Neutral Citation Number: [2022] EWHC 1969 (Ch)

Case No: BL-2019-CDF-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
BUSINESS LIST (ChD)
CARDIFF DISTRICT REGISTRY

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 26/07/2022

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court

Between :

CEREDIGION RECYCLING AND FURNITURE TEAM	**Claimant**
- and -	
(1) DEREK CLIFFORD POPE **(2) ALLISON CANN** **(3) CYFRI CYFRIFWR CYFYNGEDIG** **(4) CYFRI CYFYNGEDIG** **(5) SLA PROPERTY COMPANY LIMITED** **(6) SUFFOLK LIFE ANNUITIES LIMITED**	**Defendants**

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Ms Lydia Seymour (instructed by **Hugh James Solicitors**) for the **claimant**
Mr Guy Adams (instructed by **Redkite Solicitors**) for the **first defendant**
Mr Michael Uberoi (instructed by the **Bar Pro Bono Unit**) for the **second defendant**
Mr Stephen Innes (instructed by **Clyde & Co LLP) for the fifth and sixth defendants**
The third and fourth defendants did not appear and were not represented

Hearing dates: 6 July 2022
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Judgment Approved by the court

HHJ JARMAN QC:

1. In a judgment which I handed down on 30 June 2021 ([2021] EWHC 1783 (Ch)), I found that the claimant company was entitled to relief against its former directors, the first and second defendants, Mr Pope and Ms Cann, for breach of their fiduciary duties. The question of what relief is appropriate was adjourned to a disposal hearing, which took place before me on 6 July 2022. The delay was because of an appeal by Mr Pope and Ms Cann, which was eventually dismissed by the Court of Appeal ([2022] EWCA Civ 22). This is my judgment on relief.

2. It was not in dispute that between March 2012 and August 2014, Mr Pope and Ms Cann used the company's freehold property, from which it run its furniture recycling business, namely Station Buildings, Alexander Road, Aberystwyth (the property), for the benefit of private investment accounts in their names in the form of SIPPs (see [34]–[40] and [47] of the 2021 judgment). They also caused the company to enter into a leaseback of the property and to pay rent into their SIPPs in increasing amounts as the property was transferred in tranches ([36]). This scheme was chosen because the company had insufficient funds or profit base to do it in any other way.

3. At [90] I found that:

> "In my judgment, the establishment of SIPPs for Mr Pope and Ms Cann using the whole of the beneficial equity in the property, does not constitute the establishment maintenance or joining of a pension scheme by the company within the meaning of clause 4.2 of the memorandum, and the contrary was not seriously argued. Moreover, it is clear that the scheme

> went well beyond the payment of proper wages within clause 5, or reasonable and proper wages within clause 53 of the articles. Even if the payment of sums by way of wages or pension contributions to make up for "previous underpayments" comes within those powers, and that in my judgment is questionable given that that is what the directors had agreed at the time to pay and be paid, then it is clear that no attempt was made to work out the amount of such underpayments. What was paid was determined by reference to what could be paid, not by what should be paid. In my judgment it follows that it cannot be said that the payments were proper, reasonable or in good faith. It follows that the payments were ultra vires…"

4. Accordingly, I found that their decisions to transfer the main asset of the company into personal investment accounts and expose the company to the payment of rent amounted to: a failure to promote the success of the company; foreseeably jeopardising the success of the company; a failure to exercise due diligence; placing themselves in a position of conflict with the company; and a breach of their fiduciary duties to the company ([93]). I further found that their dealing with the company's property in this way amounted to conversion of it ([108]).

5. No directions were made in the substantive proceedings for a split trial, but by the time of closing submissions, counsel agreed that the issue of relief would have to be adjourned for two main reasons. The first was that the fifth and six defendants, who had taken no part in that hearing, should be given an opportunity to make submissions on relief. The second was that no calculations have been carried out as to the precise losses to the company or to the extent to which, if at all, some of pension contributions may have been lawful.

6. The company now seeks the transfer of the property back, compensation for the sums paid by it under the lease, indemnities from Mr Pope and Ms Cann

against any costs incurred in relation to the transfer of the property/payment of damages, and costs. The company has received £500,000 pursuant to its settlement with the third and fourth defendants who gave professional advice in relation to the scheme and will give credit for that sum, which was agreed to be divided between a payment in respect of liability and a payment in respect of legal costs.

7. The legal estate in the property is currently held by the fifth defendant on behalf of the sixth defendant who administers the SIPPS, each of whom on the issue of relief was represented by Mr Innes. They are neutral on the appropriate relief as between the company and Mr Pope and Ms Cann, but seek to have their legal costs paid. Mr Innes, and Ms Seymour for the company, agreed that this issue should await my determination on the appropriate relief against Mr Pope and Ms Cann.

8. In that regard, the company contends that it is entitled to the restoration of the property and sums converted by Mr and Ms Cann in full, by way of substitutive damages. They however submit that the court should consider what would have happened in a counterfactual world in which they had not committed breaches, and should give credit for such sums as they might have lawfully awarded themselves by way of reparative damages. If so, there is a further issue as to whether this matter should be adjourned for expert reports and further evidence, or whether the court should consider what sums would have been paid, on the existing evidence. There is a further issue as to how credit should be given for the £500,000 settlement.

9. As Ms Seymour submits, the remedies for breach of directors' duties have not been codified, and the remedies available are therefore the ordinary civil consequences including injunctions and declarations, common law damages or equitable compensation, restoration of the company's property following a declaration that the property is held by the director on constructive trust for the company, and an account of profits made by the director insofar as those profits were generated within the scope of the conduct that has been found to be a breach of duty (see Palmer's Company Law at 8.3303 and *Gray v Global Energy Horizons Corporation* [2020] EWCA Civ 1668 at [126] and [128]).

10. Ms Seymour submits that the structure of ownership adopted by Mr Pope and Ms Cann should make no difference to the company's entitlement to recover the property and such part of the rental monies that remains in the SIPPs, because they are held by the fifth and sixth defendants as constructive trustees for the company. Alternatively, the court should make an order that these defendants be instructed by Mr Pope and Ms Cann to transfer the property and monies (see *Bacci v Green* [2022] EWHC 486 (Ch) at [56]).

11. Ms Seymour submits that the property and monies which the company seeks to recover can be characterised as either restoration of the company's property and/or an account of profits. The latter would entitle the company to any investment returns which Mr Pope and Ms Cann have made on the rental monies. Unless they can prove that any monies in the SIPP are mixed funds consisting of their own monies as well as the company's, then all of those monies should be paid over (see the rule in *Re Hallett's Estate* (1880) 13 ChD 696), and there is no evidence to that effect.

12. She also submits, on the basis of my findings as summarised above, that no lawful pension contributions were made by Mr Pope and Ms Cann, that payments and decisions made in relation to the transfer/leaseback have been found to be unlawful, and that there was no pension scheme into which any payments could lawfully have been made. They have provided no evidence to the contrary. The property which was wrongfully converted is held in the SIPPs and that can be identified. An injunction is appropriate because the property was transferred away from the company's ownership in breach of duty, and should be restored. The company continues to trade from it and only its return would give adequate compensation.

13. The evidence of one of its current directors, Mrs Thomas, is that the property is unique, having been redesigned to be as good as it could be for the company. It would be difficult to find another building with the property's square footage and footfall, and if the company had to leave it at the end of the lease in 2027, it could have a devastating effect on its business. Having to pay rent of £60,000 per year, which it did not have to pay before the scheme, has put a financial strain on the company. The freehold title to the property should be transferred to the company so that it holds both the freehold and leasehold title, and the titles could then be merged at HM Land Registry.

14. In the alternative to an injunction, the company seeks an order that the payments from the company to the fifth and sixth defendants, and the transactions by which the property was purchased by them from the company are void, although this may give rise to tax liabilities. The lease should be declared void.

15. The company in either case seeks an indemnity from Mr Pope and Ms Cann as to the costs of any transfer restoring the property to its ownership, and compensation (whether as equitable compensation or damages) in respect of rental monies paid under the leaseback arrangement which was part of the scheme, together with interest. They should be jointly and severally liable, as both have been found to be in breach of their duties, by making joint decisions

16. Ms Seymour relies on several authorities in support of the company's submissions. A case similar to the present claim involving unauthorised remuneration was considered by David Richards J, as he then was, in *Interactive Technology Corporation v Ferster* [2018] EWCA Civ 1594. In [17]-[21], he set out the two types of compensation claims against trustees which are recognised in equity, as follows:

> "17. The position is stated in *Underhill and Hayton: Law Relating to Trusts and Trustees* (19th ed., 2016) at para 87.11:
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> "Equity recognises two types of compensation claim against trustees, which will be termed substitutive performance claims and reparation claims. Substitutive performance claims are claims for a money payment as a substitute for performance of the trustee's obligation to produce trust assets *in specie* when called upon to do so. Claims of this sort are apposite when trust property has been misapplied in an unauthorised transaction, and the amount claimed is the objective value of the property which the trustees should be able to produce. Reparation claims are claims for a money payment to make good the damage caused by a breach of trust, and the amount claimed is measured by reference to the actual loss sustained by the beneficiaries. Claims of this sort are often brought where trustees have carelessly mismanaged trust property, but they lie more generally wherever a trustee has harmed his beneficiaries by committing a breach of duty."
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> 18. In the same work, the means by which these two types of equitable compensation are given through an accounting process are explained at para 87.7:
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> "As discussed below, there are two types of compensatory claim which can lie against trustees: substitutive performance claims and reparation claims. These are mediated through proceedings for an account in

different ways. In the case of a substitutive performance claim where the trustees have made an unauthorised distribution of trust property or used trust funds to purchase an authorised investment, the court will not permit the trustees to enter the distribution or expenditure into the accounts as an outgoing because it will not permit the trustees to say that they acted in breach of duty. Instead, they will be treated as though they have spent their own money and kept the trust assets intact. The accounts will be falsified to delete the unauthorised outgoing, and the trustees will be ordered to produce the relevant trust property *in specie* or pay a money substitute out of their own pockets. Reparation claims are brought into the scheme of the accounts in a different way. The loss claimed by the beneficiaries is translated into an accounting item by surcharging the trustees with the amount of the loss as if they had already received this amount for the beneficiaries. They must then pay this sum into the trust funds out of their own pockets."

19. These claims for equitable compensation were described with characteristic lucidity by Lord Millett NPJ in *Libertarian Investments Ltd v Hall [2014] 1 HKC 368* , a decision of the Court of Final Appeal of Hong Kong. At [168], he referred to substitutive compensation:

"Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either *in specie* or in money. Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative. The amount of the award is measured by the objective value of the property lost determined at the date when the account is taken and with the full benefit of hindsight."

20. At [170], Lord Millett addressed reparative compensation:

"If on the other hand the account is shown to be defective because it does not include property which the defendant in breach of his duty failed to obtain for the benefit of the trust, the plaintiff can surcharge the account by asking for it to be taken on the basis of 'wilful default', that is to say on the basis that the property should be treated as if the defendant had performed his duty and obtained it for the benefit of the trust. Since *ex hypothesi* the property has not been acquired, the defendant will be ordered to make good the deficiency by the payment of money, and in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss."

21. Insofar as the judge in the present case treated "equitable compensation" in the December order as necessarily referring to compensation for loss, as a result of the general meaning or ambit of that remedy, he was, in my judgment, wrong.

17. The judge returned to the topic, when a judge in the Court of Appeal, in *Gray v Global Energy Horizons Corporation* [2020] EWCA Civ 1668, together with Henderson and Rose LJJ. The judgment of the Court at [126] stated:

> "The point we wish to emphasise is that the basic equitable rule is indeed a stringent one which requires an errant fiduciary to account to his principal for all unauthorised profits falling within the scope of his fiduciary duty. The rule is intended to have a deterrent effect, and to ensure that no defaulting fiduciary can make a profit from his breach of duty. It does not matter if the result is to confer a benefit on the principal which the principal would otherwise have been unable to reap. As it is put by the editors of Snell's Equity, 34th edition (2020) (as updated in the First cumulative Supplement), at paragraph 20-037: "Relief given by way of an account of profits is measured by the gain made by the wrongdoer irrespective of whether the claimant has suffered a corresponding loss. On the taking of the account, the object is "to determine as accurately as possible the true measure of the profit or benefit obtained" [a reference to Warman, loc.cit, at 588]. Typically, the court must determine the sums impermissibly received and deduct any allowable expenses. An account of profits 12 therefore proceeds on a different principle from reparative compensatory damages or equitable compensation."

18. The application of these principles in the specific case of property being converted away from a company by directors in breach of fiduciary duty was dealt with by David Richards LJ in *Auden McKenzie v Patel* [2019] EWCA Civ 2291, as follows:

> "56. As counsel for both parties emphasised, the present case concerns not a trust, but a company. It is unnecessary to cite authority for the basic propositions that a company is a separate legal person, distinct from its members, and that, in the absence of special circumstances, it is the beneficial owner of its assets and they are not held on trust for its members. The "beneficiary" to which the directors owe their duties is the company and payment to the shareholders is not the same as payment to the company.
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> 57. It is not in doubt that directors, while not strictly trustees because title to their company's assets are not vested in them, are in a closely analogous position to trustees by reason of their fiduciary duties to the company and are treated as trustees as respects company assets which are under their control: *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* at [34].

> 58. Where a director causes a company to make unauthorised payments for which the company receives no value, the director is liable to the company to pay compensation equal in amount to the payments. This is established in authorities dealing with the payment of unauthorised dividends. In *Bairstow v Queens Moat Houses plc [2001] EWCA Civ 712, [2001] 2 BCLC 531* , the directors were held liable to pay compensation equal to the full amount of unlawful dividends which they had procured to be paid. This was confirmed to be the correct remedy by this court in *HMRC v Holland [2009] EWCA Civ 625, [2010] Bus LR 259* , at [98] per Rimer LJ and at [125] per Elias LJ. In both cases, a submission based on *Target Holdings* that recovery should be restricted to the loss calculated by reference to what would have been the financial position of the company if the dividends had not been paid was rejected. On the appeal to the Supreme Court in *HMRC v Holland [2010] UKSC 51, [2011] Bus LR 111* , it was not necessary to decide this point but three members of the court agreed with this court, while the other two Justices expressed no view: see Lord Hope at [49], Lord Walker (who as Robert Walker LJ gave the only reasoned judgment in *Bairstow v Queens Moat Houses*) at [124-125] and Lord Clarke at [146]. I can see no reason why there should be a difference in remedy where the unauthorised payment is not a dividend, but, as here, a misappropriation of funds paid against bogus invoices.

i) 59. The above analysis provides grounds for concluding that Mr Patel is not entitled to rely on the assumed fact that dividends equal to the Payments would have been paid to his sister and himself in response to the claim for equitable compensation. However, the order below was for summary judgment, not judgment on a preliminary issue, and we must be satisfied that Mr Patel's defence is unsustainable in law.

19. Those principles have been applied subsequently in cases including *Davies v Ford* [2021] EWHC 2550. David Holland QC, sitting as a judge of the High Court, reviewed several recent authorities on this issue at [92] – [105], and concluded at [106]

> "To my mind, what these authorities show is that equitable compensation for breaches of fiduciary duty which involve the misappropriation of existing trust property is generally assessed on the substitutive basis. In such instances, the aim is to restore to the trust what has wrongfully been paid away and it is not open to the trustee or fiduciary who has been in breach to argue the counterfactual, that is that the trust property would have been lost or paid away even if he or she had not been in breach. AIB V REDLER, INTERACTIVE TECHNOLOGY CORPORATION V FERSTER, and AUDEN MCKENZIE V PATEL were all cases of this type."

20. The authors of Snell's Equity at 7-058, put it this way:

> "A principal can also claim equitable compensation for loss caused by a breach of fiduciary duty, whether it occurs by reason of a conflict between duty and interest, or a conflict between duty and duty… It has been argued that equitable compensation is not a remedy for breach of fiduciary duty on the basis that: "the primary remedy of a beneficiary is to have the account taken [and] if a trustee or fiduciary has committed a breach of trust or fiduciary duty, Equity makes him account as if he had not done so." This argument is coherent where there is a fund of which an account can sensibly be taken, such as where the fiduciary is a trustee, but fiduciaries are not necessarily stewards of property from whom an account can sensibly be taken. Where there is no fund of which an account can be taken, 15 it is sensible for equity to make available compensatory relief to ensure that any loss caused by a breach of fiduciary duty is not left unremedied… Where the fiduciary does occupy a steward-like role, such as where the fiduciary is a trustee or a company director, an award of equitable compensation can be made against the fiduciary to recover funds or property which has been misapplied by the fiduciary. This claim is more in the nature of a claim to restore the property than a claim for equitable compensation for loss."

21. Ms Seymour submits that applying these principles, the loss to the company as a result of the scheme is the full value of the property and rental monies which the company has paid, and does not fall to be reduced by reference to any hypothetical payments of lawful remuneration that could have been made.

22. Mr Adams for Mr Pope, and Mr Uberoi for Ms Cann, adopt each other's submissions. Those of Mr Adams are focussed on submitting that the pension contributions in question were not unlawful, as he had submitted in the substantive hearing. Mr Uberoi focusses on submitting that even if their clients were to be treated as trustees of the property and are in breach of trust, they are nevertheless entitled to reasonable renumeration for their services, and as they were underpaid from 2003 to 2015, it was open to the company to address that legitimately by way of pensions payments and to award a pension which recognises many past years of service.

23. Mr Adams relies upon the decision of the Supreme Court in *SR Projects Ltd v Rampersad* [2022] UKPC 24, and in particular with the following passages of the judgment of Lord Leggatt, which deal with concepts of ultra vires, illegality and agency.

> "23. The concepts of ultra vires and illegality were not clearly distinguished when the ultra vires doctrine was first established in English law and have not always been clearly distinguished since. But the distinction is important. The term ultra vires, in its strict sense in which it has properly been used by the courts below in this action, refers to a situation where a corporation has no legal power (or capacity, as it is often put) to enter into a transaction. That is different from saying that it is against the law for the corporation to enter into a transaction. The two may coincide. There could in principle be a case where, for example, a corporation does not have the power to make a contract and where, even if it did have such power, it would be illegal for the corporation to do so. But lack of power or capacity and illegality are different concepts and the legal consequences of each may differ
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> 24. A third concept which has not always been clearly distinguished from ultra vires is that of lack of authority of a person or body to act for a corporation. Thus, it may be argued that, for example, a contract entered into or approved by the board of directors of a company is not binding on the company on the Page 5 ground that it was beyond the powers of the board to make such a contract. This is different from saying that the company itself did not have the power to make the contract. It is a question of agency, governed by the law of agency.
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> 25. One aspect of the law of agency as it applies to companies is what is known as the rule in Turquand's case after Royal British Bank v Turquand (1856) 6 E & B 327. The rule is that a person dealing with a company is generally entitled to assume that matters of internal management have been regularly carried out and that the formalities (if any) necessary to enable the company's officers to exercise their powers have been duly performed. The rule only applies when the person dealing with the company is acting in good faith and without notice that the agent is contracting in excess of their authority.
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> 26. The rule in Turquand's case is of no relevance, however, where an act is not merely beyond the powers of the company's board of directors (or other organ of the company) but beyond the powers of the company itself. The doctrine of ultra vires operates as a legal sledgehammer. Where it applies, it is of no avail that the person dealing with the company was acting in good faith and did not know or even have means of knowing that the company lacked the capacity to

> enter into the transaction. The consequence at common law is that the transaction is treated as a nullity.
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> 27. On this appeal counsel for the lender cited Turquand's case and other cases in that line of authority and sought to rely on the evidence already mentioned that the lender's director and decision-maker, Mr Shamshudeen, understood the loan to be within the limit on borrowing by the credit union. But here too this evidence is beside the point. The liquidator has never put his case on the basis that the officers or board of directors of the credit union had no authority to enter into the loan agreement or to grant the security for the loan on its behalf. If he had, then questions of whether the lender had knowledge or notice of such want of authority would have been relevant. They are not relevant to whether the credit union had the legal capacity to enter into the transaction.

24. Mr Adams submits that the substantive judgment did not find the contributions to be ultra vires and as the company's capacity was not statutorily restricted, the company has not proved otherwise. Alternatively, members of the company, pursuant to article 56 of its articles of association, could distribute bonuses to members, and this could still be done by the current members if the property were to be returned to the company. The burden is on the company to prove the amounts of any excess payments, and despite requests for calculations, none have been provided, so the defendants do not know what case they have to meet.

25. Mr Uberoi relies upon *Boardman v Phipps* [1967] 2 AC 46, where a director was found to be in breach of fiduciary duty and liable to account for profits made as a result of the breach. Nevertheless, he was found to be entitled to payment in respect of work and skill which he as a solicitor had employed in making the profits. As the underpayment of salaries in the present case, on the limited evidence, was potentially £20,000 for each of the directors over a 12 year period, then potentially this matches or exceeds the company's claim of £600,000 claimed jointly and severally against them, once factors such as late

payment and investment returns are taken into account. The appropriate course is to obtain an actuarial report on a joint basis to assess the value of the underpayments against a counterfactual where an appropriate money purchase scheme was established in 2011. He also relies upon *David v Ford* at [96] in submitting that each case is different and equitable compensation is a flexible remedy to fit the facts.

26. As for the submission that there has been no finding that the contributions were ultra vires, that does not sit with the finding which I made at [90] as set out above. I do not accept that the contributions could have been made by way of bonuses. As Ms Seymour submits, article 9 provides that surpluses shall not be transferred, but held for similar objects to those of the company, which is a not for profit organisation. The power to apply by way of bonus is not a general power, and by article 58 can be applied in various ways, including by way of reserves, charitable donations, or under a suitable bonus scheme. Any such scheme would have to be devised so as not to be in breach of fiduciary duty. She submits that the company has also asked for calculations as to the amount of surplus each year, but the reply was that it is not for the defendants to say.

27. In my judgment, this is not just a case of making excessive or unlawful contributions, where lesser contributions might have been lawful. There were insufficient funds or profit margins in the company to make the contributions, and that is why it was decided to use the equity in the property, the main asset of the company, which had been particularly designed for the company to carry out its trade in the property and from the property's central location. The

scheme meant that instead of owning the freehold of the property, the company became liable to pay an annual rental of £60,000 with a term of 15 years. I held that this use of the property amounted to conversion of it by Mr Pope and Ms Cann.

28. I accept that relief is flexible to fit the facts. Some of the authorities involve a misappropriation of trust property and others do not. On the particular facts of this case I conclude that the appropriate relief is for the property to be returned to the company so that the lease will merge in the freehold title, and that there be judgment against Mr Pope and Ms Cann in respect of the rental payments made plus interest, and costs of such restorative relief.

29. In my judgment on the facts of this particular case that relief is properly categorised as restorative relief, and it is not open to Mr Pope and Ms Cann to argue the counterfactual. Even if were so open, and even putting pleading points in respect of it to one side, the evidence is not such as to allow a proper finding to be made. This is recognised by the suggestion that there should be an adjournment for further evidence. In my judgment, Mr Pope and Ms Cann had had sufficient opportunity to deal with these matters in time for the substantive hearing.

30. Furthermore, any such sums are likely to be very modest. As noted in [90] cited above, Mr Pope and Ms Cann agreed their own level of payments, and had worked on that basis. They increased their wages to £45,000 in 2011. No attempt was made to work out the amount of such underpayments when calculating the contributions into the SIPPs, or since. Ms Cann in her witness statement sets out the acrimonious way in which she left the company in 2015

and it unlikely that any annuity or additional payments, would have been awarded to her in a counterfactual scenario. As Ms Seymour submits, any claims which she and Mr Pope have for sums that they would have been entitled to award themselves in a hypothetical counterfactual situation should be claimed against the professionals who advised them in relation to the scheme, the third and fourth defendants.

31. As to the appropriate treatment of the settlement monies received by the company from the third and fourth defendants, the settlement agreement provides £293,803.36, to be in respect of any sums of damages, equitable damages or monies received pursuant to an account of profits; and £206,196.64 against any sum that it receives by agreed or assessment in respect of its legal costs. Ms Seymour submits that if the agreement is genuine, and if the costs were incurred and paid as set out in the agreement, then the defendants cannot seek to go behind it. I accept those submissions.

32. I am grateful to counsel for their assistance. I invite them to file a draft order, agreed if possible, and written submissions on matters which cannot be agreed, within 14 days of the hand down of this judgment.