as follows:

> "*Paul,*
>
> *Kate and I have had the opportunity to review the draft documents sent through by you.*
>
> *The service agreement for John is acceptable in the form proposed.*
>
> *The side letter, if required, will need to be amended to reflect the information / guidance for bonus that will be sent through to you later today under separate cover.*
>
> *In respect of the vehicle this is fundamentally as we discussed however for clarity John will not be in receipt of either car or fuel allowance whilst he retains his current car. This does need to be closed out by the end of November.*"

64. By email on 5 September 2012, Mr Young authorised Mr Garside to sign for G&L, and on 11 September 2012 he did so. Mr Young's authorisation email was in these terms:

> "*Paul,*
>
> *With respect to the signing of the documents the side letter and any compromise are yours so I am happy with you signing them.*
>
> *In respect of the contracts of employment/service agreements I am happy for you to sign them, Ellie [i.e. Ms Kenyon] perhaps you could confirm.*"

Legal Principles

65. It is an inflexible rule of equity that a fiduciary must not act in a position where his interest and his duty conflict or may possibly conflict. This incident of the duty of a fiduciary admits of few exceptions, but one is that there can be no breach where there is fully informed consent. The burden of proving informed consent is on the fiduciary.

The correct analysis is that fully informed consent means that there is no breach despite the conflict or potential conflict, rather than that there is (as such) a fiduciary obligation of disclosure: "*Fiduciaries are not generally obliged to make full disclosure and seek consent. Rather, the fundamental obligation is to desist from acting in a way that involves a conflict between duty and interest; disclosure and consent provide a mechanism by which the fiduciary can avoid liability if he wishes to act in such a situation.*" (*Snell's Equity*, 34th Ed., at 7-019).

66. That said, it is not inconvenient, and often seen in the cases, to talk of a 'duty' fully and frankly to disclose what needs to be disclosed for any consent to be materially fully informed, a failure by the fiduciary to prove the 'discharge' of which will, effectively, ground the liability, because it will mean that there was not informed consent so as to escape from the inflexible rule of breach. Furthermore, in the context, as here, of a company director, the statute does articulate a specific duty to disclose any interest the director has in a contract or proposed contract with the company (Companies Act 2006, s.177(1), unless the other directors are already aware of the conflicting interest: s.177(6)).

67. In *FHR European Ventures LLP v Mankarious* [2011] EWHC 2308 (Ch), a broker advised the claimant on the purchase of an hotel and negotiated with the vendor on its behalf without disclosing a brokerage arrangement with the vendor under which the broker would receive a commission on the sale. Simon J (as he was then) held that there had not been informed consent, since there had not been disclosure. The case went on appeal as to remedies (see [2014] UKSC 45, [2015] AC 250), but that aspect is not relevant here. Simon J said this, concerning the case where a principal knows that an agent is receiving a commission otherwise than from that principal, at [81]-[82]:

> "*81. Since the sufficiency of disclosure is dependent on the facts of particular cases, previous decisions will be of limited assistance. However, it is convenient at this stage to refer to a line of cases relied on by the Defendant:*
>
> *i) There may be circumstances in which the payment of commission is wholly immaterial since it does not give rise to any conflict of interest and duty and therefore the application of the 'inflexible rule', see for example Anangel Atlas Compania Naviera AS and ors v Ishika Wajima-Harima Heavy Industries Co Ltd [1990 1 Ll. Rep 167.*
>
> *In cases in which a conflict [between] interest and duty may arise,*
>
> *ii) Where the principal knows the agent will receive a commission and could have discovered what the commission was, but did not take the trouble to enquire, a misapprehension as to the amount of the commission will not mean that there has been no informed consent, see for example Great Western Insurance Co of New York v Cunliffe (1874) LR 9 Ch App 525 at 539 and Baring v Stanton (1876) 3 Ch D 502 at 505.*
>
> *iii) The Court will not regard there being a lack of consent where the principal knows that commission will be paid, but wrongly assumes that it is an annual retainer rather than the 'standard and usual brokerage', see Hindmarsh v Brigham & Cowan Ltd (1943) 76 Ll.LR 141 at 152r.*

> *82. The latter two categories illustrate a consistent approach: where the agent can show a customary usage or that the amount of the commission is standard and ascertainable on enquiry, the failure of the principal to make enquires as to the amount of the commission is fatal to a contention that there has been insufficient disclosure. They do not assist where there is no customary usage of which the principal is deemed to have notice, or where the amount of the commission is not easily ascertainable from an available source which the principal has failed to take the trouble to discover.*"

68. Mr Cavender QC suggested that the present case was similar to that of a 'half-secret' commission as considered by Simon J at [81]. Mr Martin QC did not accept the analogy and, in the alternative, argued that if there were a similarity then this would be like the particular instance of that type of case considered by Simon J at [82], where there was no standard or typical level of or basis for remuneration of which the principal can be taken to have notice.

69. The doctrine of half-secret commissions has been considered more recently in *Medsted*, *supra*, and in *Wood v Commercial First Business Ltd; Business Mortgage Finance 4 plc v Pengelly* [2021] EWCA Civ 471. *Medsted* was decided after trial but before judgment in the present case. It is therefore not correct to say, as the judge did when granting permission to appeal, that it could not have been cited to him. If it were material to the issues on which he had reserved judgment, that is to say the issues considered at trial, it was the duty of counsel to draw *Medsted* to the judge's attention so he could be assisted by it, receiving supplementary submissions on its impact if he saw fit, when preparing his judgment.

70. To my mind, the judge was rightly not troubled by counsel with the half-secret commissions cases, and not only because the defence of implied informed consent in advance that is now Ground I on appeal was not pleaded. Those cases are not relevant here. As Longmore LJ explained in *Medsted*:

(1) (at [34]), an agent must not receive (or agree to receive) a secret commission from a third party; where the principal knows, or will have assumed, that the agent was receiving some payment from another, it overstates the matter to say there is a secret commission, and the question is whether it is within the scope of the agent's duty to inform the principal of the amount (see also at [45], citing *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 at 1130A and *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 102, for the proposition that the precise scope of the duty must be moulded according to the nature of the relationship);

(2) (at [35]-[41]), that question was considered in *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, [2007] 1 WLR 2351 and *McWilliam v Norton Finance (UK) Ltd* [2015] EWCA Civ 186, [2015] 1 All ER Comm 1026;

(3) (at [42]), the upshot is that for commissions paid or payable by a third party to an agent, "*the scope of the fiduciary duty is limited where the principal knows that his agent is being remunerated by the opposite party. As Bowstead and Reynolds say, if the principal knows this, he cannot object on the ground that he did not know the precise particulars of the amount paid. He can, of course, always ask and if he does not like the answer, he can take his business*

> *elsewhere. Bowstead adds that where no trade usage is involved ..., the principal's knowledge may require to be "more specific".*"

71. In *Medsted*, the total commission being paid on the relevant transaction was known. There was no question, even as to amount, of some commission being paid of which the principals were unaware. What was not disclosed was how much of the total commission being paid would go to Medsted, the position being that the commission was all payable to another firm (Collins Stewart), it was known that Medsted would be paid a share, but it was not known how large that share was. The Court of Appeal held that the failure to disclose the size of Medsted's share of the commission was no breach of fiduciary duty.

72. Here, the relevant task delegated to Mr Garside, although there was a potential for conflict in performing it between his duty of loyalty to G&L and his personal interest as vendor of G&L by virtue of Clause 11.3 of the SPA, was negotiating with the key managers, including Mr Reader, the terms on which they would be willing to accept the less generous SPIE bonus scheme from 2012/13, for Mr Young (with the assistance of HR) to decide whether to approve the same. Obviously Mr Garside had to inform Mr Young of the terms that Mr Young was being asked to approve. The question was simply whether he did so.

73. That is to say, the question upon which any possible liability of the kind held to exist turned was simply whether Mr Garside informed Mr Young of the terms Mr Young was being asked to approve (or whether, rather, he caused Mr Reader to enjoy, directly or indirectly so as to benefit Mr Garside, some secret arrangement of which Mr Young was not informed when he approved the package for Mr Reader that he approved).

Discussion

74. The judgment runs to 50 pages and 140 paragraphs. Though it was regrettably much delayed after the end of the trial, there was good reason for that. The judge had the benefit of full transcripts of the evidence. In contrast to a case like *Bank St Petersburg PJSC et al v Vitaly Arkhangelsky et al* [2020] EWCA Civ 408, to which I was referred, the judgment here shows no sign of a judge failing still to have a coherent grasp of the entire case or putting a judgment together piecemeal and without an ability, through lapse of time, either to be on top of the detail, to the extent required, or to step back from that detail and evaluate matters properly.

75. The judge had a difficult task, not because of the delay he encountered, but because of the insistence of the parties, particularly SPIE, on raising a wide range of more or less speculative, peripheral allegations. The judge rightly identified in the judgment (at [18]) the "*danger of an unhelpful proliferation of issues and sub-issues*", and the consequent need to focus on the core issues in the case, the first of which being "*did [Mr Garside], in 2012 and thereafter, disclose to [G&L] adequate information about the changes made to the [G&L] terms and conditions of employment of Mr Parker, [Mr Reader], Mr Coyne and Ms Schofield?*"

76. The judge continued, at [19], by referring to the "*variety of other dimensions to the case, which are related to the [core issues]*", but said after listing them, "*I approach all these "collateral" issues with considerable hesitation. Although a not insignificant*

part of the hearing was devoted to them, I remained throughout anxious as to whether they were, indeed, relevant." He was also careful in that first part of the judgment to identify some main lines of attack pursued by SPIE that did not give rise to or reflect any pleaded cause of action or plea for a remedy, concluding, at [22], that "*these matters were ventilated before me and they form part of the background and consequently I think it would be wrong to ignore them …, however, … I should not be tempted to stray beyond the pleadings and I ought to be circumspect about making findings beyond the evidential significance of these issues*", by which I understand him to mean he should be careful not to make findings that were not reasonably called for in order to determine the claims SPIE had pleaded.

77. The judge, with respect, is to be commended for all of that, and I am conscious as any appellate court must be of the need to avoid over-precise scrutiny of a trial judge's judgment, as if looking to find error, and the need not to substitute an assessment by reference to a necessarily selective review of trial highlights of a point on which the trial judge will or may have been better placed to make a proper assessment, upon the whole of the evidence and the unreproducible dynamics and atmosphere of a trial. In that regard, I was reminded, for example, of Lewison LJ's summary of the proper approach to appeals as to findings of primary fact or the evaluation of those facts or inferences a trial judge did or did not draw from them, in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29, at [114]-[115].

78. All that said, in my judgment it was fair of Mr Cavender QC to criticise the judgment, as he did, for a surprising brevity and paucity of reasoning on the one point said to result in liability. I also agree with Mr Cavender that, putting aside his client's rejected claim that the enhanced bonus term had been mentioned to Mr Young by telephone on 31 August 2012, the facts material to the pleaded defence, now pursued on appeal as Ground II, are within a narrow compass constituted by a limited run of contemporaneous correspondence. There is no appeal against any finding of primary fact or inference drawn or not drawn from the findings of primary fact. The appeal merely asserts that on the judge's findings of fact, either taken alone or when put in the context of a few additional items of correspondence not mentioned by the judge, there was only one answer that could sensibly be given to the question whether Mr Garside informed Mr Young of the terms proposed for Mr Reader (including the enhanced bonus term), so that Mr Young's approval of them should be taken to have been informed consent.

79. Mr Cavender QC emphasised in that regard, and it was common ground, that these were matters to be judged objectively. That is important in two ways.

(1) Firstly, it is apparent from the judgment that the judge accepted SPIE's case that Mr Young had not in fact noticed, when he authorised Mr Reader's package, that it included an enhanced 2011/12 bonus term, because Mr Young (and likewise the two senior HR professionals at G&L assisting him) cannot have taken proper care to look at what he was authorising. The objective nature of the enquiry, and the fact that the reason for Mr Young's failure to spot that to which he later objected was through his own (and Ms Kenyon's and Ms Marchant's) lack of care in reading the documents, means that Mr Young's actual ignorance at the time does not tell against Mr Garside's case that he disclosed what he needed as fiduciary to disclose.

(2) Secondly, the appeal is not concerned with any possible liability that might have arisen on a finding that Mr Garside appreciated at the time that when approving Mr Reader's package Mr Young was ignorant of the enhanced bonus term, or believed that to be the position, or did not have a positive belief that Mr Young had checked things for himself and was content. There is no finding to that or like effect, there is no Respondent's Notice inviting the court to say that there should have been, and I agree with Mr Cavender QC that any possible liability arising upon such a finding would not be the liability held by the judge to exist, for acting when in a position of (actual or potential) conflict, but a liability for not acting in good faith towards G&L (acting by Mr Young). There was a pleaded allegation that when the documents to give effect to Mr Reader's package were signed, Mr Reader and Mr Garside both knew that the enhanced bonus provision had not been drawn to G&L's attention and that Mr Garside did not have authority to agree it, alternatively "*were reckless and/or wilfully blind as to whether this statement of affairs existed*"; but the judge made no such finding, and rejected SPIE's wider allegations of improper conduct as unfounded speculation.

80. It follows in particular that it does not assist SPIE on appeal to emphasise, as Mr Martin QC did, that the judge said this within his reasons for preferring Mr Young's evidence to Mr Garside's on the alleged Friday evening telephone call on 31 August 2012, namely that: "*I cannot accept that if [Mr Young] had been told then [of the enhanced bonus term] he would have done and said nothing about it.*" The judge did not make of that any finding that when the enhanced bonus term was, as unarguably it was, included in the revised draft side letter sent to Mr Young for review the following Monday, 3 September 2012, and it did not provoke any reaction from Mr Young other than approval, Mr Garside appreciated, and in bad faith took advantage of, his principal's ignorance. I could not now judge whether that might have been the position so as to consider making any such finding on appeal, none having been made at trial, even were there an invitation by a Respondent's Notice to do so, which there is not.

81. The judgment to explain why Mr Garside was held liable consists, then, of the following brief passages:

> "*118. ... I turn then to the allegation of breach of fiduciary duty. This is a broad concept but the sense in which it is invoked in this case is that of a conflict between the duty imposed on the fiduciary and that person's own interest. In terms of employment it will be a breach if the fiduciary "puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer" (per Cotton LJ in* <u>*Boston Deep Sea Fishing and Ice Company v Ansell*</u> *(1888) 39 Ch D 339 at 357. ...).*
>
> *119. ... The issue is really one of disclosure and the primary argument put forward by Mr Vickers is that Mr Young was told about [Mr Reader's] enhanced bonus. Indeed, as I understand it, the matter is put more broadly than that because it is contended that Mr Young was told about all the enhanced bonuses. The case is, however, essentially about [Mr Reader's] bonus. [Mr Garside] says that this was discussed with Mr Young in the second telephone conversation between them on 31 August 2012. Mr Young denies this.*

[At [120]-[125], the judge dealt with the second telephone conversation alleged by Mr Garside, concluding on the balance of probabilities being that it did not take place, before continuing:]

126. But that is not the end of the matter. Mr Vickers has an alternative case. It is that there was no breach of fiduciary duty because the information was disclosed in written form. It plainly was and I also accept the inevitable conclusion that Mr Young, Ms Marchant and Mrs Armour cannot have studied the suite of documents very carefully. In essence, Mr Martin's case is that there was a duty of disclosure on [Mr Garside] to ensure that attention was drawn to the variation of contract in respect of the bonus provisions. The answer given by Mr Vickers to that analysis is that in the case of [Mr Reader] the change was emphasised by the use of black lines placed around the text and in the other cases the change was there to be read. Whether or not that emphasis was prominent in 2012 is something I find impossible to resolve but it seems to me to beg the question as to whether that or the presence of the rubric in the draft documents is fulfilling the fiduciary duty. I have come to the conclusion that it would not be. It seems to me that it was incumbent on [Mr Garside] as a director and as a person who might benefit financially to draw attention to the change. It was not good enough to present the documents without obvious comment or adequate signposting."

82. The judge then considered, and dismissed, the conspiracy theory SPIE had instructed Mr Martin QC to put forward. The judge expressed at [127] "*great admiration for the forensic thoroughness with which Mr Martin constructed his conspiracy theory*", but at [128] rejected it in these terms:

"*I am not prepared to find on a balance of probabilities that there was a broad and far-reaching conspiracy of the kind Mr Martin has constructed. Indeed, I do not find that there was any conspiracy at all. Mr Martin submitted that it was a matter of clear inference. I do not agree. It seems to me it is a matter of speculation and I am not prepared to indulge in it.*"

83. I mention that not merely as an illustration of the difficult task SPIE gave the judge by failing to focus its claims in a proportionate and realistic way, but because it reinforces what I said in paragraphs 79-80 above. The judge held that Mr Garside had a liability because he took the view that as an incident of the 'no conflict' aspect of his fiduciary duties owed to G&L, Mr Garside was obliged to provide comment or additional signposting explicitly inviting Mr Young's specific attention to the enhanced bonus provision in the final version of the side letter. He did not find that Mr Garside had acted in bad faith, indeed the robust terms in which the SPIE conspiracy theory was rejected suggest, if anything, that notwithstanding the judge's rejection of Mr Garside's evidence about an oral disclosure in a second telephone conversation on 31 August 2012, he was distinctly unpersuaded that Mr Garside had not acted in good faith. Liability was found on the basis of a failure to do something the judge supposed a fiduciary in Mr Garside's position was required to do for it to be said, objectively, that he had disclosed the personal interest he had that conflicted or might conflict with his duty of loyalty to G&L.

84. Mr Martin QC submitted that, reading the judgment fairly, not looking to find error in it, the judge simply asked himself the question whether Mr Garside had made full and

frank disclosure, that being required for him to say that Mr Young's approval of Mr Reader's package amounted to fully informed consent, and answered it against Mr Garside, an evaluation of the facts that was reasonably open to him and with which therefore the court should not interfere on appeal. I do not agree. The only sensible way to read the judge's explanation, at [126], for finding Mr Garside liable, is that:

(1) the information that Mr Garside as fiduciary was required to disclose, *viz.* that an enhanced 2011/12 bonus was being proposed for Mr Reader (and for that matter Mr Coyne and Ms Schofield too) plainly was disclosed, to Mr Young, Ms Kenyon and Ms Marchant, because it was provided to them in a way that would have caused any reasonable person in their position, if they took any care in reading the documents, to register and understand it;

(2) that however was not enough to fulfil Mr Garside's fiduciary duty of disclosure (as the judge characterised it) because it extended to a duty to volunteer commentary or explanation that in terms drew attention to the enhanced bonus provision.

85. The judge was thus accepting what he records as having been a submission for SPIE that disclosing in writing the information that needed to be disclosed was not good enough. That is why he was able to dismiss the reliance for Mr Garside on the prominence given to the enhanced bonus term in the draft side letter for Mr Reader provided on 3 September 2012. He found that it was not possible to say exactly how prominent that would have made the term appear to Mr Young in 2012, a reference to the specific point pleaded that the emphasis was particularly stark on a computer screen (see paragraph 38(3) above). But the basis for liability was not that therefore Mr Garside could not show that the enhanced bonus term had been disclosed. The judge's reasoning was that it did not matter how prominent the bold tramlines had made the enhanced bonus term appear. In other words, according to the judge Mr Garside was liable *even if (as he claimed) those tramlines had made the term jump off the page*, because he did not, additionally, provide a covering comment or explicit 'signposting' telling Mr Young to look at that term.

86. In my judgment, in that respect the judge erred in law. The judgment at [126] did not ask and answer the correct question to judge whether Mr Garside was liable. It proposed the existence of an obligation, incident upon Mr Garside's fiduciary duty not to act when in a position of conflict, that, with respect to the judge, did not exist. Having decided, correctly in my view, that the enhanced bonus term was plainly disclosed by Mr Garside, the correct conclusion in law, so far as concerns the 'no conflict' aspect of Mr Garside's fiduciary duty, was that there was no breach of duty. That aspect of that duty required Mr Garside to inform Mr Young, which he did, accurately and in full, of the terms proposed for Mr Reader, leaving it to Mr Young to consider them and decide for G&L whether to authorise them.

87. In that regard, *Hurstanger Ltd v Wilson*, *supra*, is relevant. In that case, the defendant consumers were not told by a consumer credit broker acting on their behalf that he would be paid a commission by the claimant from whom, through the broker, they arranged a loan. The defendants signed a document provided by the claimant, before the loan was agreed, stating *inter alia* that "*In certain circumstances this company does pay commission to brokers*", but not informing the defendants that those circumstances applied or would apply in their case.

88. The Court of Appeal decided that the defendants could not be said to have had the information they as consumers needed to have, on the facts of that case, in order to give fully informed consent to the broker's commission. They could not deny, however, that they were fully aware of what had been in the document from the claimant: "*By signing the document the defendants must be taken to have understood what it said but no more*", *per* Tuckey LJ at [42].

89. In this case, the only thing Mr Young needed to know from Mr Garside, to make a fully informed decision, was the set of terms proposed for Mr Reader (including the enhanced bonus term). It was common ground before me that Mr Young was aware of the amounts of the 2011/12 bonuses due to each of the four key managers under their outgoing G&L terms of service, and of Mr Garside's personal interest in getting them to move over to the less generous SPIE bonus scheme from 2012/13. By authorising Mr Garside to sign on behalf of G&L the documents giving effect to the terms for Mr Reader that had been sent to him for approval, just as much as if he had signed the documents himself, Mr Young must be taken to have understood what those terms were and meant.

90. Mr Martin QC's argument in my view provided no answer to that proposition. As the judge summarised it early in the judgment, at [12], the case for SPIE was that the enhanced bonus terms for Mr Reader, Mr Coyne and Ms Schofield, "*had not been drawn attention to, were otherwise not obvious and, in effect, had been smuggled in via documents which [Mr Garside] calculated, as it turned out quite correctly, would not be studied in detail by those who received them.*" Much of Mr Martin's argument on appeal involved taking the court through the correspondence and the findings in the judgment to suggest, in effect, that Mr Garside had behaved in an underhand fashion, as he had submitted to the judge. But that case did not succeed at trial. The evidence did not persuade the judge to make the findings necessary to sustain it. Had those findings been made, there may have been a breach of fiduciary duty by Mr Garside, but not the breach the judge found to exist, for which in my view there was no basis.

91. Accordingly, I conclude by reference to Ground II that the judgment against Mr Garside cannot stand and his appeal succeeds.

Ground I

92. Ground I therefore does not need to be considered further, whether for its primary merits or as to whether it ought to be entertained since the point was not pleaded in the court below. I shall deal with it only briefly, therefore, for completeness.

93. As was common ground before me, the question of the extent of any implied consent given by delegating a task is inevitably sensitive to the facts of the case, including the nature of the relationship within which the 'no conflict' fiduciary duty arises.

94. In this case, judging the point on the findings of fact made by the judge, I would say that:

    (1) it was appreciated by G&L (acting by Mr Young) when keeping the task of getting the four managers to sign up to SPIE terms of service in Mr Garside's hands, after completion of the SPA transaction, that Mr Garside had his own

personal interest in achieving that outcome, because of his potential liability under Clause 11.3 of the SPA (even if Mr Young may have misunderstood the true nature or extent of that potential liability), which could mean that Mr Garside's and G&L's interests might conflict if any of the managers sought a *quid pro quo*, be it cash or benefits in kind or a mixture of both, for agreeing to the less favourable SPIE bonus scheme terms for 2012/13;

(2) *inter alia* for that very reason, G&L was going to take any decision over what package to approve for the four managers independently of Mr Garside, in practice by Mr Young, for which purpose it needed to be given accurately by Mr Garside the terms the four managers, after their discussions with him, were seeking;

(3) accordingly, far from the situation being one in which some implied consent was given to Mr Garside carrying out his task without disclosure (beyond the known basic fact that his interests could be in conflict with G&L's, depending on what the managers sought), it was inherent to the task that Mr Garside had to report the terms proposed, precisely so that Mr Young, and not Mr Garside, could make the decision.

95. I do not think in any event it can be said to be clear, despite the judge suggesting he thought this was the position when granting permission to appeal, that if this defence of implied consent in advance had been pleaded there would not have been additional or different lines of enquiry pursued at trial that may have led to further material findings of fact. Most obviously, the judgment pays no attention to the fact that it was a significant decision, and not a necessary one, to keep the task of dealing with the four managers with Mr Garside after the SPA transaction had closed. Indeed, precisely because (contrary to the case advanced by Mr Garside at trial but rejected by the judge) there was so obviously a potential conflict of interest, *prima facie* the task should not have been left to him then.

96. A plea of implied consent at that point, by charging Mr Garside with the continuation of the task, would have called for a close and particular focus on that as a possible 'step change' in the narrative, with questions to be explored of how that came about, whether there was really no more to it than a couple of emails in early August 2012, whether in particular there were discussions between the individuals involved articulating or explaining that decision. Instead, it is treated in the judgment as unremarkable in and of itself that Mr Garside kept the task throughout, but of course on neither side's pleaded case was that, in itself, material.

97. The judge was at pains to restrict himself to the pleaded claims and defences, even where the evidence had ranged more widely at trial. I am not persuaded that he would have, or should have, entertained the argument that is now Ground I on appeal had it been raised at trial, and I would not have allowed this appeal on the basis of Ground I even if I had concluded, judging it on the basis of the judgment given after a trial at which the point was not taken, that it appeared to give Mr Garside a good defence.

Conclusion

98. The result is that in QA-2020-000069, SPIE's appeal against the judge's failure to apply Part 36 Consequences by reference to the 2017 Offer fails and is dismissed,

while in QA-2020-000076, Mr Garside's appeal against liability succeeds and is allowed.

99. There will be an order in SPIE's appeal dismissing the appeal, and an order in Mr Garside's appeal allowing the appeal, setting aside the judgment against him and substituting for it a judgment dismissing SPIE's claims with costs. There will need to be consequential orders for repayment by SPIE to Mr Garside, with interest, of whatever judgment sums, including as to costs, he has paid to date, and consideration will need to be given to the costs of the appeals.

Our ref: PG/PY/KM 140812
Date: 4TH September 2012

Mr John Reader
6 Formby Drive
Fleetwood
Lancashire
FY7 8HZ

OPERATIONS MANAGER

Dear John

This side letter deals with elements in addition to your main terms and conditions of your employment

Company Car	As discussed, the company will provide you with a grade 4 car allowance. In the way of an alternative, it has been agreed by SPIE UK that if you so wish you can purchase your existing company car (Audi Q5) for the sum of £13,600. To assist you in financing this, Garside and Laycock Ltd will facilitate a loan to you by way of a loan agreement, consisting of 24 equal payments of £525 per month and a final balancing payment of £1000. Whilst you consider this option, the company has agreed that you may keep the car until the 30th November 2012 to afford you reasonable time to make your decision.
Bonus	Bonus for financial year 1st August 2011 to 31st July 2012 will be paid in accordance with the terms of Mark Parker's Garside and Laycock Contract of employment, "WRITTEN STATEMENT of terms and conditions of employment given in accordance with the Employment Rights Act 1996".

From the 1st August 2012, bonus will have an award ceiling of 20% of salary. This will be subject to achieving certain business / personal targets as set out below.

SPIE UK Executive & Senior Managers Bonus Scheme 2012 > 13

Garside & Laycock budget 1st August 12 > 31 July 2013 is £1.7M EBIT

Reference Salary "X" £71,400.00 per annum

Bonus Calculation:

			£'s
80% of Budget (£1,360,000 EBIT)	-	Salary "X" x 20% x 20%	2856
85% of Budget (£1,445,000 EBIT)	-	Salary "X" x 20% x 35%	4998
90% of Budget (£1,530,000 EBIT)	-	Salary "X" x 20% x 60%	8568
95% of Budget (£1,615,000 EBIT)	-	Salary "X" x 20% x 80%	11424
100% of Budget (£1,700,000 EBIT)	-	Salary "X" x 20% x 100%	14280

* Additional award of 1% bonus for each 1% of EBIT delivered above target upto 110%

Therefore +£17k EBIT plus multiples up to £170k = +Salary "X" x 1% plus multiples up to 10%

Payment to be made during October 2013

KPI's

Financial		
1. Profit	8%	
2. Customer Financing Days	1%	
3. Orders Won	1%	
Personal		
1. Customer Satisfaction	5%	Measured by CSI of 80%>
2. Business Unit Colleague Feedback	5%	Measured by of 80%>

Before the final "payable" sum is determined the financial KPI component of the bonus will be adjusted downwards by up to 5%. If:

Company's safety performance measured against targets is not achieved. The award will be adjusted downwards by up to 2.5%

Therefore 10% minus up to 2.5% = 9.75%

Any core performance target set is not achieved. The award will be adjusted downwards by up to 2.5%

Therefore 5% minus up to 2.5% = 4.88%

<Your name>
<Your position>