Neutral Citation Number: [2022] EWHC 623 (Ch)

Case No: BL-2020-LDS-000053

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

Leeds Combined Court Centre,
1 Oxford Row, Leeds LS1 3BG

Date: 23/03/2022

Before :

HH JUDGE DAVIS-WHITE QC
(sitting as a Judge of the High Court)

- -

Between :

HAMUEL REICHENBACHER LIMITED **Claimant**

- and –

ROBERT MCDERMOTT **Defendant**

- -
- -

Mr Phillip Patterson (instructed by **The Wilkes Partnership LLP**) for the **Claimant**
Mr Robert McDermott, the Defendant, in person

Hearing dates: 14th -18th, 22 February 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE DAVIS-WHITE QC

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HH Judge Davis-White QC :

Introduction

1. These proceedings, brought by claim form issued on 25 February 2020, seek relief against a former director, the defendant Mr Robert McDermott ("Mr McDermott") in respect of alleged breaches of fiduciary duty as director, contractual duties as employee and whilst he was a director of the claimant company, between on or around 1 March 2011 and July 2019. The allegations, as the case was opened to me, amounted to some 26 in number and the total monetary claim, by way of equitable compensation and/or damages was a sum of just under £250,000. Although this sum is comparatively large, some of the claims were for exceedingly small sums. Mr McDermott counterclaimed in respect of seven matters and his counterclaim was quantified at just under £380,000.

2. Both parties moderated or clarified their claims during the course of the trial in ways in which I will come onto explain.

Representation

3. The claimant was represented by Mr Phillip Patterson of Counsel who came into the case at a relatively late stage. I am extremely grateful to him for his clear, well-ordered and organised presentation of the case and for raising points which might assist Mr McDermott, a litigant in person. I should in particular commend his organisation of the materials which made pre-reading a much easier task.

4. Mr McDermott represented himself. I am grateful to him for the moderate and careful manner in which he presented his case. Although he represented himself at the trial he had had the benefit of legal assistance and representation prior to that. Between 17 November 2020 and 18 February 2021 he was represented by Blacks Solicitors LLP. Between 18 February 2021 and 25 January 2022 he was represented by Gateley plc. This meant that his defence and counterclaim dated 15 July 2020 was filed at a time when he was not represented but that he did have representation at the time that he gave extended disclosure in January 2021 and when witness statements were served and filed in June 2021 as well as at various case management hearings.

The parties and a summary of the relevant history

5. The claimant company, Hamuel Reichenbacher Limited ("HR", the "Company" or the "Claimant"), was incorporated on 15 August 2005. As I understand matters from Mr McDermott, it was a successor company to an earlier company carrying on a similar business in similar circumstances but which went into a formal insolvency regime and was subsequently dissolved in about 2003-4.

6. In broad terms, the business of HR at the relevant times was the sale of CNC machines manufactured in Germany (and supplied by its German parent company) in the UK and Ireland and the servicing of such machines under contract. A CNC (computer numerical control) machine is an automated, pre-programmed tool used particularly (but not exclusively) in vehicle manufacture.

7. At all material times, HR operated as a subsidiary of Hamuel Reichenbacher GmbH, a German company ("HR Germany"). HR Germany is itself a German subsidiary within the Scherdel Group of companies ("Scherdel"). The holding company is Scherdel GmBH.

8. HR was incorporated by Novis & Co, a firm of chartered accountants in Leeds, which firm became its accountants. Shortly after incorporation of the Company, Mr Andreas Leutheußer was appointed a director. At all material times Mr Leutheußer has acted as joint managing director of HR.

9. Both Mr Leutheußer and Mr Stephen Tucker of Novis & Co gave evidence at the trial.

10. Mr Leutheußer has worked for Scherdel since 2000. In March 2004 he became a director of HR Germany and has been its managing director since October 2009.

11. On allotment and issue of its issued share capital, HR became a wholly owned subsidiary of HR Germany.

12. In 2006, a Mr Albert Thompson was appointed a further director of HR and acted as joint managing director with Mr Leutheußer.

13. Mr McDermott was appointed a director and the company secretary of HR on 1 March 2011. Mr Thompson resigned as director on 16 March 2012. Thereafter Mr Leutheußer and Mr McDermott were the two managing directors of HR.

14. In April 2011, Mr McDermott employed (on behalf of HR) Ms Samantha Haigh to take day to day control of the finance, accounts, bookkeeping and human resources. She was responsible for preparing cheques for Mr McDermott's signature and for processing invoices and for the payroll. In April 2012, Ms Haigh brought in her step-daughter, Ms Carmela Owens, to work at HR. Initially, Ms Owens helped Mr McDermott with marketing, contacting customers, and other office matters.

15. Mr McDermott also took advice from a Mr John Banks, a sole trader trading at the time as J F Banks & Co, from time to time. The scope of such advice and whether Mr McDermott properly employed Mr Banks are matters in dispute. Mr Banks also gave evidence at the trial.

16. On 1 June 2012, of the Company's issued share capital of 25,000 Ordinary shares of £1 each, some £10,000 were transferred by HR Germany to Mr McDermott. They were the subject of a shareholders' agreement, also dated 1 June 2012. Thereafter, HR Germany held 15,000 Ordinary shares, being 60% of the issued share capital, and Mr McDermott £10,000 shares, being 40% of the issued share capital.

17. The shareholders' agreement dated 1 June 2012 was made between (1) Mr Leutheußer and a Mr T Czwielong acting jointly on behalf of HR Germany; (2) Mr McDermott and (3) HR (the "Shareholders' Agreement"). I was told by Mr Tucker, now a director at the firm of Novis & Co, that he had drafted this document. As I have mentioned, Novis & Co, as well as incorporating HR, was

for many years HR's accountants. Their services were terminated in about May 2019, their last piece of work being the preparation of the HR monthly management accounts for June 2019.

18. The Shareholders' Agreement was on its face for a (maximum) five year term. It envisaged that, well before its expiry in 2017, replacement agreements would be put in place covering the period post-expiry. It was a document that dealt with a number of different things. First, it dealt with the shareholding position in HR. In exchange for £1, Mr McDermott was given a 40% shareholding in HR. However, he was obliged to sell back this shareholding to HR Germany at the end of the Shareholders' Agreement for £1. The shares therefore gave Mr McDermott a potential source of income through dividends but no opportunity to benefit from capital appreciation. Secondly, the agreement dealt with the service agreement between HR and Mr McDermott. Thirdly, it dealt with management issues concerning HR. Finally, it dealt with the terms of dealing between HR Germany and HR. It is signed by the three individuals. On the signature page, Mr Leutheußer is said to sign on behalf of HR Germany and HR, Mr Czwielong is described as signing on behalf of HR Germany and Mr McDermott is described as signing on his own behalf but with no reference to any other capacity.

19. So far as the termination of Mr McDermott's office and employment with HR is concerned, the Shareholders' Agreement provided that:

"This agreement will end no later than five years from the date of this signed agreement or earlier if the director's service agreement with respect to R. H. McDermott ceases before that date.
Within a three year period, and no later than 31st May 2015, an agreement will be in place for the post contractual period of five years."

20. In November 2017, Ms Haigh was summarily dismissed by Mr McDermott. Ms Owens took over Ms Haigh's role and responsibilities.

21. Although the Shareholders' Agreement envisaged a replacement agreement being entered into prior to 31 May 2015, before its expiry on 31 May 2017, no such agreement was entered into prior to 2015 or indeed prior to 31 May 2017. There is a dispute as to the legal position after the date given for its expiry. The claimant says that the terms of the Shareholders' Agreement effectively continued thereafter. Mr McDermott was somewhat more equivocal, sometimes asserting in evidence that its terms did continue and sometimes asserting that they did not.

22. Negotiations for a new agreement were certainly underway in 2017-18 and Mr McDermott made various suggestions as to the way ahead. Negotiations were only concluded at a meeting on 29 January 2019. At that point it was agreed that Mr McDermott would leave HR and that Mr Meier would be appointed to the board.

23. On 29 January 2019, Mr Christopher Meier was appointed a third director of the Company. Mr Meier has worked at HR Germany since about February 2011. He was appointed a director of HR Germany in September 2015. He too gave evidence at the trial.

24. Also on 29 January 2019, the agreed terms on which Mr McDermott was to leave HR were recorded in the minutes of a board meeting of that date. Those minutes were signed by (among others) Mr McDermott. The main terms were:

(1) Payment to Mr McDermott (only) of a £50,000 dividend.

(2) Payment to Mr McDermott of £30,000 for loss of office etc.

(3) Payment to Mr McDermott of £20,000 for his shares in HR.

(4) Entry into a consultancy agreement with Mr McDermott for the period July to December 2019 at a remuneration of £5,000 per month.

A draft consultancy agreement to implement (4) above was subsequently prepared and provided to Mr McDermott but he declined to enter into it and in effect decided to sever links with HR permanently when he left office as director at the end of June 2019.

25. HR originally claimed that the dividend agreed to be paid to Mr McDermott was agreed to be paid (and was paid) in reliance on misrepresentations by him as to the financial position of HR. Mr McDermott counterclaims for the difference between what he says was the true value of his shares in HR (£165,378) and the sum that he was in fact paid under the agreement encapsulated in the minutes of the January 2019 Board Meeting (£20,000). He says that the sum in question is £145,378.

26. In April 2019, Ms Owens resigned. She returned to HR very shortly after Mr McDermott left. Ms Owens gave evidence in the proceedings before me but Mr McDermott says that parts of her evidence are false and that this is explained by his having dismissed Ms Owens' relative, Ms Haigh.

27. On 28 June 2019, Mr McDermott resigned as director and secretary of the Company.

Mr McDermott

28. Mr McDermott was born in August 1945. During the period of directorship of HR he was 65 (in 2011) to 73 (in June 2019). He is currently 76. He is justly very proud of his state of physical fitness. He would often tell Mr Leutheußer that. I shall have to return to the question of Mr McDermott's health. In these proceedings one claim within his counterclaim is for damages of £33,000 for work-related stress. In addition, he asserts that his health was such that it affected his ability to use company vehicles and that this justified the Company incurring (and paying) various costs in relation to his privately owned vehicles. The Claimant seeks to recover such relevant costs.

29. At the material times, Mr McDermott's financial interests were not limited to HR. He owned and/or was director of a number of other companies. One such company was Poppy Asset Management Limited ("Poppy Asset"). At the material time, Poppy Asset owned the freeholds of 7 Halifax Road, 9-11 Halifax Road, and 13 Halifax Road, in Dewsbury. As I understand it each of these addresses forms part of what is now in effect one building. HR occupied parts

of those properties at various times while Mr McDermott was director of HR. Certain of the claims and the claims within the counterclaim related to such occupation. As I understand matters Mr McDermott originally held over 75% of the issued share capital of Poppy Asset but in about May 2019 that interest was transferred to his wife. He has also acted as a director of Poppy Asset at various times, as has his wife.

30. Another company in which, at the material times, Mr McDermott had shares was Supersys Limited ("Supersys"). This company supplied IT support to HR from about 2006. Another of Mr McDermott's companies was Software Solutions Limited.

31. Mr Banks is a registered auditor who offers finance director services to small family businesses, frequently ones that cannot afford a full-time finance director. Mr McDermott has been a client of his, though his various companies, for some 15 to 20 years. Having worked for Ernst & Young in the UK and Australia, Mr Banks returned to the UK went into industry, becoming a finance director of a listed UK company. In his '40s he left that company and went to work for a firm of chartered accountants, Finance Directors Yorkshire Limited, providing finance director services to small and medium sized businesses. He started his own firm about 20 years ago and has a client base of some 14 or 15 companies.

32. Mr Banks recommended Mr McDermott to a previous managing director of HR, a Mr Dowling, in connection with a need of HR for some IT services.

33. During Mr McDermott's tenure of office as director, HR's financial position improved. In August 2017, as part of a renegotiation of his position ongoing. Mr McDermott prepared a "UK Project Status Report" dated 17 August 2017. That recommended that Mr McDermott continued his current contract with 40% shares and that HR should employ an additional sales engineer from the tooling industry to build up service contracts and to employ a full time sales engineer in the UK reporting back to Germany and that HR Germany should fund 50% of the service sales engineer and 100% of the full time machine sales engineer, with a new contract being drawn up to incorporate the above. The document also noted that "*Very little assistance has been requested or provided by the German parent company*".

34. In support of Mr McDermott's continued employment the document sought to show how HR's financial position had improved by setting out the financial results for the previous 10 years. Taking those from 2010 (the year before Mr McDermott took over as one of the managing directors) to 2017 they were as follows. I have also added in the 2018 figures taken from the accounts in evidence:

Y/E	**Turnover £**	**Net Profits (pre tax) £**	**Net assets (leaving out shareholders funds of £25k) £**

31.12.10	593,968	284,489 (A)	178,256
31.12.11	853,107	103,340	281,596
31.12.12	632,964	76,529	341,878
31.12.13	2,103,124	201,181	446,575
31.12.14	848,544	151,465	486,123
31.12.15	1,218,078	(247,567) (B),(C)	227,184
31.12.16	1,921,617	110,182	284,615
31.12.17	832,594	106,878	336,459
31.12.18	1,911,228	82,689	349,831

Notes:

(A)Parent loan write off £379,456 actual trading loss of £94,967

(B) Write off of old debtor balances and other adjustments

(C) Euro/sterling devaluation leading to Brexit vote

Burden and standard of proof

35. As a generality, the burden of proof of course lies upon the claimant. It is the ordinary civil standard of proof. Nevertheless, where serious allegations are made (as in this case) the court will consider the case with some care.

36. The current position regarding the standard of proof is set out in, for example, *Re B* [2008] UKHL 35; [2009] 1 AC 11 and *Re D* [2008] UKHL 33; [2008] 1 WLR 1499. In the latter case, Lord Carswell cited the famous passage from Lord Nicholls' speech in *Re H* [1996] 563 at 586-7 (emphasis supplied):

"*When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established . . . No doubt it is this feeling which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability*."

37. Lord Hoffmann has given the example of the animal in Regent's Park being more likely to be an alsation dog than a lioness, despite the proximity of the London Zoo. Nevertheless, it is a question of considering the otherwise less likely scenario against all the relevant facts or circumstances in the case. As Lady Hale said in *Re B* (and with whose speech Lord Hoffmann agreed)

"[72] As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

38. As regards the burden of proof there are circumstances where company property is received by or utilised for the benefit of a director or those closely connected to him which can give rise to a burden of proof lying on the director to establish that the relevant payment was proper and not brought about by a breach of his duties owed to the company.

39. In *GHLM Trading Limited v Maroo and ors* [2012] EWHC 61 (Ch), Newey J (as he then was), having considered various authorities, concluded at [149]:

"In the circumstances, I agree with Mr Miles QC[1] that, once it is shown that a company director has received company money, it is for him to show that the payment was proper. In a similar way, it seems to me that, where debit entries have correctly been made to a director's loan account, it must be incumbent on the director to justify credit entries on the account. That conclusion makes the more sense when it is remembered that the director (a) will have been (one of those) responsible for the management of the company's business and (b) will have had a responsibility for ensuring that proper accounting records were kept (see e.g. sections 386-389 of the Companies Act 2006)."

40. More recently, the position has helpfully been summarised in *Reynolds v Stanbury* [2021] EWHC 2506 (Ch), by ICCJ Barber as follows:

"[8] In my judgment the correct approach is as follows. Overall, the burden of proof is on the Applicant. He must prove his pleaded case. To the extent, however, that the Applicant's pleaded case rests on the wrongful transfer to the Respondent (or those connected with her) of money or other assets belonging to SC1, a two-stage process is involved. First, it is for the Applicant to prove, within the bounds of his pleaded case, the transfer of given sums or other assets belonging to SC1. As part of this first stage, where ownership of the asset or money in question is in issue, it is for the Applicant to establish on a balance of probabilities that the asset or money in question belonged to SC1. It is only once the Applicant has established the transfer or payment of assets or money belonging to SC1 that the second stage is engaged. At the second stage, the evidential burden is on the Respondent to prove that the payment or transfer was proper."

41. I should make clear that, as it happens, none of my conclusions turn upon the incidence of the burden of proof.

Witness evidence and the witnesses

42. The general approach to witness evidence that I have taken is as set out below.

43. Although the position remains that the "gold standard" for the ascertainment of the truth of witness evidence is the confrontation of a witness in the witness box by way of cross examination, the manner in which the court assesses the result has, in recent years, been the subject of judicial comment and explanation based on scientific research. In particular, the court has, on a number of occasions, given guidance as to the exercise of evaluating oral evidence and the accuracy/reliability of memory.

44. A convenient summary is set out in the judgment of Warby J (as he then was) in *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at paragraphs 39 to 41 where he said (with emphasis removed, and inserting sub-paragraph numbers for bullets in the extracts from the judgment in the *Kimathi* case, referred to below):

"[39] There is now a considerable body of authority setting out the lessons of experience and of science in relation to the judicial determination of facts. Recent first instance authorities include Gestmin SGPS SA v Credit Suisse

[1] As he then was, sitting as a deputy High Court Judge and giving judgment in *Gillman & Soame Ltd v Young* [2007] EWHC 1245 (Ch).

(UK) Ltd [2013] EWHC 3650 (Comm) (Leggatt J, as he then was) and two decisions of Mostyn J: Lachaux v Lachaux [2017] EWHC 385 (Fam) [2017] 4 WLR 57 and Carmarthenshire County Council v Y [2017] EWFC 36 [2017] 4 WLR 136. Key aspects of this learning were distilled by Stewart J in Kimathi v Foreign and Commonwealth Office [2018] EWHC 2066 (QB) at [96]:

"i) Gestmin:

(1) We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.

(2) Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.

(3) Events can come to be recalled as memories which did not happen at all or which happened to somebody else.

(4) The process of civil litigation itself subjects the memories of witnesses to powerful biases.

(5) Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.

(6) The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

ii) Lachaux:

(7) Mostyn J cited extensively from Gestmin and referred to two passages in earlier authorities.[45] I extract from those citations, and from Mostyn J's judgment, the following:-

(8) "Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a

legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance…"

(9) "…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"

(10) Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty.

iii) Carmarthenshire County Council:

(11) The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness. However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of Gestmin, Mostyn J said: "…this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context.

[40] This is not all new thinking, as the dates of the cases cited in the footnote make clear. Armagas v Mundogas, otherwise known as The Ocean Frost, has been routinely cited over the past 35 years. Lord Bingham's paper on "The Judge as Juror" (Chapter 1 of The Business of Judging) is also familiar to many. Of the five methods of appraising a witness's evidence, he identified the primary method as analysing the consistency of the evidence with what is agreed or clearly shown by other evidence to have occurred. The witness's demeanour was listed last, and least of all.

[41] A recent illustration of these principles at work is the decision of the High Court of Australia in Pell v The Queen [2020] HCA 12. That was a criminal case in which, exceptionally, on appeal from a jury trial, the Supreme Court of Victoria viewed video recordings of the evidence given at trial, as well as reading transcripts and visiting the Cathedral where the offences were said to have been committed. Having done so, the Supreme Court assessed the complainant's credibility. As the High Court put it at [47], "their Honours' subjective assessment, that A was a compellingly truthful witness, drove their analysis of the consistency and cogency of his evidence

…" The Supreme Court was however divided on the point, and the High Court observed that this "may be thought to underscore the highly subjective nature of demeanour-based judgments": [49]. The High Court allowed the appeal and quashed Cardinal Pell's convictions, on the basis that, assuming the witness's evidence to have been assessed by the jury as "thoroughly credible and reliable", nonetheless the objective facts "required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt": [119]."

[45] The dissenting speech of Lord Pearce in Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, 431; Robert Goff LJ in Armagas Ltd v Mundogas SA [1985] 1 Lloyd's Rep 1, 57."

45. The question of the significance of the demeanour of a witness has also been addressed by Leggatt LJ (as he then was) in *R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391:-

"[36] Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval: "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help." "Discretion" (1973) 9 Irish Jurist (New Series) 1, 10, quoted in Devlin, The Judge (1979) p63 and Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, The Business of Judging p9).

[37] The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter.
…

[39] To the contrary, empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour. The consistent findings of psychological research have been summarised in an American law journal as follows: "Psychologists and other

students of human communication have investigated many aspects of deceptive behavior and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments." OG Wellborn, "Demeanor" (1991) 76 Cornell LR 1075. See further Law Commission Report No 245 (1997) "Evidence in Criminal Proceedings", paras 3.9–3.12. While the studies mentioned involved ordinary people, there is no reason to suppose that judges have any extraordinary power of perception which other people lack in this respect.

[40] This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.

[41] No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts."

(a) Mr Leutheuβer

46. I found Mr Leutheuβer to be a truthful and accurate witness. He was careful to say where he could not remember matters of detail or where matters were outside his experience or expertise. Nevertheless, on the key points his evidence was clear and confirmed the evidence in his witness statement.

(b) Mr Meier

47. Due to having contracted covid, Mr Meier gave evidence remotely. I did not find that this method of giving evidence hampered me in assessing its reliability. I found Mr Meier also to be a witness of truth whose evidence could be relied upon for its accuracy.

(c) Ms Owens

48. Mr McDermott suggested that Ms Owens' evidence was not to be trusted, primarily on the basis that she had an axe to grind being related to Ms Haigh, who had been summarily dismissed. This was further demonstrated, it was said, by the manner in which Ms Owens had left HR on very short notice and then been re-employed by HR within days of Mr McDermott leaving. Testing Ms Owens' evidence against the probabilities and the documentary evidence I did not find it to be untruthful or inaccurate or tainted in the manner that Mr McDermott suggested. Naturally, as the primary person who had carried out investigations, the written evidence was not always clear as to when a matter was one of inference or found out at a later stage but in general I found Ms Owens' evidence to be truthful and reliable.

(d) Mr McDermott

49. I found Mr McDermott to be an engaging witness. Nevertheless, as Henry LJ counselled in the context of directors disqualification and corporate fraud and mismanagement in *Re Grayan Building Services Limited* [2005] Ch. 241

> "*Reliable figures are hard to come by, but it seems that losses from corporate fraud and mismanagement have never been higher. At the same time the regulatory regime has never been more stringent—on paper even if not in practice. The parliamentary intention to improve managerial safeguards and standards for the long term good of employees, creditors and investors is clear. Those who fail to reach those standards and whose failure contributes to others losing money will often both be plausible and capable of inspiring initial trust, often later regretted. Those attributes may make them attractive witnesses*." (emphasis supplied).

The focus should however be on the conduct of the director and not on his personality while giving evidence. Another way to look at his issue is to stress that demeanour of a witness, in the sense of how they come across in the witness box, is an uncertain guide to the truth, for the reasons that I have set out above.

50. In a number of respects, Mr McDermott accepts that he has (in effect) lied in the past, for example in doctoring certain invoices so as to misrepresent what they related to (see Allegations 1 and 2). In a number of other respects I have found that Mr McDermott has not told the truth, either in the past or when giving evidence before me.

51. So far as this is concerned, I should make clear that I have given myself what is usually referred to as a lies or *Lucas* direction, named after the decision in *R v Lucas* [1981] 73 Cr App R 159, CA. A useful summary of that direction, as it applies in the criminal context (where the criminal standard of proof applies) and as given to juries, is contained in the Crown Court Compendium (August 2021, amended December 2021), as follows (leaving out footnotes):

"*A Defendant's lie, whether made before the trial or in the course of evidence or both, may be probative of guilt. A lie is only capable of supporting other evidence against D if the jury are sure that:*

(1) it is shown, by other evidence in the case, to be a deliberate untruth; i.e. it did not arise from confusion or mistake;

(2) it relates to a significant issue;

(3) it was not told for a reason advanced by or on behalf of D, or for some other reason arising from the evidence, which does not point to D's guilt."

52. Connected with this point is the issue of the court's approach to bad character. Again, the points helpfully set out in the Crown Court Compendium regarding bad character are well known. For present purposes, and in the current context, the key point that I stress is the direction that "*just because someone has told lies in the past does not mean that he/she is telling lies now*".

53. Regrettably, where Mr McDermott's evidence was not supported by contemporaneous documents or the general probabilities I had to treat it with great caution and where it conflicted with other witnesses I tended to prefer the evidence of the other witnesses, including, as well as the claimant's witnesses, those that I now go onto deal with.

(e) Mr Banks

54. Mr Banks was able to give limited factual evidence. His relevant files had been destroyed and, as far as I could tell, he was largely working from memory and a reconstruction of what had happened based on the limited invoices before him. I found that his limited factual evidence was truthful and intended to assist the court but had limited value in terms of accuracy or detail. However, as regards his assessment that he was at no time acting in a position where he owed conflicting duties to (or at least had a conflict of interest as regards) Mr McDermott, and his companies, on the one hand and HR on the other as regards some of the relevant matters on which he apparently tendered advice, I regret that I was unable to accept it and do not accept that Mr Banks genuinely believed the same.

(f) Mr Tucker

55. Mr Tucker was able to give limited evidence but to the extent he gave relevant evidence I found him to be truthful and anxious to assist the court. I regarded his evidence as careful and accurate.

Some company law points

56. I deal very briefly with the main duties of directors relied upon in this case as against Mr McDermott and which are codified in the Companies Act 2006 further below. There are however some preliminary points that I should make at this stage.

57. First, the duty under s172 Companies Act 2006, the duty to promote the success of the company, is essentially a duty to act subjectively in what the director considers is in the best interests of the company. This is clear from the words of s172 itself: the director "*must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole*". It is also well established by the authorities such as *Regentcrest v Cohen* [2001] BCC 494

"[120] The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law para 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

58. Secondly, where the breach of duty is other than in negligence, for example, disposing of company property improperly in breach of what is now s171 or entering a transaction in breach of s177 Companies Act 2006, loss is caused by entry into the transaction in question and, to establish causation, it is not necessary for the company to show that had he not breached his duty in certain respects but complied with it (eg in declaring his interest or in asking more about the transaction) the same transaction would still not have occurred (see generally *Bishopsgate Investment Management Limited v Maxwell* [1993] BCC 120).

59. Thirdly, there was not in terms a pleading by Mr McDermott relying upon what is now s1157 Companies Act 2006. There may be a question as to whether under the CPR it is time to re-appraise whether it should be necessary to expressly plead the same (see discussion in e.g. *Phillips v McGregor-Paterson* [2010] 1 BCLC 72). I need not enter that debate because even if it was necessary to plead the same I would have given Mr McDermott permission to amend. He had to the extent necessary raised a case that he was acting reasonably and honestly and so the facts were clearly raised and did not take the claimant by surprise.

60. Section 1157 confers power on the court to relieve a director from liability in proceedings for negligence, default, breach of duty or breach of trust, if it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused. There are therefore three conditions to be met before the court may grant relief. So far as acting "honestly" is concerned, the cases on the section (or its statutory predecessors) confirm that the test is a "subjective" one (see e.g. *Coleman Taymar Limited v Oakes* [2001] 2 BCLC 791). I accept that. However, it seems to me that, taking the subjective state of mind of the director, whether it is honest (or dishonest) has now to be read and determined in the light of *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67; [2018] A.C. 391.

61. Fourthly, Mr McDermott spent a lot of time in his cross-examination of the claimant's witnesses in seeking to establish that they were individually in breach of their duties to HR, in particular by not exercising due care and skill in their role (where relevant) as directors, for example in devoting time to HR's affairs or in failing adequately to question and examine the monthly management accounts provided. I deal separately with the question of Mr McDermott's counterclaim for stress and anxiety and ill-health but as a generality it is no defence to the claims brought against him for breach of duty to assert that others may have been in breach of duty as well.

The claims and counterclaims

62. Mr Patterson identified the claims brought by the claimant as comprising 26 in number. For convenience I have referred to them by allegation numbers in the same manner that they were used in the hearing. However, I have considered them in a different order and grouping. Mr McDermott brought seven counterclaims which, again, I have referred to by the counterclaim numbers that I used during the trial. Broadly speaking the claims and counterclaims relate to the terms of Mr McDermott's employment and what he was entitled to thereunder, the use of company money for what the claimant asserts was for private expenditure of Mr McDermott, what the claimant says is a failure to account by Mr McDermott for various items of property of HR and various matters relating to the occupation by HR of premises owned by Mr McDermott (or his wife) through a separate company.

The terms of Mr McDermott's engagement

63. Before turning to the claims in detail it is necessary to consider the terms on which Mr McDermott was employed/appointed a director and (so far as relevant) the duties that he owed to HR.

64. According to Mr Leutheußer, he was aware that Mr McDermott was the managing director of HR's IT service provider, Supersys Limited which company had acted as such from soon after incorporation of HR. He was introduced to Mr McDermott through Mr Thompson, then managing director of HR in 2011. Mr Thompson put forward a proposal that HR would be taken over by him in the UK and be run independently from the Scherdel group and that a necessary capital injection would be made by Mr McDermott.

65. A first meeting between Mr McDermott and Mr Leutheußer was arranged by Mr Thompson. It took place in February 2011 in Coburg Germany. Mr Thompson did not attend. It became clear that Mr Thompson did not form part of Mr McDermott's plans. HR Germany was content with that position because they too were not satisfied with Mr Thompson's capabilities in an entrepreneurial as opposed to administrative role.

66. Mr Leutheußer says that Mr McDermott was initially offered the role of external consultant while also acting as managing director. Mr McDermott made clear that he wanted to become a shareholder of HR in due course. Mr McDermott was then employed as a consultant at an annual salary/fee of £60,000 and made managing director. Mr Thompson's role was altered to sales director. It was,

says Mr Leutheußer, agreed that after 6 months the position would be reviewed, in the light of results, and that the question of a shareholding for Mr McDermott would be part of the matters to be reviewed. On 28 April 2011, Mr Leutheußer says that Mr McDermott sent him consultant's invoices for the months of March, April and May 2011.

67. On 8 August 2011, Mr Leutheußer says that Mr McDermott sent him his first draft of a proposed shareholder agreement and consultant's invoices for June, July and August 2011. The draft shareholders agreement, says Mr Leutheußer, provided for a 25% shareholding in HR for Mr McDermott and a valuation by an accountant to determine the sale price.

68. On 7 October 2011, says Mr Leutheuβer there was a meeting between Mr Leutheußer, and Mr Freiherr von Waldenfels. The latter represented the Scherdel group. The meeting was to discuss Mr McDermott's proposed shareholding in HR.

69. On 28 March 2012, says Mr Leutheuβer, Scherdel/HR Germany offered Mr McDermott a 40% shareholding in HR for a purchase price of a £1 and an automatic transfer of the shares back to the majority shareholder after 5 years for the same sale price of £1. This closely resembles the terms set out in the Shareholders' Agreement. According to Mr Leutheuβer, Mr McDermott confirmed by email on 28 March 2012 that the arrangement would be alright for him if he received in addition a consultant salary of £60,000 per annum. He also wanted the agreement to be backdated to 1 September 2011.

70. There were, says Mr Leutheuβer, further negotiations in April and May 2012 which resulted in the Shareholders' Agreement of 1 June 2012.

71. According to Mr Leutheuβer there was never any discussion about an employment contract because the remuneration was set out in the Shareholders' Agreement. In this respect he must be mistaken because the Shareholders' Agreement itself envisaged a service agreement as Appendix B to it. Whether or not the information was conveyed to Mr Leutheuβer, I also agree with Mr Tucker, who says that he drafted the Shareholders' Agreement, that the terms set out in it concerning employment more resemble "heads of terms" rather than a full-scale detailed service contract which would have been expected to be drafted separately. However, I accept Mr Leutheuβer's evidence to the extent that he says that there was no discussion beyond what is set out in the Shareholders' Agreement and that no draft of a proposed Service Contract between Mr McDermott and HR was sent to him thereafter.

72. As I have said, the relevant written terms that governed Mr McDermott's employment/office as a director for the period after 1 June 2012 are those set out in the Shareholders' Agreement dated 1 June 2012. That agreement contains a section headed "Service agreement". Mr Tucker explained in oral evidence that the document was drafted by him, as a non-lawyer with a view, among other things, to setting out the main terms of Mr McDermott's position as managing director, almost as "heads of terms" so that it could form the basis for a fuller, lawyer-drafted service agreement.

73. Prior to that, there is uncertainty as to whether, contrary to Mr Leutheuβer's evidence, there was a written agreement in place. It is therefore necessary to consider the documentary evidence in more detail. The one certain matter is the Shareholders' Agreement, drafted by Mr Tucker, and signed by Mr McDermott.

74. The Shareholders' Agreement, under the heading "Service Agreement", sets out some key terms. It starts by dealing with the length of the agreement and the circumstances in which it might be terminated at an earlier date (essentially in circumstances where Mr McDermott was unable or unwilling to act or he could not perform his role "to 100% of his ability"). As regards the length of the agreement the Shareholders' Agreement provides:

"*The service agreement relates to the operation of the role of Managing Director for an initial agreed maximum period of five years…"*

75. Remuneration is dealt with as follows:

"*The remuneration of the role of managing director will be split into two equal amounts of £2,500 per month. These amounts will be of (a) a salary payment and (b) a consultancy payment The consultancy is in recognition for the additional skills brought to the role and these among other include IT support. The total paid in any 12 month period will be £60,000."*

76. As regards the time to be spent on the role the Shareholders' Agreement provides:

"The role of Managing Director is expected to take the majority if not all of the working week and therefore it is understood that the business interests of Hamuel Reichenbacher Ltd will be given priority."

77. With regards to conflicts of interest, the Shareholders' Agreement provides:

"*It is also agreed that for any matters that may involve a (potential) conflict of interest that both directors agree in advance, this may be by way of employment, service contracts etc."*

78. Under the heading "Reporting", it is provided that:

"It is agreed that R. H. McDermott acting as Managing Director will provide a monthly report to Reichenbacher Hamuel GmbH that will provide all 'key' information with regards to the operation of the Hamuel Reichenbacher Ltd. This report will also include an updated sales report, although the format will be discussed more fully in the future. This reporting mechanism will not seek approval for all decisions made but will give adequate notice should discussions be required, by either party. It is anticipated that this monthly report will be delivered at or around then same time as the monthly accounts or no later than the 15th of the following month of the reporting period.

It would appear prudent to include certain matters that require the approval of at least two directors; these are namely, the increasing of employee's remuneration and/or the payment of bonuses, the employment of new employees and self employed individuals, capital expenditure in excess of £5,000 as well as to any changes to the services offered by either director or linked companies."

79. Under the heading "Meetings", it is provide that there will be four meetings per annum, two in Germany and two in the UK. It concludes by saying:

"*Other matters that require separate signed agreements:*
Office rental agreement, to be agreed by both directors - Appendix A.
Service contracts for any services provided, to be agreed by both directors- Appendix B"

80. In fact, the Shareholders Agreement did not have either an Appendix A or an Appendix B. I was told, and accept, that such agreements were envisaged as being annexed at the time but that they were not ready at the time that the Shareholders' Agreement came to be signed.

81. In his witness statement, Mr McDermott simply said that he went to Germany on 1 June 2012 and signed the Shareholders' Agreement. He said nothing about its genesis or the background against which it was signed.

82. So far as pension is concerned, the evidence of Mr Leutheuβer was that no terms were agreed regarding a pension. Although he says that he did discuss with Mr McDermott at some point the usual pension arrangements for UK employees which was organised within the framework of written employment contracts, as I understood his evidence, this was not a discussion with reference to Mr McDermott's own employment but rather a reference to the fact that Mr McDermott, as had Mr Albert Thompson before him, became responsible for giving details of the relevant pension statements to employees. For example, an unsigned contract in the pre 2014 form was in evidence before me for Mr Alexander McKinney dated 13 (or possibly 23) November 2009. Clause 10.1 of that contract provides:

"*You will be permitted as soon as you are eligible to join the Company's Stakeholder pension scheme (subject to the rules from time to time) full details of which can be obtained from Albert Thompson".*

83. The equivalent wording in the form of service contract adopted by the Company from 2014 was:

"You are entitled to benefit from the Employer's pension provision and details are available on request"

84. As there was nothing relevant in the Shareholders' Agreement, says Mr Leutheuβer, there was no pension entitlement in Mr McDermott.

85. In the particulars of claim it was alleged that Mr McDermott commenced employment on or about 1 March 2011 pursuant to an employment contract agreed orally whereby Mr McDermott was appointed managing director with a remuneration of £60,000 per annum. The particulars of claim then went on to deal with the Shareholders' Agreement.

86. In the defence and counterclaim dated 15 July 2020 there are several allegations by Mr McDermott that he never had a written service contract. I set out the more salient averments by reference to the relevant paragraph numbers of that document:

"*1.3 As the Defendant did not have a formal service contract….."*

7. The claimant did not provide the Defendant with a formal service contract despite many requests from the defendant to issue a full description of his salary, pensions, expenses, provision of a company vehicle and duties…

7.1 ….in the absence of a Service contract the Defendant had no guidance on what was expected of him and how he should carry out his duties…..

…in the absence of a detailed Service or Employment Contract [Mr Leutheuβer and Mr Meier shared Mr McDermott's statutory and corporate responsibilities].

9 The Defendant refutes the statement that the Employee Handbook was given to him on or around 1 September 2013 and, as can be seen from the copy in the Claimant's Annex 4, no signature of the Defendant is present on the document. At that time requests had been made for a formal Service Agreement to cover all aspects of the duties and responsibilities of the Defendant's directorship but there was no action on this from Mr A Leutheusser or other members of the HR GmbH management team. The Employee Handbook, issued two and a half years after the commencement of the Defendant's employment, was not taken as a response to the Defendant's request for a formal Service Contract. In not providing a Service or Employment Contract to the Defendant the other two Directors of the Claimant, Mr AR W Leutheusser and Mr CD W Meier, were not fulfilling their contractual, fiduciary and statutory duties.

33 ..As there was no formal Service Contact with details of holiday entitlement the Defendant sought a meeting with Novis & Co….Before any payment for holiday pay was made discussions took place between Stephen Tucker at Novis & Co to establish that this was a legal and correct payment….."

87. In his witness statement, Mr McDermott said that the it was initially agreed orally by him with Mr Leutheuβer in February 2011 that he would be paid £60,000 per annum, half paid as a consultant and half paid to him as a PAYE employee. He says that he explained that he needed an employment contract but although Mr Leutheuβer said he would sort it, he never received anything back from him. These latter points regarding Mr Leutheuβer agreeing to provide a service contract and Mr McDermott having said that he needed one are denied by Mr Leutheuβer. I accept his evidence on this, as on other matters where it conflicts with Mr McDermott's.

88. Mr McDermott goes on to say that as he had not received an employment contract back from Germany he spoke to Mr Albert Thompson, by then a sales director rather than managing director of HR, and that Mr Thompson told him he would have difficulty in getting a service contract from Germany and so should draft his own. He says that he got a template from his old IT company and drafted his own employment contract, signed it and sent it to Mr Thompson. Mr Thompson, he says, reviewed the contract, said that it was fine, signed it himself and then emailed Mr McDermott with the copy signed by both of them. The contract produced is apparently dated 6 April 2011. The claimant denies this version of events and says that the document in question is a later creation.

89. The contract apparently signed on 6 April 2011 (the "2011 Service Contract") was disclosed by Mr McDermott by way of extended disclosure in January 2021.

90. Although said to have been drafted from a template from his own company it is striking that the document has at its heading "Statement of Terms and conditions of employment" in a box resembling a speech bubble and which, as I expand upon below, matches the format of other written contracts of employment entered into by HR with other employees from January 2014. That heading appears on every subsequent page of the document.

91. The 2011 Service Contract provides for a start date (clause 1), title of employment (clause 2), a probationary period of three months (clause 3), place of employment (clause 4), remuneration (stated as being £60,000 with no distinction between consultancy and employment payments) (clause 5); hours (clause 6), benefits (being private health insurance) (clause 7), holidays (clause 8), incapacity due to sickness or injury (referring to the Employee Handbook, which only came into existence in September 2013, having been arranged by Mr McDermott) (unnumbered clause), Pensions (clause 9). Restraint of employment (clause 10) and confidentiality (clause 11).

92. There is a dispute between the parties as to whether Mr McDermott was entitled to payment in lieu of holidays and whether he could carry untaken holiday over from one year to another. The 2011 Service Contract provides for 35 days' holiday per annum in addition to 8 days of identified Bank/Public Holidays. That untaken holidays can be carried forward "indefinitely" and that any untaken accrued holidays at the time of the employee leaving will be paid in accordance with the employee's current rate of pay.

93. As regards pension, clause 9 provides:

> *"You are entitled to benefit from the Employer' s pension provision which entitles you to 5% on all earnings for the period of your employment.".*

94. Mr McDermott says that after the 2011 Service Contract but before the Shareholders' Agreement, further pension terms were agreed. According to Mr McDermott's witness statement, he met with Mr Leutheuβer in Germany on 6 October 2011. On this occasion, he says, they reached an agreement that he would be paid an amount for a pension of £150,000, as well as receiving 40% of the shares in HR and the salary of £60,000 per annum. As regards the pension he says that he was already entitled to be paid 5% of his total earnings <u>in lieu of</u>

pension contributions from HR but that he told Mr Leutheuβer that he needed a "top up" to his pension and that a reasonable sum would be about £150,000. Mr Leutheuβer, he says, agreed that once "we got to the end of the contract" he would be paid £150,000 "as long as various targets were achieved." He says that HR Germany's main concern was to build up relationships so that sales could be increased but that at that time Mr McDermott could not guarantee sales targets. He says that HR Germany also wanted him to address "the problem of their debt recovery". He says they shook hands on "the arrangement" and that he then thought he would get £150,000 less any amounts paid in the interim period. He says he met the targets as required under this agreement. All of this is disputed by Mr Leutheuβer.

95. When questioned as to what the relevant targets were, Mr McDermott, and the targets described by him, were more than a little vague. Eventually he said that the targets that he had to meet were not financial. Rather, they involved trying to re-establish contact with previous customers and bringing them back on board. When pressed, he said obtaining one order from Bentley or Rolls Royce would meet the target.

96. There is an invoice in evidence from J F Banks & Co. with a typewritten date of 31 December 2011, struck out in manuscript, and a manuscript date of 26 January 2012 inserted alongside. That invoice, for £685, includes the following items:

"*1. Meetings and discussions on the taxation issues related to the proposed shareholder agreement*

2. Final drafting of the proposed Directors Service agreement and meetings to review content.

3. Further review of trading contracts including profitability, costing and conditions of trade elements."

97. According to Mr Banks' witness statement, there were some:

"*small discussions on the shareholder agreement regarding what I thought about it and whether I thought it was comprehensive enough. The work was conducted for* [HR] as [Mr McDermott] *was asking for advice on the shareholders agreement to provide a template for the other Company representatives in Germany….the document also included the responsibilities for* [Mr McDermott] *as a Director from* [HR's] *point of view.*"

98. The witnesses could not remember to what extent Mr Banks had actually drafted a director's service agreement or to what extent he had merely reviewed the terms of the same set out in one or more drafts of the Shareholders' agreement produced by Mr Tucker and eventually signed off. I find that Mr Banks was at most considering drafts of documents produced by others rather than himself producing drafts.

99. In his witness statement, and notwithstanding the terms of paragraph 9 of his defence and counterclaim set out above, denying that he had been given a copy of the same in about September 2013, Mr McDermott asserts (as alleged in the

claimant's reply to the defence to counterclaim) that in 2013 he was responsible for the drafting and bringing into force of the HR employee handbook.

100. According to Ms Owens, whose evidence I accept, the new Handbook was prepared with the assistance of the employment law services prepared by a company called Citation Holdings Limited towards the end of 2013. At about the same time she says a new layout was adopted for employment contracts. The layout she exhibits to her witness statement is the same layout as the 2011 Service Contract with the distinctive "Statement of Terms & Conditions of Employment" in a box resembling a speech bubble at the top and, above that, HR's name in full in red and blue together with the annotation "A member of the SCHERDEL group". A number of contracts in this format, which match the format of the 2011 Service Contract, are in evidence. It is clear from the documentation in evidence that these contracts were created and signed from January 2014, although the commencement of the various employments date back 2011 and 2012. I accept Ms Owens evidence about this.

101. A version of an earlier draft contract of employment, dated 13 November 2009, for a Mr Alexander McKinney (and sent to him to sign) is in evidence (with the covering email to Mr McKinney sending the draft for signature) which does not have this heading or formatting and which has completely different formatting and text, including a statement at the bottom about service with the company also being subject to terms contained in the relevant employee terms letter.

102. The Employee Handbook in evidence has the annotation: "Issue: 1-September 2013". It envisages that it will be signed by an employee though it is not immediately obvious whether that is the employee to whom the Handbook si to apply or the person at the company who hands over the Handbook. This is because the place for the signature comes immediately below an "Introduction" introducing the handbook on behalf of HR and explaining (among other things) that:

"*Some of the rules in this handbook form part of your contract of employment. Part one contains the rules that form part of your contract of employment and are mandatory. Part two outlines how we intend to do things and are non-contractual. The policies and procedures in this section may be changed from time to time*."

103. The Employee Handbook contains detailed provisions regarding matters such as holiday, absence, timekeeping, expenses etc. I will have to return to it in relation to certain claims made by HR against Mr McDermott. For present purposes it suffices to say that even if it applied to Mr McDermott it does not impinge upon general duties that he would otherwise owe to the Company but, at most, makes provision of detail regarding the sort of matters that I have adverted to.

104. In his witness statement, Mr McDermott does not assert (as he impliedly does in his defence and counterclaim) that the Employee Handbook had no relevance to him because he was not provided with a copy of it. Instead, he asserts that because he was a director and shareholder he "didn't rely on the Employee Handbook". I take this to mean that he also considered that it did not apply to him and that he was not bound by anything in it (including the provisions in Part 1). This evidence is somewhat surprising given the references to the Employee

Handbook in the 2011 Service Contract and what Mr McDermott says about that document.

105. I have already referred to the agreement reached in January 2019 as set out in board minutes signed by Mr McDermott (among others).

106. The evidence of each of Mr Leitheuβer and Mr Meier about the circumstances in which agreement was eventually reached in January 2019 are as set out in paragraphs [107] to [114] of this judgment.

107. From about 2017, Mr Meier was given the task of supporting Mr Leutheuβer with respect to HR.

108. Mr Leutheuβer and Mr McDermott met at Manchester airport on 4 May 2017, before expiry of the Shareholders' Agreement. Mr McDermott put forward a proposal whereby he would take over ownership of HR, which would continue with the service business that it currently carried on. However, the machine sales part of the business would, he proposed, be handled by HR Germany direct.

109. In a meeting in Germany on 23 May 2017 between Mr L, Mr Meier, Mr Thomas Czwielong (the 2nd managing director of HR Germany), Mr McDermott presented his concept of a continuation of HR as he had already outlined to Leutheußerat Manchester airport. This proposal was not acceptable to HR Germany/the Scherdel group. No other agreement was reached and so it was agreed that the current contractual arrangements would continue until the end of July 2017 to allow time for an agreement to be reached after the holiday period.

110. In fact, negotiations were delayed and were only discussed further by telephone between Mr Leutheußer and Mr McDermott in early to mid-August. Nothing was agreed then, although Mr McDermott proposed an extension to the existing contractual relations for another three years. This was not however agreed.

111. Only in May 2018 did matters start moving again with a further proposal from Mr McDermott. His proposal was that the Shareholders' Agreement would continue until 31 December 2019 there might thereafter be the possibility of further annual extensions by agreement; separate contracts for him in his roles as managing director and consultant and there should be employment of a sales employee.

112. In July 2018, Mr McDermott made another proposal involving continuation of the Shareholders' Agreement until 30 September 2020; an increase of his salary to £100,000; an ex gratia payment to him of £150,000; a buy back of his shares in HR on a valuation of 5x after tax earnings at the end of the term. Again, this was not acceptable to HR Germany/the Scherdel group.

113. In November 2018, HR Germany instructed the Wilkes Partnership to assist in reaching terms for the parting of the ways between HR and Mr McDermott.

114. On 29 January 2019 a meeting was held at the office so the Wilkes Partnership at which were present Mr McDermott, Mr Leutheußer, Mr Meier and Mr Nigel

Wood of the Wilkes Partnership. This meeting eventuated in the agreement contained in the relevant board minutes.

115. On 21 March 2019, Mr Meier met Mr McDermott at the Dewsbury offices of HR. The relevant part of the meeting is spoken to by both Ms Owens and Mr Meier. What follows is a summary of their evidence. Ms Owens had been responsible from August 2018 for keeping HR personnel files up to date on the firm's OneDrive system for every employee. She had never seen a contract of employment for Mr McDermott prior to 21 March 2019. At the meeting Mr McDermott handed Mr Meier copies of the service contracts for current members of staff which were four in number. Mr McDermott also handed over what he claimed to be an employment contract of his that he claimed to have found at his home. The contract in question was signed by Mr McDermott (only) and his signature was dated as being affixed on 7 March 2019 (the "First 2019 Service Contract"). The contract was unsigned on behalf of the employer, HR.

116. Since Mr McDermott's position had been dealt with at the meeting on 29 January 2019 and the contract was not signed on behalf of HR, Mr Meier gave it no further thought.

117. Ms Owens thought that it was odd that Mr McDermott should have handed over an employment contract for himself because he had always maintained to her that he did not have one and she had never seen one for him in any relevant personnel files.

118. The format of the First 2019 Service Contract is again in the company format of the contracts of employment issued in January 2014 and indeed the 2011 Service Contract. The terms and formatting are identical to those of the 2011 Service Contract with one exception. That relates to the signature page. The 2011 Service Contract has the signatures immediately under clause 11 dealing with confidentiality. The 2019 Service Contract has a large space under clause 11 dealing with confidentiality. The signatures then follow on a separate page. The formatting and text differ between the two documents as follows: (1) The 2011 Service Contract repeats the text "Please sign the copy of this statement where indicated and return to me as soon as possible" so that it appears twice. One of these versions is in a different format (bold and as it appears on the page) compared with the other. Further under the first occasion this text appears are the words "For and on behalf of the Employer" and then on the next line the repeated text about signing and returning.

(2) In the First 2019 Service Contract, the space for signature by the Employer has the signature space and date space all on the same line with "For and on behalf of the Employer" immediately under the signature space. In the 2011 Service Contract the words "Albert Thompson" are typed in above the space for the signature, there is then space for his signature (and what appears to be his manuscript signature) on the next line with the date underneath.

(3) In the First 2019 Service Contract, immediately under the space for the employer's signature and date there is a heading in capitals "Acknowledgment By Employee" with three lines of text following acknowledging receipt of the document and a copy of the Employee Handbook and confirming that they have both been read and understood and

accepting that where relevant they form the contract of employment. In the 2011 Service Contract the heading appears but not the text.

(4) In the First 2019 Service Contract the signature and date appear on one line, in the 2011 Service Contract they are on separate lines and immediately above Mr McDermott's signature is his name typed in.

119. In his witness statement Mr McDermott says that on 8 March 2019, the day following that when he purportedly signed the First 2019 Service Contract, he spoke to Mr Tucker about the holidays that he had not taken over the years and worked out that it was about 117 days. He says that he agreed with Mr Tucker that payments in lieu of holidays would be made. As a result a sum of £14,884 was "rightly" paid to him. He goes on to explain how he reached this amount. He says that he carried out a calculation in Novis' office which was about £15,000. The formula was, he says, on his computer which failed during April 2019 with a Blue screen. From memory, he says, it was based on an average cost per day x 117 days. The average cost per day must therefore be approximately £127 per day. Assuming 35 days holiday a year this means that Mr McDermott was claiming for 117 days out of approximately 280 days holiday over the years he had worked at HR.

120. There is yet a further version of a service Contract between HR and Mr McDermott. This one was emailed to Mr Banks by Mr McDermott under cover of a blank email dated 14 March 2019 which email has the heading "Employment Contract". This contract appears to be solely a draft and is unsigned (the "Second March 2019 Service Contract"). It is in the same terms and formatting as the 2019 Service Contract but with a completely different clause 8 regarding holidays. Clause 8 as it appears in this contract provides for 30 days' holiday, rather than 35. The paragraph stating that untaken holidays can be carried forward indefinitely and that any untaken accrued holidays at the time of the employee leaving will be paid in accordance with the employer's current rates of pay, which appear in the 2011 Service Contract and the First 2019 Service Contract is not present in the Second March 2019 Service Contract. Instead, and in its place, there are two paragraphs as follows:

"*Rules as to holidays and holiday pay are set out in the Employee Handbook provided with this statement*

For the purposes of the application of the statutory holiday entitlement under the Working Time Regulations, you agree that the holiday section of this statement and the Employee Handbook will be held to be a "relevant agreement"."

121. The Employee Handbook provides (among other things) in Part 1 that:

"1.2 Rules regarding annual leave

...

i) No part of one year's holiday to be carried forward to subsequent years.

j) You are required to take all your statutory annual leave, to be booked in line with normal procedures, as stated above. Holiday that is not taken will be lost and not paid in lieu. However, should your employment come to an end before any accrued holiday is taken, you will be paid the balance of holiday pay due."

122. Mr Thompson sadly died in 2019. HR has been unable to verify with him his signature on the 2011 Service Contract.

123. In 2021, Ms Owens has looked for relevant emails but has been unable to find any, other than the email to Mr Banks dated 14 March 2019 and enclosing a copy of the Second 2019 Service Contract. In particular, in light of the claim by Mr McDermott that Mr Thompson had emailed him a signed copy of the 2011 Service Contract, Ms Owens attempted to search for relevant emails of Mr Thompson and Mr McDermott. One email account of Mr McDermott contained no emails earlier than 27 August 2013. She looked for other email accounts including one that she knew Mr McDermott had used before this time but all emails prior to 27 August 2013 seemed to have been deleted. Mr Thompson's email account had been deleted years before her search so that did not reveal anything. Ms Owens also looked again through relevant personnel files for Mr McDermott but found no service contracts for him, whether from 2011 or otherwise.

124. Mr McDermott, the day before the trial, produced his own trial bundle of documents which contained a number of new documents not within the trial bundles. One such document was purportedly a document showing metadata which he maintains verifies the existence of the 2011 Service Contract in 2011. What in fact the document showed and what its provenance was were both unclear. I did not permit such evidence to be admitted. An application for relief from sanctions would have had to be made. There was no evidence regarding such an application. Further, the document produced would have needed further enquiry to be made as on its face it was far from clear what it demonstrated. An adjournment would have been inevitable.

Conclusions regarding service contracts

125. The 2011 Service Contract was neither entered into nor, if it was, did it bind HR.

126. I accept the evidence of Mr Leutheuβer regarding the negotiations leading up to the 2012 Shareholders' Agreement, that he was never asked to agree to and was not aware of any service contract being entered into between HR and Mr McDermott until after these proceedings were produced and Mr McDermott started producing copies of service contracts.

127. I also accept the evidence of Ms Owens regarding her lack of knowledge prior to March 2019 of any service contract and the searches that she undertook to verify the position.

128. I also accept the evidence of Mr Meier on this point.

129. In no particular order, the following reasons underly my conclusion that the 2011 Service Contract was not executed until, at the earliest 2019, and that it does not bind HR.

(1) First, the format of the 2011 Service Contract is in a form that HR only adopted from 2014. Further, it referred to the Employee Handbook which only came into existence in 2014.

(2) Secondly, the other versions of a service contract produced (the 2019 versions) show clearly that the 2011 Service Contract is a culmination of those drafts in 2019;

(3) Thirdly, in his witness statement, Mr McDermott said that, following the termination of Mr Thompson's employment with HR (which was March 2012) the compromise agreement (apparently dated 1 August 2012, according to an invoice from Mr Banks dated 31 August 2012) eventually entered into between Mr Thompson and HR included an entitlement to 5% "in lieu of pension contributions" and "it was this arrangement which was set out in the employment contract" that he had agreed and signed with Mr Thompson in April 2011. The inference is that the 5% in lieu of pension contributions was agreed as part of a compensation package for Mr Thompson and that it did not exist as an entitlement before. The inference is also to be made that the 2011 contract was drafted after the date of the compromise agreement in August 2012 so as to replicate its effect. Of course, Mr Thompson would have had no authority to agree such a contract at that point on any view. So far as Mr McDermott says that the reliance by him on Mr Thompson's compensation package simply shows that HR Germany was prepared to agree to such a term and is not otherwise relevant in the manner that I have indicated, I do not agree. The evidence about Mr Thompson's compromise agreement shows that the relevant pension term was not a term of Mr Thompson's employment prior to the compromise agreement. As a new term, the 2011 Service Contract's drafting to set out "this arrangement" supports the conclusion that it was drafted after the Compromise Agreement.

(4) Fourthly, Mr Thompson had no authority to sign any such contract in 2011 being one only of the directors and Mr McDermott knew full well that HR Germany (and Mr Leutheuβer as director of HR effectively representing HR Germany's interests) had to agree to its terms. Mr Thompson of course had no authority at all to execute such a contract after March 2012 whether after August 2012 or in 2019;

(5) Fifthly, Mr McDermott did not produce or mention the 2011 Service Contract in connection with the negotiations leading up to the 2012 Shareholders' Agreement: either to Mr Leutheuβer, to Mr Banks or to Mr Tucker. It is incredible to suggest that Mr McDermott would have "forgotten" about having entered into a contract in March 2011 during the succeeding period of just over a year while Mr Banks and Mr Tucker were advising him on precisely that issue.

(6) Sixthly, Mr McDermott has admitted forging or tampering with documents that he presented to HR and took personal advantage under (I refer to certain doctored invoices for servicing cars that I shall come). In addition, he has a track record of producing different service contracts to be used for different purposes (I refer to the employment of Mr Cherry dealt with later in this judgment).

(7) Seventhly, the 2011 Service Contract deals in his favour with two matters that were not dealt with by the matters agreed and recorded in the 29th January 2019 board minute.

(8) Eighthly, the reason given by Mr McDermott for entry into the 2011 Service Contract makes little sense. In his witness statement he said that he told Mr Leutheuβer that he needed an employment contract "so that I knew what my jobs were". All that the 2011 Service Contract says about this is that he was employed as "director" and might be required to perform such other and/or additional duties within his skills and competence as the employer might require. His normal workplace was described as HR's address at Halifax Road, Dewsbury but he could be required to work elsewhere. It is difficult to see how this really helped him "know what his job was". Indeed, in evidence it is quite clear that he had a very clear vision of what being a managing director (albeit one of two) encompassed.

(9) Ninthly, the changing position he took (at the time and in these proceedings) as to whether there was or was not a service contract and if so what it was is itself indicative that the 2011 Service contract was created in 2019 and Mr McDermott was unsure in these proceedings whether to rely upon it. It is not credible that in March 2019 he should have produced a contract signed by him alone which mirrored so closely the 2011 Service Contract, had there indeed been a 2011 Service Contract which he claims to have "forgotten".

130. It follows that the only written terms governing Mr McDermott's term of office with HR are those set out in the Shareholders' Agreement and the January 2019 Board Minute.

131. As regards the period before that, I find that the agreed terms were those basic terms that Mr Leutheuβer identifies as having been agreed orally.

132. As regards the 2019 documents, neither have been signed by or on behalf of HR and so no question arises as them being in force.

133. As regards the period after expiry of the fifth anniversary of the Shareholders' Agreement, I consider that the evidence shows that the parties thereafter simply continued on the basis that the same terms applied. As regards Mr McDermott's service contract that is made out by the fact that his salary etc, continued to be paid and taken as before.

Duties owed by Mr McDermott to HR

134. Other than the refinements to the duty to avoid being in a position of conflict between duties or between duty and self-interest set out in the service contract, the general duties lying on Mr McDermott as a director of HR are clearly set out in the Companies Act 2006. Those duties are not in any way relaxed by any written service contract or resolution of the company (whether by the board or the members).

135. The general duties relied upon by HR are set out in sections 171 to 177 and are summarised below, as it happens not all of them are relied upon by HR on the facts in this case:

(1) s171.Duty to act within powers

(2) s172.Duty to promote the success of the company

(3) s173 Duty to exercise independent judgment

(4) s174 Duty to exercise reasonable care, skill and diligence

(5) s175 Duty to avoid conflicts of interest

(6) s176.Duty not to accept benefits from third parties

(7) s177.Duty to declare interest in proposed transaction or arrangement

136. Mr Patterson submitted that I can deal with this case without needing to consider whether or not there were separate contractual duties owed by Mr McDermott to HR and that I can proceed and determine the case on the basis of the general duties he owed as a director as set out in the Companies Act 2006.

Claims and Counterclaims directly concerning the terms of Mr McDermott's Employment

137. HR makes a number of claims against Mr McDermott arising from payments that he has caused HR to make on his behalf and/or for his benefit. There are also counterclaims arising in respect of sums said by Mr McDermott to be due to him under his contract of employment with HR or as subject to specific separate agreement or as resulting from breach of his contract of employment. Some of these matters arise in relation to motor vehicles other equipment and might be regarded broadly as expense claims by Mr McDermott and I deal with these first.

138. None of Mr McDermott's actual or putative contracts contain any provisions about expenses. Accordingly, the starting position is that any provisions in this regard needed to be agreed separately and could not be unilaterally determined by Mr McDermott. Indeed, after 2012, any such agreement about expenses, either general or specific, would fall within the "conflict" provisions of the Shareholders' Agreement. The alternative position (which I find was not the factual or legal position) is that the position was governed by the Employee Handbook (though only of course from 2014 or so). As regards expenses, clause 4.2 of the Employee Handbook provided that "all reasonable authorised expenses" incurred on behalf of the company would be reimbursed "once approved by your manager". In reality therefore, as regards expenses there was little difference in effect between this regime and that which I have held did apply. In either case the expense would have to be authorised and approved.

139. As regards vehicles, at least from 2014 the Employee Handbook in Part two, section 9 (which did not form part of an employee's contract of service) dealt with the care and control of company vehicles. Mr McDermott was allocated company vehicles but says that he used his private vehicles (whether his own or his wife's) either because a company vehicle was not available and/or because a company vehicle was uncomfortable for him and a cushion that he had purchased

(for about £50) to make driving less painful for him did not fit in the company vehicles.

Allegations 1 and 2: service of Mr McDermott's/his wife's cars in September/November 2018

140. In summary, in September 2018 HR paid for a service of Mr McDermott's wife's car by Anderson Garage Services in the sum of £594. HR paid for this service on a doctored receipt, which operated for present purposes as an invoice from the perspective of HR. The receipt had been doctored by altering the reference to Mr McDermott's wife's car and in its place inserting a reference to the vehicle registration number ("VRN") of a company car belonging to HR (Allegation 1).

141. Further, HR paid for a service of Mr McDermott's Bentley motor car in the sum of £4,712.16. HR paid for this service on a doctored invoice dated 1 November 2018. The invoice had been doctored by removing the reference to Prestige Services as "specialising in Rolls Royce and Bentley motor cars" and removing the reference to Mr McDermott's Bentley Motor car and in its place inserting a reference to two VW Transporters owned by HR, one having VRN YC62 OAJ (substituted in the receipt from Anderson Services as the serviced vehicle in place of the details of the car of Mr McDermott's wife as discussed above) and the other having VRN YD15 SUX (Allegation 2).

(a) Allegation 1

142. A receipt from Andersons Garage Services dated 25 September 2018 shows the customer as HR and under "Job Description" sets out: "Range Rover Sport V4KMC 30872 miles". The description goes on to refer to a service and vehicle inspection together with the supply and fitting of various brake components. The total price is £594 including VAT of £99. It is accepted by Mr McDermott that at the time the Range Rover Sport vehicle with VRN V4KMC was his wife's personal motor vehicle.

143. A second copy of the same Receipt was contained within HR's records and contains two HR stamps, one showing it as paid on 26 September 2018, the other giving details of the date of receipt the sage accounting system reference and a nominal ledger reference. It is accepted by Mr McDermott that the relevant sum was indeed paid by HR to Anderson Garage Services. As I have said, in the hands of HR it appears that the receipt was in fact treated as an invoice or at least that it fulfilled that function. For consistency, I continue to refer to the documents as receipts.

144. The second copy of the receipt is clearly a doctored version of the first receipt. On it, at the top, has been added in manuscript the VRN, "VC62 OAJ". Under the heading "Job Description" the reference to the Range Rover Sport, its VRN and mileage have been removed, probably through some photocopying process.

145. It is accepted by Mr McDermott that at the relevant time the VRN "VC62 OAJ" was in fact the vehicle registration of a black VW transporter vehicle, that vehicle being a company vehicle belonging to HR, and that he had use of that vehicle.

146. In the Particulars of Claim it is asserted that it is to be inferred that Mr McDermott, given his position within HR, had fraudulently tampered with what I have described as the first receipt and then defrauded HR of the sum of £594 used in paying the relevant receipt.

147. In his Defence and Counterclaim, Mr McDermott makes two points justifying the payment by HR of this service cost:

(1) He used his vehicles on many occasions for HR business when it was not convenient to use a company car, for example because none was available or he was away from home. He did not charge HR business mileage therefore it only "seemed reasonable" that the service of his/his wife's vehicle should be paid for by HR.

(2) At a meeting with Mr Leutheuβer, Mr McDermott was instructed to "do whatever it takes" to improve relationships with key customers and this included entertaining members of their staff and providing them with presents. Mr McDermott had done this with his own funds. The payment by HR of the servicing of his cars "was seen as a payment in kind" for this expenditure.

Of course neither of these explanations or justifications explains why it was necessary to tamper with the first receipt and to misrepresent what the service provided was for.

148. In his witness statement Mr McDermott in terms accepted that he "amended the description" on the receipt to remove reference to his wife's vehicle. He says that at the time he was under a significant pressure at work. He was suffering from stress. He accepted that amending the receipt in this was "not the right thing to do". However, he said that as he used his own vehicles for work purposes he was owed payment that he did not receive in respect of such use and that it would have been "entirely fair to claim these expenses" from HR.

149. In oral evidence, Mr McDermott resiled from the admission that it was he who had altered the receipt. He said that he couldn't remember anything about altering the receipt and, in effect, that he could not say how it had come to be altered or by whom or in what circumstances. He asserted that because of the medication he was taking he was unable to remember anything very much. He also asserted that payment of the service was justified because of the use of his vehicles on company business.

150. I make the following additional findings:

(1) Mr McDermott knowingly altered the receipt and presented the second, doctored, receipt to HR to hide from those at HR that the service paid for was not for service of a company car but a service of his wife's car. No-one else had the motive to make these changes.

(2) There was no agreement that Mr McDermott should receive the benefit of HR paying for services of his/his wife's vehicles and no legal obligation on HR to pay the same.

(3) Whether or not Mr Leutheuβer encouraged Mr McDermott to improve relationships with customers, he did not knowingly or intentionally encourage Mr McDermott to

entertain employees of main customers or send them gifts. Both Mr Leutheuβer and Mr Meier strongly denied any suggestion that they gave any such encouragement, express or implied, and I accept their evidence, which also fits with the probabilities. I also do not accept that whatever Mr Mc Dernmott was told was such that objectively it could properly have been taken by Mr McDermott as in any way encouraging or authorising him so to entertain and/or buy gifts. I also note that there is evidence that HR itself did pay for entertainment as it appears in its accounts for the year ending 31 December 2018 as an item on the profit and loss account and is identified on the detailed income statement as an administrative expense of £483 (in the year 2017) and £1,116 in the year 2018. I am not satisfied that Mr McDermott himself made any payments in respect of entertainment or gifts or, that if he did, that he did not recharge the costs back to HR.

(4) Assuming in his favour that Mr McDermott did indeed entertain and buy gifts for members of staff of main customers of HR, he did not at any time genuinely consider that that in any way justified him causing HR to pay for the service of his wife's car. That is shown not least by the absence of any reliance on the same in his witness statement or his oral evidence.

(5) Neither reason put forward as making it "reasonable"" or "fair" that HR should pay the relevant service cost was genuinely considered by Mr McDermott at the time as a reason justifying the same. There was simply no reason to doctor the invoice in the manner that he did. If he genuinely considered the matter was above board the doctoring would not have taken place. The reasons put forward are ex post facto justifications. They are not good on their face in any event.

151. I accept HR's submission that this state of affairs reveals a breach of the duty set out in s172 Companies Act 2006 in that he could not have believed subjectively that the payment was in the best interests of the company given his concealment of the true reason for the payment by the doctoring of the relevant receipt/invoice. It also follows that there is no scope for the operation of s1157 Companies Act 2006 as Mr McDermott acted neither honestly nor reasonably nor should he fairly be excused from his breach of duty.

(b) Allegation 2

152. In a two page invoice dated 1 November 2018, Prestige Services invoiced HR the sum of £4,712.16. That invoice identified Prestige Services as "Specialising in Rolls Royce and Bentley motor cars". At its head it also identified Mr McDermott's Bentley and set out details such as its model (Arnage), VRN and mileage.

153. The invoice provided to HR was doctored as I have described. An HR stamp upon it shows that it was received on 1 November 2018. Mr McDermott accepts that HR discharged this invoice.

154. In the particulars of claim, it is asserted that Mr McDermott fraudulently amended the invoice and that HR was thereby defrauded of the sum of £4,712.16 which it paid.

155. Mr McDermott's Defence and Counterclaim sets out the same defence as in relation to the altered receipt from Anderson Garage Services, namely that the payment of this invoice was "reasonable" given his use of his vehicles on company business and his payment for entertainment and gifts to members of staff of the main customers of HR.

156. I have made relevant findings about the case in relation to the Anderson Garage Services receipt. The same findings and conclusions apply in the case of the Prestige Service invoice.

157. In oral evidence, Mr McDermott was asked about this matter and taken through the relevant documents after he had given his answers about the altered Anderson Garage Services invoice. For the first time, he suddenly suggested that the reason that the invoice had been altered was for VAT reasons. There was a concern, he says, that on a VAT inspection the VAT element of the invoice would not have been allowed as input tax because the vehicle serviced was not a company car (the "VAT Explanation"). When asked by me whether, if true, this meant that he was prepared to defraud the VAT authorities, he denied that this was the case. However, it is difficult to draw any other conclusion. My additional findings with regard to this matter are as follows:-

(1) Mr McDermott knowingly altered the receipt and presented the second, doctored, receipt to HR to hide from those at HR that the service paid for was not for service of a company car but a service of his Bentley. No-one else had the motive to make these changes.

(2) There was no agreement that Mr McDermott should receive the benefit of HR paying for services of his/his wife's vehicles and no legal obligation on HR to pay the same.

(3) The VAT explanation is not a true explanation but is simply a matter thought up after the event to try and justify the falsification or doctoring of the invoice (and Anderson Garage Services receipt). It has never been mentioned before.

(4) The claimant's witnesses had no opportunity to deal with the VAT explanation in evidence. I find that it was not an explanation put forward to HR or any of its directors or employees until the evidence was given from the witness box and they knew nothing about it.

(5) The VAT Explanation is wholly unjustifiable but demonstrates (a) that Mr McDermott is prepared to make up evidence and (b) that he thinks or purports to think that there is nothing wrong in defrauding the revenue authorities. It also betrays a willingness to deceive and dress up transactions to misrepresent what they truly were. If I am wrong and this was a genuine motivating factor at the time, it cannot have been in HR's interests or thought to be in its interests to dress up transactions so as to mislead and/or defraud the revenue authorities.

158. As with Allegation 1, I accept HR's submission that this state of affairs reveals a breach of the duty set out in s172 Companies Act 2006 in that he could not have believed subjectively that the payment was in the best interests of the company given Mr McDermott's concealment of the true reason for the payment by the

doctoring of the relevant receipt/invoice. It also follows that there is no scope for the operation of s1157 Companies Act 2006 as Mr McDermott acted neither honestly nor reasonably nor should he fairly be excused from his breach of duty.

159. Finally, I should note that to the extent that a matter has been relied upon by Mr McDermott as a defence of one of Allegations 1 and 2 but not the others and I have rejected the same, the same rejection applies if the matter is treated as applying to the other allegation.

Allegation 16: payment for Jaguar Tyre Repair

160. On 7 April 2019, Mr McDermott purchased a tyre fitting package for his wife's Jaguar I Pace vehicle at a cost of £199.99, bearing his wife's personalised number plate and caused HR to pay for it. This is admitted. In his defence he asserted that the car was his.

161. Mr McDermott's justification for this payment is that he was using the car at the time it acquired a puncture and that the repair was therefore something that it was "reasonable" that HR should pay for it.

162. Assuming in Mr McDermott's favour that the puncture occurred in the circumstances that he says it did, this was clearly a matter in which there was no legal entitlement to reimbursement. Under the Shareholders' Agreement, the agreement of both directors was required. Mr Leutheuβer was not consulted. Further, under s177 of the Companies Act 2006 there was a duty to declare the relevant interest. There is therefore a breach both of the statutory restated duty and the contractual duty. I am further satisfied that Mr Leutheuβer would not have agreed, whether on this occasion or as a matter of principle, that Mr McDermott could routinely use his or his wife's car and charge HR in respect of such use (including by reimbursing costs of repairs necessitated while so using it).

163. I am not satisfied that there was a breach of s172 of the Companies Act 2006. The test is a subjective one not an objective one. I give Mr McDermott the benefit of the doubt in concluding that he thought that it would be in HR's interests to reimburse costs like these so as not to discourage the use of private vehicles by him when there was a strong need (for example, when other HR Company vehicles were not available).

164. I am not satisfied that grounds for relief are made out under s1157 Companies Act 2006. Mr McDermott on a number of occasions said that he couldn't be expected to trouble Mr Leutheuβer with every trivial matter and that Mr Leutheuβer was difficult to contact. I do not accept this. First a simple email would have sufficed. Secondly, this is but one of many such costs which could clearly mount up. In the circumstances, Mr McDermott needed to agree the principle with Mr Leutheuβer which he never attempted to do.

Allegation 14 and Counterclaim 5: payments of fuel for private vehicles and business mileage

165. Allegation 14 relates to 28 occasions between April 2018 and May 2019 when Mr McDermott used HRL funds to pay for the filling of his, his wife's or a company with which he was connected, Carbide's vehicles, with fuel. The payments in question amount to £2,721.52 (including VAT).

166. Counterclaim 5 is a counterclaim by Mr McDermott for £10,820 representing what he says is for business mileage using his or his wife's vehicles during the course of his employment. Although an allowance for fuel is but part of a traditional mileage allowance the arguments regarding both fuel allowance and mileage allowance are connected.

167. As regards allegation 14, the relevant payments are as follows:

DATE INVOICE	DATE PAID	AMOUNT £ (exclusive of VAT)	REG	SUPPLIER
22/04/18	30/04/2018	66.87	V4KMC	UK FUELS
13/05/18	21/05/2018	89.61	V4KMC	UK FUELS
17/06/18	25/06/2018	117.8	V4KMC	UK FUELS
12/08/18	20/08/2018	128.45	V4KMC	UK FUELS
09/09/18	17/09/2018	121.18	V4KMC	UK FUELS
14/10/18	22/10/2018	£98.87	V4KMC	UK FUELS
18/11/18	26/11/2018	121.74	V4KMC	UK FUELS
07/01/18	14/01/2018	160.65	VNF7, V4KMC	FUEL CARD
21/01/18	29/01/2018	50.41	YH66 DWP	FUEL CARD
28/01/18	05/02/2018	80.92	V4KMC	FUEL CARD
11/02/18	19/02/2018	94.40	V4KMC	FUEL CARD
04/03/18	12/03/2018	82.99	V4KMC	FUEL CARD
25/03/18	03/04/2018	27.70	V4KMC	FUEL CARD
08/04/18	16/04/2018	82.73	V4KMC	FUEL CARD
10/06/18	17/06/2018	91.73	VNF7,	FUEL CARD
24/06/18	01/07/2018	90.55	V4KMC	FUEL CARD
08/07/18	15/07/2018	57.18	V4KMC & VNF7	FUEL CARD
31/08/18	09/09/2018	54.02	YH66 DWP	FUEL CARD
30/11/18	30/11/2018	92.27	B3 EBJ	FUEL CARD
16/12/18	16/12/2018	29.00	V4KMC	FUEL CARD
23/12/18	30/12/2018	70.67	V4KMC	FUEL CARD
13/01/19	20/01/2019	74.21	BJ12 AOU	FUEL CARD
28/02/19	10/03/2019	62.88	YH66 DWP	FUEL CARD
17/03/19	17/03/2019	88.64	Y7RKM	FUEL CARD
31/03/19	07/04/2019	66.98	Y7RKM	FUEL CARD
28/04/19	05/05/2019	59.75	YH66 DWP	FUEL CARD
05/05/19	12/05/2019	30.42	YH66 DWP	FUEL CARD
12/05/19	19/05/2019	75.31	YNF7	FUEL CARD
		£2,267.93		

168. The payments are admitted. It is notable that the payments of fuel for Mrs McDermott's vehicle only ceased when it was replaced with an electrical model. I also accept Mr Pattterson's submission that the regular payments in respect of Mrs McDermott's car suggest not simply the odd payment or reimbursement of fuel when the car was used on company business but a payment for all her fuel at various points.

169. It was also accepted that there was no legal obligation on HR to pay these sums. First, there was no relevant contractual term between HR and Mr McDermott entitling him to such payment. Secondly, under the Shareholders' Agreement, the payment or arrangement resulting in the payments would have to have been agreed with Mr Leutheuβer. There was no such agreement nor any attempt to agree the same. Further, even if the Employee Handbook applied (and I have found it was not incorporated in Mr McDermott's contractual arrangements), that provided in terms that a company fuel card must only be used for authorised purchases and implicitly provided that use of fuel for company purposes had to be authorised (clause 9.3). I am satisfied that, given Mr McDermott had the use of a company vehicle, these regular fuel payments would not have been authorised by Mr Leutheuβer. I am therefore satisfied that there was both a breach of the Shareholders' Agreement and a breach of the duty in s177 Companies Act 2006.

170. Broadly for the same reasons as when considering the Jaguar Tyre Pack (Allegation 16), I am not satisfied that a case for relief under s1157 Companies Act 2006 is made out.

171. As regards the counterclaim, there is simply no entitlement to a business mileage. The Employment Handbook (which did not apply in any event) said that there might be an entitlement to reclaim business mileage when using a personal vehicle for business use, but this all seems to turn upon agreement. There was none in this case.

172. Mr McDermott's position was that on occasion he had to use his own car because a suitable HR vehicle was not available. I reject this explanation. At all material times he had his own HR vehicle available for use as well as being entitled to use other ones.

173. His other explanation was that he was forced to use personal vehicles due to his bad back. There is no medical evidence of the same other than a letter to a Dr Hayat from Mr Deniz (Neuro.Surg) at the Department of Neurosurgery at Leeds General Infirmary dated 5 October 2015. Apparently, Mr McDermott consulted him privately at the Spire Leeds Hospital. The letter refers to Mr McDermott finding:

"*sitting and driving to be the most troublesome position but he tells me today that he has since developed strategy's [sic] that make driving more comfortable.*

...

His symptoms have improved and are now very manageable. His normal activities of daily living and his quality of life are not affected by these symptoms. We were therefore in agreement to adopt a conservative approach for the time being. I have encouraged him to avoid any strenuous lifting and twisting until he has been symptom free for 4-6 weeks. Should he suffer a recurrence of symptoms which are refractory to conservative measures then of course I would be delighted to see him once again to revisit surgical options"

174. This does not suggest serious difficulty requiring him for comfort to drive his own car as opposed to the vehicles provided for his use by HR.

175. At the material time he was telling those at HR Germany of how he commonly cycled 200 miles many weekends. He said that he bought a cushion for use at the office and in oral evidence said he used this cushion in his car but it would not fit the HR vehicle he had the use of. He accepted a further cushion for use in HR vehicles would not have exceeded about £50. In fact one of the HR vehicles that he had the use of was replaced and he chose a new one but according to him that car was not suitable either. I reject these medical excuses. However, as I have said, the counterclaim ultimately fails because there was simply no contractual entitlement to the same.

Allegation 10: Payments for Mrs McDermott's telephone

176. It is admitted that Mr McDermott caused HR to pay for the mobile telephone charges of his wife, Mrs McDermott. The charges in question amount to some £1,857 (including VAT), averaging about £43 per month, and cover a period from 21 July 2015 to 21 June 2019. The telephone number charges were placed on HR's account which was paid by direct debit.

177. There was no contractual entitlement to payment of these charges. Mrs McDermott was at no time either an employee or an officer of HR.

178. Mr McDermott asserted that these payments were justified in two bases. First, in his witness statement he asserted that his wife acted as his private secretary keeping details of his appointments and typing up reports as well as handling calls. He said that many business calls were made from his personal phone and the expenses were not claimed and accordingly he thought it was sensible for his wife's mobile phone bill to be paid by HR and that this was "fully justified". Sometimes she would drive him to appointments so that he could "work on the go" and drop him off and collect him and, if he was away, she would need to contact him.

179. It was put to him in cross examination that he had a company mobile phone so there was no need for him to use his personal mobile phone and therefore no relevant business calls that he could legitimately even begin to make a claim for. He accepted that he had a company mobile phone but raised a new assertion that when abroad the charges were cheaper on his mobile phone than on the company mobile phone.

180. I am not satisfied that Mr McDermott's points are made good. First, as put by Mr Patterson, it seems to me that Mrs McDermott was assisting Mr McDermott in carrying out the duties he owed to HR rather than directly assisting HR. Secondly, it is hard to understand how the payment of the entire mobile phone bill can be justified in any event. Thirdly, there was no independent evidence about a difference in mobile phone charges between Mr McDermott's personal phone and his HR mobile phone and Mr McDermott was unable to explain what that difference actually was. In short, as is the case with the fuel bills for Mrs McDermott's car I am satisfied that this was simply and knowingly a creaming off of the payments for the benefit of the McDermott family and a breach of s172 Companies Act 2006.

181. In any event and even if I am wrong about the breach of s172, I am satisfied that clear breaches of s177 and the contractual duty to obtain Mr Leutheuβer's consent were breached. I am also satisfied that Mr Leutheuβer would not have agreed to pay these bills. For similar reasons to those given regarding the payment of fuel bills, I am not satisfied that grounds are established for the granting of relief under s1157 Companies Act 2006.

182. I turn now to other claims directly arising from the employment relationship.

Allegation 19 "pension payment" of £24,000; Counterclaim 6: £126,000 balance of pension entitlement

183. I have already dealt with much of the evidence as to how Mr McDermott says that agreement was reached entitling him to a pension payment. I need to move on to events after the January 2019 Board Meeting at which terms for his departure from the company were agreed. Those terms contained no provision regarding payment in lieu of pension.

184. On or about 18 February 2019, Mr McDermott wrote himself a cheque on HR's bank account for £24,000. The cheque stub records "5% payment in lieu of pension".

185. In his Defence and Counterclaim, Mr McDermott asserted that "as there was no formal Service Agreement" he sought advice from Novis & Co. The document that he refers to in that connection is dated 8 July 2020 and refers to a recent meeting between Mr Tucker and Mr McDermott. The first bullet point said to be confirmed is as follows:

" **Pension contribution.** Throughout the years that Novis & Co provided services to Hamuel Reichenbacher Ltd, it was noted that all employees were entitled to and where paid a 5% contribution in respect of an employer's pension contribution."

186. For present purposes it suffices to note that the meeting was over a year after Mr McDermott had paid himself £24,000 from company funds in respect of pension entitlement.

187. Mr McDermott's pleaded defence is that:

"*Prior to joining the Government Pension Scheme, all employees were paid the equivalent of 5% of their total earnings during the previous period of their employment which was in [sic] lieu of pension payments. As the defendant did not join the government pension scheme because of his age, the accountant confirmed that he should receive this benefit based on his gross earnings, as previous company employees did."*

188. As regards this, as I have said the advice, even on Mr McDermott's case, seems to postdate the drawing of the £24,000 by a considerable period.

189. Precisely what happened with other employees is unclear. What seems to be suggested by Mr McDermott is that payments in lieu of pension were made at the time when they (through the company) joined the new government workplace pension scheme, Nest. I assume that this would have simply given them the option of bringing their existing workplace pension pot within the same scheme that the company had now in effect decided to replace them with. The precise mechanics of, and precise impacts on other HR employees in this case of the company in effect enrolling in Nest were not explored in evidence nor was relevant documentation before me.

190. What is clear however is that Novis, through Mr Tucker, could not and did not give advice about whether or not Mr McDermott had any contractual entitlement to a lump sum payment from the Company or not. The Novis letter simply

confirms what employees received as a generality (and does not even suggest it was a lump sum capital payment). Novis took its instructions (both as to the facts and more generally) from Mr McDermott, not the other way round.

191. At the most, it might be said that had Mr McDermott been entitled to a pension he might have qualified for the lump sum payment in lieu at the relevant time. If that was the case there was no explanation as to why he didn't take such payment (or ask for it to be agreed) at the time that the other employees allegedly received their lump sum payments in lieu.

192. In any event of course, the "in lieu" payment was, says Mr McDermott, "topped up" to £150,000 by reason of the "handshake" deal done with Mr Leutheuβer. It is agreed that, taking into account the payment of £24,000, the alleged shortfall being counterclaimed for is in fact £126,000 not (as alleged in the defence and counterclaim) £136,000.

193. As regards this, I entirely accept the evidence of Mr Leutheuβer that no such agreement as alleged by Mr McDermott was ever made.

(1) First, the idea that such an important matter would be done on an oral handshake and not even confirmed in the Shareholders' Agreement makes little sense. Mr McDermott's suggestion that it went undocumented at Mr Leutheuβer's insistence, so that Scherdel would not find out about it makes little sense.

(2) Secondly, the suggested "targets" said to be a term or condition of the payment were so vague as to simply be an aspiration as to what in general terms Mr McDermott was primarily employed to achieve (ie re-establishing contacts with and orders from previous clients) or (if it was to obtain one order from Rolls Royce or Bentley, when a machine could have a price to the client of as low as £300 to £400 again makes little sense.

(3) Thirdly, it was not recorded or confirmed as part of the termination provisions given effect to by the 2019 January board meeting.

(4) Fourthly, Mr McDermott's position had been that Mr Tucker advised him to take the £24,000 while he could as HR would be likely to refuse to pay it (evidence which I reject as I find Mr Tucker gave advice after the event and I do not accept he ever would have or did give such advice regarding what was after all a client of his to one of its employees which was in the course of departure). He could not convincingly explain why exactly the same advice would not have been given or the same logic applied to the remaining £126,000 that he says he was also entitled to.

194. I have already explained why I have found that the 2011 Service Contract is not in fact a binding agreement between Mr McDermott and HR. Further, absent actual agreement, there can be no entitlement to any pension in Mr McDermott.

195. It follows that the relevant counterclaim falls to be dismissed. As regards the payment of £24,000, HR succeeds in its claim for repayment of such sum, the same having been made in breach of duty. There was no contractual entitlement to the same, and so it was in breach of s171 and also s177, but in any event I also

consider that the payment was also in breach of s172 Companies Act 2006. The circumstances of the payment and the evidence are such that I consider that Mr McDermott was effectively dishonest in making this payment and not acting in what he thought was the best interests of HR. I do not consider that grounds for relief under s1157 Companies Act 2006 are made out.

Allegation 20: "holiday" payments of £14,884

196. After the January 2019 Board Meeting, Mr McDermott emailed Novis & Co on 19 February 2019, 17 May 2019 and 19 June 2019 instructing them to make payments to him in respect of alleged unused holiday pay. The payments in question were made. In total they amounted to £14,884. They were in respect of allegedly "untaken" holidays from previous years (such entitlement being in respect of years prior to the then current year, 2019).

197. In his defence and counterclaim Mr McDermott made essentially two points: first (as I have referred to) that as there was "no formal service contract with details of holiday entitlement" he had consulted Novis & Co who had in effect confirmed the legality and correctness of such payments being made and secondly that the monthly management accounts reflected these additional payroll costs and were made available to the other two directors "so that their fiduciary duties could be fulfilled". A letter from Mr Tucker at Novis dated 8 July 2020 and referring to a recent meeting was relied upon. As regards holiday pay the letter records:

*"**Holiday pay .** I recall our conversation where you indicated that you hadn't used your full holiday entitlement. This unused entitled was processed through payroll as part of the normal payroll routine."*

198. In his witness statement, Mr McDermott says that he spoke to Mr Tucker about the holidays that he had not taken over the years and worked out he was owed 117 days and that he agreed with Mr Tucker that payments in lieu of the holidays would be made. He then worked out the compensation according to a formula (since lost when his computer broke down) which identified a figure of about £127 per day which he multiplied by 117.

199. Mr Tucker, in his witness statement and with reference to Mr McDermott's departure from HR said that Mr McDermott was paid money for his untaken holiday and that he recalled having a conversation with Mr McDermott who mentioned that he had not taken all of his holiday entitlement. He asked if it could be paid to him and I said that if the contract provided for it then yes it could,

200. I accept Mr Tucker's evidence over Mr McDermott's. It fits in with the overall probabilities. It would be out of the ordinary for an outside accountancy firm to give what would in effect be legal advice about the terms of the managing directors' term of employment when there was no written contractual terms and without proper and full instructions. Further such advice would be likely to be set out in writing.

201. As regards the information being in the relevant management accounts, that in my view is insufficient to give rise to any implied agreement of the other directors to the same unless it was clearly drawn to their attention. They may or may not

have been in breach of their own duties in not examining the accounts more carefully but it cannot be taken that they, acting as directors, approved such payments.

202. On the facts, I have already held that there were no relevant contractual terms governing holiday pay entitlement. The making of payments in lieu of holiday by the company was therefore something which Mr McDermott, consistently with his fiduciary duties, could bring about of his own volition. The express consent of the other directors had to be obtained. It was not. Accordingly the payments were made in breach of duty and must be repaid.

203. So far as relevant I do not find on the evidence before me that, had matters been properly explained, the other directors would have agreed to make such payments. First, the evidence as to such a huge holiday entitlement is backed up solely by assertion and lacks credibility or detail. Secondly, it was against company policy.

204. I do not consider that any grounds for the application of s1157 of the Companies Act 2006 are made out.

Counterclaim 7: Underpayment for shares £145,378

205. As is clear, under the Shareholders' Agreement, Mr McDermott held shares in HR not as in investment with the possibility for capital growth but as a means to receive income, by way of distributions of profit by way of dividend. He acquired the shares for £1 and was required to sell them back to HR Germany (or a different Scherdel nominee) for the sum of £1:

" *On a date no later than five years from this signed agreement the above mentioned shares (being 40% of the Issued Share capital) will be transferred to Reichenbacher Hamuel GmbH (shareholder A) (or any other nominated company controlled by the Scherdel Group) for the agreed sum of £I, from R. H. McDermott (shareholder B).”*

206. Mr McDermott asserts that the Shareholders' Agreement expired with effluxion of time and this obligation with it. However, the obligation accrued prior to expiry of the Shareholders' Agreement so Mr McDermott was in fact only entitled to £1 for his shares and the obligation to transfer them for a £1 remained in being even if the Shareholders' Agreement did expire by effluxion of time (in fact I have found that the agreement continued between the parties until 29 January 2019).

207. As it happened, HR was prepared to agree a package for Mr McDermott on his departure which included a payment of £20,000 for his shares as well as a dividend (to him only) of £50,000.

208. Although Mr McDermott refers to being under "duress" at the meeting on 29 January 2019 I do not accept that there is evidence of anything approaching legal duress at the time.

209. Mr McDermott also refers to Mr Leutheuβer and Mr Meier as having "misrepresented to him" the valuation of HR. There is simply no evidence that they made any representation about any value of HR. The truth is that the package was designed in the manner it was for taxation reasons. The price of £20,000 was never fixed by reference to the overall value of HR.

210. I also note that Mr McDermott has not adduced any expert evidence of value in any event and that the court order of 20 November 2020, when Mr McDermott was represented by Counsel (instructed by solicitors), provides for a single joint expert valuer in relation to an issue of car valuation but makes no provision for expert evidence regarding share valuation and (so far as relevant) that order was never appealed. Mr McDermott cannot therefore in fact establish any loss in any event.

211. Counterclaim 7 therefore falls to be dismissed.

Counterclaim 4: work related stress £33,000

212. Mr McDermott also counterclaims for work related stress in the sum of £33,000. In his counterclaim he asserts that he suffered mental health problems since 2012 shortly after taking up employment with HR and that such problems were due entirely to working stress and lack of support from Mr Leutheuβer, Mr Meier and HR Germany.

213. As regards the cause of his mental health problems, which his Defence and Counterclaim asserts have been subject to investigation by "Consultant Psychiatrists and other health professionals", he relies on a letter dated 23 April 2020 from a Dr Lopa Mitra Consultant Psychiatrist with the NHS South West Yorkshire Partnership NHS Foundation Trust as "confirming that the cause of his mental health problem was entirely work related". The letter, so far as materials states:

" Mr McDermott is a 74 year old gentleman who was referred to our services on 9 March 2020 and is currently under secondary mental health services for depressive episode with poor concentration and pervasive low mood. He is under regular review by our Kirklees Outreach Team which is an alternative to an Inpatient hospital admission and his current medication is being closely reviewed on a dailly basis."

214. In his defence and counterclaim, he asserts that the HR owed a duty of care to him which was not exercised and caused the mental ill health of which he complains.

215. In its Reply and Defence to Counterclaim, HR pointed out the failure to comply with CPR PD16 paragraph 4 dealing with procedural requirements in relation to the content of statements of case concerning personal injury claims and the need for various annexures including requirements regarding relevant reports from medical practitioners.

216. In short, on the state of the pleadings and evidence before me, the counterclaim for for work-related stress falls to be dismissed:

(1) there is no sufficient evidence as to the precise medical condition;

(2) there is no sufficient evidence as to what has caused the precise medical condition;

(3) there is no sufficient evidence as to whether the factual cause involves or flows from a breach of any duty of care owed by HR.

Allegation 24: Dividend payment: £50,000

217. As I deal with later in this judgment, there are a number of items that are set out on the company's fixed asset register which cannot be located. I accept HR's case that the keeping up to date of the fixed asset register and its accuracy were primarily matters falling within Mr McDermott's duties as managing director "on the ground", though I accept that in practice the asset register was kept by Novis at the relevant time.

218. Allegation 24 is that in reliance on the company's management accounts (which reflected the company owning the assets shown on its fixed asset register) and which also reflected an order placed with Rolls Royce which HR says had in fact been cancelled, it was agreed, as part of his termination package, that Mr McDermott should receive the dividend payment as set out in the minutes of the board meeting on 29 January 2019. The case was based upon Mr McDermott having misrepresented the financial position of HR to Mr Meier and Mr Leutheuβer at the 29 January 2019 meeting.

219. In closing, it was accepted by HR that the evidence was insufficient to enable the court to be satisfied that the pleaded cause of action was made out and the allegation was pursued no further. I need say no more about this allegation.

Items of HR property

220. I now turn to various items of HR property, or which are alleged to be HR property, and which it is said that Mr McDermott has failed to account for or alternatively that he acquired them using HR funds when they were for his personal use and the price paid by HR was misapplied by him or at his direction.

Allegation 9: Server £5,000

221. The allegation is that in 2013, HR purchased a server (the "Server") from Mr McDermott at a cost of £5,000. When he left HR, Mr McDermott refused to return the same unless and until HR paid him a further £2,000. He said that the server was jointly owned by HR and a company connected to him, Carbide Tooling Group Limited ("Carbide"), which was prepared to sell its half share for £2,000.

222. The Server was paid for by HR in two instalments, one of £2,235 on 24 January 2013 and one of £2,765 on 11 December 2013. The two cheque stubs are in evidence as "Server payments". There is no suggestion that only 50% of the server was being acquired.

223. According to Ms Owens, whose evidence I accept, it was used until about 2017 and was used for the purposes of keeping accounts back ups, sage backups and 365 backups. In 2017 HR became cloud based so that thereafter files were either stored on the relevant One Drive account or Microsoft 365 Sharepoint. That the company should buy and own the server makes some sense. That it should buy only a 50% share in the server makes little sense. I accept Ms Owens evidence that the staff believed that the server belonged to HR until Mr McDermott asserted the contrary in 2019. The asset register of the company shows the server (and not a 50% interest in the server) as being owned by HR from the 2015 asset register and is shown there as an item held as at 1 January 2015 not as an asset acquired during 2015. This is of course consistent with the date of the payments that I have referred to. Mr Leutheuβer's evidence was that he had known about the acquisition of a server but he had understood the server itself to be acquired, not a 50% interest. I accept that evidence.

224. Mr McDermott's Defence and Counterclaim asserts that the Server was "purchased jointly" by HR and the Carbide, with both parties paying £5,000 each. Carbide making its payment on 10 August 2015. The dates suggest therefore that the position presented by Mr McDermott of both acquiring a 50% share at the same time is wrong. On his case, HR must have acquired a 50% interest with the remaining 50% remaining with Mr MCDermott's company/business until it was later sold to Carbide. From HR's perspective such a deal would make little commercial sense.

225. In any event, no evidence, other than Mr McDermott's assertion, has been produced to verify the payment by Carbide and, without limitation, there is no evidence of payment by Carbide or of its books and/or accounting records showing ownership of a 50% interest.

226. I am satisfied that the interest that HR acquired was a 100% interest in the Server. I am concerned however that the server may not now be worth anything near approaching £5,000. If Mr McDermott is willing and able to deliver up the server I will make an order to that effect. If not, there will have to be an inquiry to establish its relevant value in 2019 with an order for Mr McDermott to pay equitable compensation/damages in a sum to be determined.

Allegation 11: Disposal of Audi A4 at an undervalue

227. Following the departure of Mr McDermott from HR, investigations showed that an Audi A4 (VRN YE59 HNB) (the "Audi") which belonged to HR had apparently been disposed of but no sums in respect of such sale had been received by HR and that there was no record of such sale in HR's books and records. The particulars of claim asserted a value of some £18,633.50 being the value ascribed to the car in HR's fixed asset register. The essential cause of action relied upon is one of a failure to account, though a raft of breaches of duty are pleaded.

228. In his defence and counterclaim, Mr McDermott asserted that the car had been sold by him for approximately £1,600 in cash which he had retained to "cover some of his expenses". The car is stated to gave completed over 160,000 miles, to be in poor condition and have had damage to the bodywork.

229. In his witness statement, he alleges that the reverse gear also did not work.

230. In oral evidence Mr McDermott asserted that the cash had been kept in an envelope in his safe which had been not been opened, since the sale in about 2019. However, the envelope was later brought to court and found to contain polymer £20 notes which had not been in circulation prior to 2020. Mr McDermott then suggested that his daughter had replaced the previous paper notes when the new polymer notes had come into circulation.

231. Ms Owens gave evidence, which I accept, that the Audi was Mr McDermott's company vehicle which he used until it was, in effect, replaced by a VW Passat which he determined that HR should buy as a replacement which took place in in December 2016. She said that after Mr McDermott received the new VW Passat at the beginning of 2017, she did not see the Audi A4 again. Mr McDermott said that the Audi was parked up on his drive for some 3 to 4 months.

232. By email dated 25 July 2019, Mr Whittaker of Novis (Novis apparently continued to work for Mr McDermott and/or his companies after it ceased to work for HR), told Ms Owens that at a meeting between Mr McDermott and Mr Tucker on 18 June 2019 Mr McDermott advised them that the Audi had been disposed of and the sale proceeds would be transferred into HR's current account in June/July. This does not explain why Mr McDermott had thought it right to retain the proceeds since 2017.

233. As regards mileage, the figure put forward by Mr McDermott of 160,000 miles is shown to be widely inaccurate by reference to relevant MOT certificates which show the relevant mileage to have been as set out below:

MOT Test date	**Mileage**
03.07.19	99,603
25.07.18	95,833
10.10.17	95,700
16.09.16	92,646

234. Documentary evidence shows that the Audi passed its MOT on 16 September 2016 and was serviced on 20 September 2016. This was a matter of months before the new VW Passat was purchased. The MOT record records a pass but with an advisory notice that the offside break pads were wearing thin and a reference to undertrays fitted. The invoice from Aeromotive refers to a full service but does not indicate any gear problems. Had there been any it is most likely that they would have been mentioned to, or identified by, the garage on the full service and MOT test. It seems unlikely a rear gear fault suddenly developed between September 2016 and December 2016 or that if it had this would not have been mentioned in the office.

235. Mr McDermott gave some evidence as to the circumstances of the sale. He suggested that he had checked on-line regarding the gear problem but did not seem to have taken any expert advice on the value of the car as it was nor to have taken any serious steps to market the same.

236. Pursuant to court order, there is the report of a single joint expert, Mr Peter Etherington. He had limited information regarding the alleged defects of the Audi. As he pointed out, they could be minor condition defects or major defects with a significant effect on the value. I consider that any defects in the Audi were minor. I do not accept Mr McDermott's assertions to the contrary. They have as much value as his assertion as to the mileage of the vehicle and are not consistent with the contemporaneous documentary evidence or the probabilities.

237. I accept that the value of the Audi, which Mr McDermott is liable to reimburse HR for, is the value of it in January 2017. If the Audi was in good condition Mr Etherington gives a "retail" value of between £9,750 and £10,750. This appears to be a band between the Glass's Guide figures that he cites of Retail Asking (£11,090), Retail Transacted (£10,690), Private Sale (£9.850) and Trade (£7,670). If the Audi as at that date was "in poor condition with damage to the bodywork and a defective reverse gear" then the range would be between £6,500 and £7,500. I do not accept that there was a defective reverse gear. I do accept that the Audi did have some but limited, bodywork damage. Doing the best I can I determine that the value of the Audi was some £9,000 (which makes allowance for some bodywork damage).

238. In this case the cause of action is simply for taking the Audi and not accounting for it. I do not need to determine whether Mr McDermott did in fact sell it for £1,600 or not, nor, if he did, whether or not such disposal was carried out by him negligently. However, so far as it is a matter of evidence going to the valuation of the Audi, I do not accept Mr McDermott's evidence that he disposed of the Audi for £1,600 on an open market basis and, even if he did, there seems to have been absolutely no marketing nor any expert advice taken on the value prior to disposal. This undermines the value of £1,600 as representing market value and therefore does not undermine the opinion of the single joint expert.

239. Accordingly, Mr McDermott is liable to HR in respect of the Audit in the sum of £9,000. There is insufficient evidence to establish grounds for relief under s1157 Companies Act 2006.

Allegation 12: Disposal of Black VW Transporter van

240. In about April 2019, Mr McDermott apparently disposed of a VW Transporter van belonging to HR with VRN YC62 OAJ (the "Black Transporter Van"). HR was unaware of such sale until it received a cheque from Cosmo Telecom Limited ("Cosmo") for £2,100 in September 2019. As with the Audi the key allegation of breach of duty is, in effect, a failure to account.

241. Mr McDermott asserts in his defence and counterclaim that he properly disposed of this vehicle and at a proper price. He says that the van had not been used for many months and was parked on his home drive. There was a "major problem" with the gearbox and the motor kept cutting out into "limp mode". He says the

vehicle had a mileage of 170,000 and that the local VW dealership placed a value of between £2,500 and £3,000 on the vehicle due to its faults. He sold the vehicle for £2,100 " as seen".

242. The evidence of the local VW dealership advice is an email dated 6 July 2020 saying:

"Ref conversation relating to the sale of the 62 plate van in approx.. 2018 I can confirm the sale price was approximately £2,500"

243. On its face this does not confirm a valuation in its then current state of £2,500 to £3,000. Furthermore, it was accepted by Mr McDermott in oral evidence that the valuation that he says was placed on the vehicle was done without any inspection being carried out by the garage concerned.

244. The single joint expert, Mr Etherington, notes that "limp mode" is a security feature activated when the electronic modules detect a fault. The feature in such circumstances deactivates some systems on the vehicle but allows it to be driven as a much reduced speed for a short time until the defect can be remedied. The fault could be a serious defect or a simple problem with a sensor or poor electrical condition.

245. Mr Etherington concludes that if the defect was intermittent, as the description suggests, then this is more likely to be a less serious defect. This is not the only evidence suggesting that any defect was not serious. The evidence is that other employees of HR were unaware of the problem. Further, an invoice for repairs to the Black Transporter Van in November 2018 for £366 (inc VAT) includes in its description: "investigate into running faults and lack of power supply and fit fuel pressure regulator." Mr Etherington is of the opinion that the described defect could cause the VW to go into limp mode. However, that the work was carried out suggests that the defect was fixed.

246. Mr Etherington notes that no description was given to him of how the vehicle was in bad condition other than the limp mode point.

247. His conclusion is that the retail value of the VW Black Transporter Van in March 2019 if in good condition would have been in a range between £5,600 and £6,600. In poor condition, with an intermittent fault activating the limp home mode the valuation would be in a range between £3,500 and £4,500. The upper valuation range appears to be the top limit of the Glass's Retail Transacted Value of £6,611 with a starting point some way above the trade value of £5,071.

248. On the limited evidence before me I am satisfied that the VW Black Transporter Van was in good condition within the meaning give to that term (and its limits) by Mr Etherington.

249. I do not see why I should assume that a sale at the top of Mr Etherington's range would have been achieved. Doing the best that I can I therefore place a value on the Black Transporter Van of some £6,100 (being the midway figure in the range given by Mr Etherington).

250. It seems to me that in this case, as with the Audi, Mr McDermott is liable to account for the property that he effectively took and sold and that the only issue for me is one of valuation of that property. However, to the extent that his evidence bears upon the issue of valuation: (a) the email from the VW garage is unclear and takes matters little further forward; (b) the price achieved cannot be taken as being reflective of market value given the very limited marketing carried out.

251. Accordingly, taking into account the £2,100 received by HR, Mr McDermott remains liable to HR for a further £4,000 in respect of the Black Transporter Van. There is insufficient evidence to establish grounds for relief under s1157 Companies Act 2006

Allegation 15: Lenovo computer (£853)

252. In April 2019, a Lenovo laptop was purchased by HR from Currys PC World for the sum of £853.33 (ex VAT). The relevant invoice is dated 30 April 2019. Like the Sony camera discussed later in this judgment, this was an item on HR's fixed asset register which was identified as missing after HR moved out of its Dewsbury premises in July 2019.

253. On the part of HR, the investigations into this matter were conducted by Ms Owens who gave evidence about the matter, Her evidence, which I accept, was first that all staff at the relevant time had their own laptops and that HR laptops were all HP laptops and secondly that only Mr McDermott had access to purchase items through HR's Currys account. She also confirmed that she had never seen the Lenovo laptop and that it is nowhere to be found on HR's premises and that no members of staff has retained it.

254. Mr McDermott's position was that some unknown employee must have purchased the Lenovo and that it had been nothing to do with him and he had never seen it. I reject this evidence.

255. That Mr McDermott purchased the Lenovo laptop for his own use also received some support from evidence in his witness statement that he had been in discussions with Mr Tucker of Novis about his, Mr McDermott's, entitlement to holiday pay. Mr McDermott said that he did a calculation as to what he considered his entitlement to be "in Novis office" and that the formula that he used was on his PC "which failed during April 2019 with Blue Screen". The date of the calculation appears to have been early March 2019. The obvious inference is that he worked on his laptop at the Novis offices and that that laptop failed. That would of course provide a basis for saying that he would have replaced his laptop in April 2019.

256. In oral evidence, Mr McDermott suggested that it was his office based desktop computer not a laptop, which failed. This made little sense: he clearly did not take his desktop computer to Novis in March to carry out a calculation but a laptop and it was, he says, that machine that failed.

257. Accordingly I find that Mr McDermott is liable to account for the laptop and the cost to HR has been the (net) sum spent on the laptop, namely £853.33.

258. I do not consider that there are any grounds for relieving Mr McDermott for liability to account under s1157 Companies Act 2006.

Allegation 17: Sony Camera

259. HR moved out of the premises in Dewsbury in July 2019. A number of items were later found to be missing. One of these was a Sony RX100 camera. HR had purchased this (with some extra related items) at a cost of £514,99 plus VAT from Currys PC World as evidenced by an invoice dated 19 February 2018.

260. Mr McDermott was asked to make the same available for collection by HR by email dated 6 September 2019. In the list of equipment that he was making available to be collected pursuant to such request, Mr McDermott referred to the camera having been "upgraded to Canon Sure shot with 30x Zoom". HR replied that their records and accounts showed a Sony camera as having been purchased not a Canon. Mr McDermott's further explanation by email dated 10 September 2019 was that he "decided that it was not good enough for the purposes I intended. I decided to change the camera for one that was better suited for that purpose." HR was only prepared to collect an item matching the description of the goods that they had purchased.

261. However, in his defence, as re-iterated in his witness statement, a different version of events was given by Mr McDermott. It was asserted not that the camera had been exchanged because it was not good enough but instead that Mr McDermott had accidentally dropped and damaged the Sony such that he bought a replacement camera with his own money to replace it. This apparently was in response to the particulars of claim asserting that the Sony camera was one among a number of items that he had either acquired with company funds for his own benefit or had misappropriated.

262. The case that the Sony camera had been replaced by way of exchange was exploded by investigations carried out by Ms Owens. Looking at HR's purchase history and account with Currys (where the Sony had been purchased) there was no record or paperwork of it having been returned for a trade in. Further, there was no reason for an accidental dropping of a camera to result in Mr McDermott paying personally to replace it.

263. Mr McDermott accepts that he should return the replacement Canon camera to HR as belonging to it. There is therefore no need for me to consider whether he should be reimbursed for cost that he incurred in its purchase (assuming that he did). I should however make clear my finding, in case this matter goes further, that I am not satisfied that the camera was broken and then replaced by Mr McDermott out of his own monies as he alleges. It is for him to account for the company property and I am not satisfied that his latest explanation is true. If it was, it is simply incredible that he did not offer it up in September 2019 and instead gave the completely different explanation of a trade in.

264. I am satisfied that Mr McDermott is under a duty to account for the company property being the Sony camera. His explanation is that it has been replaced. HR is entitled to falsify that account. I am satisfied that it succeeds on that issue. Accordingly, HR is entitled to the value of the Sony Camera. The best evidence

of value is its cost to HR, and I accordingly award damages in that sum. Although not pleaded there would of course be a like remedy in conversion.

265. Mr McDermott complained that HR refused to accept the Canon camera. It was not bound to do so and there is no independent evidence that it is indeed an upgraded camera and worth more now than the cost of the original Sony camera.

266. I do not consider that any grounds for relief under s1157 of the Companies Act 2006 is made out.

267. Accordingly, HR is entitled to damages/equitable compensation of £514.99 (ex VAT) with regard to this item.

Allegation 18: Mobile Phone £879

268. This allegation was, in effect, an allegation that Mr McDermott had taken a phone which HR had purchased under a mobile phone plan. Mr McDermott's position as that the relevant phone plan had been transferred to his own name and that he had met the payments under it with the result that the phone became his.

269. By the end of the evidence, HR accepted that here was insufficient documentary evidence before the court to enable the matter to be resolved in its favour and accordingly this allegation was not pursued. I need say no more about it.

Allegation 26: Orbital Polisher £274.96

270. This allegation related to a random orbital polisher purchased from a company called "Clean Your Car" for the sum of £274.96 (ex vat). Ms Owens in her witness statement explained how the polisher had been used by HR, in effect to polish the side panels of an HR vehicle. The polisher could not be found after Mr McDermott's departure. The allegation was essentially that he had wrongly taken it.

271. During the course of the trial it was accepted that there was inadequate evidence for the court to find that this allegation was made out and accordingly it was not pursued further, I need say no more about it.

Allegation 23: Other assets listed on the fixed asset register which are missing: £16,000-£52,000

272. In addition to the specific items that are the subject of specific separate allegations, the particulars of claim set out a "catch all" list of assets which were listed on the fixed asset register and which could not be located. Essentially, the case in the alternative was that such assets had never formed part of the proper asset base of HR but were items that had been purchased by Mr McDermott for his personal use or that he had subsequently taken such items.

273. The case was largely based on circumstantial inference. Some of the items were in fact items that I have already dealt with (including the Lenovo and certain of the invoices for CCTV and lighting at the Halifax Road premises (which Mr McDermott accepted were wrongly included as fixed assets)). Other items were matters that Mr McDermott challenged as being lost (such as Tools worth over

£12,000, which he said the engineers would hold). Other items were listed simply by reference to the supplier and it was impossible to say what the items in question were. The value placed on such missing items by HR was in excess of £52,000 as regards cost price with a written down value of just over £16,000 as at May 2019. This however included some items that I have already dealt with in relation to separate allegations. The remaining equipment was largely computer equipment and it is probably that its value might be much less than the depreciated value stated in HR's books and records.

274. By the end of the evidence, it was accepted by HR that the evidence did not enable the court to reach a conclusion that the items not otherwise the subject of a separate allegation had either been purchased for Mr McDermott personally or subsequently misappropriated by him. In those circumstances this allegation was not pursued further and I need say no more about it.

Lease of 7, 9, 11 and 13 Halifax Road, Dewsbury: Allegations 3, 4, 5, 6, 7, 8 and Counterclaims 1, 2 & 3

275. I turn now to allegations relating to the property leased by Mr McDermott through his company to HR.

276. Between 2010 and 2012, HR occupied premises on the first floor of 7, Halifax Road. In October 2012, following the departure of a firm of solicitors that had previously been occupying that unit HR moved into premises located at 9-11 Halifax Road. HR vacated those premises on or about 9 July 2019. There is a dispute as to the terms on which occupation took place after 1 October 2012 when a written lease was entered into.

277. A number of claims and counterclaims are made in relation to HR's occupation of 9-11 Halifax Road.

(a) Counterclaims 1, 2, 3

278. As regards the counterclaims, Mr McDermott brings the following counterclaims by these proceedings (counterclaims 1, 2 & 3):

(1) Dilapidations of £12,000;

(2) Rental of £18,000

(3) Service charges of £24,000.

279. These counterclaims are all brought in relation to a lease of the premises by Poppy Asset as landlord. In those circumstances the correct claimant is Poppy Asset. This was recognised by Mr McDermott in a letter sent during the course of the proceedings. He told me that it was a mistake that these counterclaims had been brought, or at the least, persisted in by him in his personal name. It is not appropriate for me to say anything more about the underlying claims. The counterclaims, brought by Mr McDermott with no standing to do so, I dismiss.

280. HR however also brings claims against Mr McDermott in respect of sums charged to it and/or the terms under which it occupied the premises.

(b) Allegation 3: Falsified Lease

281. The first point to note is that the rent originally charged to HR in respect of occupation of the first floor of 7, Halifax Road was £1,000 a month or £12,000 a year. That rent was known to Mr Leutheußer and effectively agreed to by him.

282. I have already referred to the Shareholders' Agreement. That document so far as material for present purposes, provided :

(1) Under the heading "Service Agreement": "for any matters that may involve a (potential) conflict of interest that both directors agree in advance, this may be by way of employment, service contracts etc."

(2) Under the heading "Other matters that require separate signed agreements:" the words "Office rental agreement, to be signed by both directors-Appendix A". No appendix A was included. It was explained to me by Mr Tucker that it had been hoped a draft agreement would be ready in time but none was.

283. There are a number of versions of a lease relating to 9-11 Halifax Road, dated 1 October 2012 and made between Poppy Asset and HR in evidence before me.

284. HR asserts that the lease under which it occupied the relevant part of 9-11 Halifax Road is that dated 1 October 2012 and which, on the signature page, is signed by Mr McDermott on behalf of Poppy Asset and by Ms Samantha Haigh on behalf of HR. For present purposes the key provisions of such lease are:

(1) An annual rent of £12,000 (that is £1,000 a month).

(2) A contractual term of 5 years commencing on and including 1 October 2012;

(3) Under the heading "Utilities" a covenant by the tenant:

"to pay all costs in connection with the supply and removal of heat, air conditioning, electricity, gas, water, sewage, telecommunications, date and other services and utilities to or from the Property." There is a further covenant by the tenant "to comply with all laws and recommendations of the relevant suppliers relating to the use of those services and utilities" (clauses 6.1 and 6.2).

(4) A tenant's repairing covenant and a tenant's decorating covenant;

(5) A covenant by the tenant to yield up "in the repair and condition required by this lease" and to remove "all chattels belonging to or used by it".

(6) Any underletting as permitted is to include an agreement that ss24-25 of the Landlord and Tenant Act 1954 are excluded as applying to the tenancy created by the underlease. On its face, the protections of the 1954 Act are not excluded from the tenancy created by the lease to HR itself.

I refer to this lease as the "First Lease".

285. There is a second lease which Mr McDermott asserts to be the relevant lease (the "Second Lease"). It appears to be a copy of the First Lease but with certain changes as outlined below:

(1) On the first page in clause 1 with the heading "Interpretation", the definition of Annual Rent has been altered from "£12,000 (Twelve thousand pounds) from the Rent Commencement Date" to "£18,000 (Eighteen thousand pounds)".

(2) In the same clause 1, the definition "Contractual Term" has been altered from " A term of 5 years beginning on, and including the date of this lease" to " A term of 8 years beginning on, and including the date of this lease".

(3) A significantly different clause 15 dealing with the return of the property to the landlord. The original clause 15 was in the following terms:

"***15, RETURNING THE PROPERTY TO THE LANDLORD***
15. l At the end of the term the Tenant shall return the Property to the Landlord in the repair and condition required by this lease.
15.2 At the end of the term, the Tenant shall remove from the Property all chattels belonging to or used by it."

(4) The clause 15 as appearing in the Second Lease (which looks as if it has been cut from a different document and pasted into the original document) is in the following terms:

"***15. RETURNING THE PROPERTY TO THE LANDLORD***
15.l By the End Date of the lease or at the date vacating the property. Whichever is the earlier unless required by the Landlord in writing not to do so, must have;
(a) remove all tenant's and trade fixtures and loose contents from the Premises and all signage Installed by the Tenant at the Premises.
(b) reverse any alterations and remove any additions to the Premises that have been carried out by the Tennant.
I made good all damage to the Premises caused when complying with paragraphs (a) and (b); and
(d) restore the premises to the same state and condition as they were in before the Items were installed or added and before the alterations were made as documented in the Schedule of Condition.
15.2 The costs of the work to return the property to the original condition will either (a) be reimbursed by the Tenant to the Landlord or (b} paid directly by the Tenant. ·
15.3 The Landlord can claim the loss of any rental income during the time taken to return of the property to the original state and condition or as a result of the Tenant's breach of these obligations if the property cannot be re- let because the reinstatement works.
15.4 lf the Landlord and the Tenant do not agree on any matter relating to the reinstatement [sic] *of the property, an expert or arbitrator is to be appointed by the President of the Royal Institute of Chartered Surveyors on the application of either the Landlord or thye* [sic] *Tenant.*
15.5 If the Tenant vacates the property before the End Date 1 the Tenant shall pay the whole of the outstanding rent and rates calculated from the last paid rental

period to the end of the lease period (1st October 2020} on the last date of the Tenants occupancy."

(5) The Signature page is the same signature page as the First Lease and contains the same manuscript signatures in each case witnessed by a Linzi Beaumont. However there are the following changes and additions compared with the First Lease.

(i) The typed words that Poppy Asset was acting by "Mr McDermott" has been removed so that the typed phrase is that the lease has been "Executed as a deed by [Poppy Asset] acting by"

(ii) Next to Mr McDermott's original signature is a new signature, being that of his wife. The witness signature is unaltered and there is only one.

(iii) The original signature of Ms Samantha Haigh, witnessed by Linzi Beaumont remains but next to it is a new signature of Mr McDermott.

286. The Second Lease came to the attention of Mr Meier as follows. He had understood the rent to be £1,000. He asked Mr McDermott by email on 22 February 2019 to send him a copy of the lease. Mr McDermott's response on 28 February 2019 was that he would forward the original lease as soon as possible but that his property agent, a Mr Chadwick, had died suddenly the previous Christmas and his staff were obtaining the original agreement.

287. On a visit to the UK on 21 March 2019, Mr Meier was handed a copy of the Second Lease. Quite apart from the shock at seeing the rent there set out, he was also surprised to see the lease was for a term of 8 years. That would not have been agreed, he says, at a time when the arrangements with Mr McDermott were only lasting 5 years. The First Lease came to light when a retained scanned copy of the same was found in Mr McDermott's email account in the course of investigations in about 30 July 2019.

288. The pleaded case of HR is that the Second Lease is not a genuine document and that it was drafted, composed or altered fraudulently by Mr McDermott. In so doing, and in causing HR to pay an increased rent of £18,000. HR asserts that Mr McDermott breached his duties owed to HR in various respects (allegation 3).

289. According to Mr McDermott's defence and counterclaim, the Second Lease was drafted by Chadwick & Beddard. The draft lease prepared initially had the same terms as agreed by the previous tenants of the property from 2007. The Defendant then had a meeting with the senior partner, Mr Beddard, to discuss other requirements for the terms of the lease which "had changed". The draft 5 year lease was then extended to 8 years to coincide with the estimated time that HR would operate management from Dewsbury and other standard clauses were included. The annual rent was fixed at £18,000 pa, a level not dissimilar to the other properties of the Landlord. The Second Lease had similar conditions as a lease of other premises for the unit at 13 Halifax Road (entered into on 5 May 2015). It is then alleged that:

"The Defendant, as an authorised officer of the company and exercising his fiduciary duties agreed that the new lease was commercially feasible and the

lease was adopted and rent payments of £1,500 per month commenced, as specified in the new lease, were set up by the finance manger, Mrs Samantha Haigh."

290. In his witness statement, Mr McDermott asserts that the Second Lease, with its revised terms, came about following a meeting with Mr Beddard in August or September 2012. Mr McDermott asserts (as he so often does) that he thought the Second Lease terms were "reasonable" but accepts that there was no relevant discussion about the revised terms with Mr Leutheuβer.

291. Mr McDermott's case makes little sense. The First Lease was not a draft. It was an executed and witnessed document. The inference must be that the Second Lease was an attempted variation of the same, not that it was simply the first and only version of the lease. The Shareholders' Agreement required such agreements, and specifically a lease agreement, involving conflicts of interest/duty to be agreed by both Directors. HR accepts the First Lease, so there is no issue about that. As regards the Second Lease, the two directors of HR did not agree the same. Mr McDermott acted in breach of duty in purportedly agreeing on behalf of HR, to an amendment to the same. What the effect of this is on the other contracting party, Poppy Asset, is not for these proceedings.

292. It also follows that I need not go further and consider any more fully the factual circumstances in which the Second Lease came into being. There are however strong suspicions that it was well after 2012. First, the suggestion that the First Lease was executed before 1 October 2012 and then re-executed on 1 October 2012 but with parts amended/substituted and as the Second Lease raises many questions and Mr McDermott was not able to explain them.

293. Further, on 14 March 2019 a scan of a third version of the lease (the "Third Lease") was emailed to Mr McDermott from a scanner at HR. The suspicion is that this was done by or at the behest of Mr McDermott. Noticeably the document appears to be a document midway between First and Second Leases which suggests that it was an intermediary version in between those two versions. It also suggests that the Second Lease was in fact re-executed as a Second Lease later in 2019 and not 2012.

294. The fact that the 2019 Lease was prepared against a background of Mr McDermott parting ways with HR and strengthening his (or his company's) position is that the 2019 Lease contains the provisions in the Second Lease as to length of term and rent but does not contain the crucial new clause 15 regarding returning the property to the landlord which is set out in the Second Lease. Further, the signature page is the original signature page of the First Lease without the new executions effected on the Second Lease.

295. So far as necessary, I decide that the Second Lease was created by Mr McDermott in 2019 and that he did so knowing that in executing it he was not acting in the best interests of HR but was rather benefitting his company, Poppy Asset by changing the terms in favour of Poppy Asset and dressing it up to make it look as though that had been agreed as long ago as 2012.

296. No specific loss is identified in the particulars of claim in relation to allegation 3 and therefore I grant no relief.

(c) Allegation 4: RCS Doors Invoice for £2,252.64

297. In summary, on 11 January 2019 RCS Doors raised an invoice in the sum of £2,252.41 (including VAT) addressed to HR. The supply was of a roller door and related accessories. It is accepted that the supply was in fact in respect of 13, Halifax Road, also owned by Poppy Asset. The invoice was raised to HR and HR paid the same. Mr McDermott says that this was a mistake. It is difficult to believe that this was a mistake. It is not as though the factual position was that complicated or complex or that many invoices were coming through from companies in respect of supply to Poppy Asset premises. One would have expected Poppy Asset to pick up that it had not been charged for such a major item of work, which was very much a one off item of capital expenditure and property improvement. If the invoicing through HR was deliberate, as I consider that it was, then there was an obvious breach of duty by Mr McDermott in causing HR to be invoices and to pay the invoice. The reason that I consider that this was deliberate is because, as I have said, it is on the one hand difficult to understand how a mistake can have been made by Mr McDermott and on the other hand it is consistent with the pattern of conduct revealed by this judgment where personal expenses seem to have got charged to HR, especially as regards the car servicing incidents that I have referred to.

298. However, even if I am incorrect about the deliberate nature of the decision to seek to charge HR for this matter, there is undoubtedly a breach of duty in the misapplication of company money, for which Mr McDermott is responsible.

299. No grounds for excusing any such breaches of duty arise under s1157.

300. Accordingly it follows that the claim in relation to this allegation succeeds.

(d) Allegation 5: the InHome invoice for servicing of a boiler £198

301. During the course of the trial, the claimant decided not to pursue this claim further. HR had paid the relevant invoice for the servicing of a boiler which appears to have provided hot water and heating to part of the Halifax premises occupied at the relevant time by HR. Under clause 6 of the First Lease it was arguable that HR as tenant was obliged to pay such costs as being a cost "in connection with the supply of heat" to the Property, although even then there was an issue as to whether the relevant boiler services other part so the building not occupied by HR. I need say no more about this matter.

(e) Allegations 6, 7, 8: repair, installation and maintenance invoices totalling £13,623.44

302. Mr McDermott caused HR to pay the following invoices which cover three suppliers and three main types of supply, drains and gutters servicing; internal lighting and security matters including CCTV and external lighting.

Date	Issuer of invoice	Broad Description of work/goods supplied	Value
20.06.18	Drain Cleaning Services	Inspection of drains releasing blockages cleaning all gutters	£ 220
15.07.18	Drain Cleaning Services	For un-blocking off drain	£ 85
03.06.19	Drain Cleaning Services	For inspection of all drains releasing of any blockages cleaning of all gutters and downpipes	£ 220
27.09.17	PAR M & E Solutions	Replacement of 11 light fittings with LED type as agreed	£ 976.86
27.09.17	PAR M & E Solutions	Replacement of 11 light fittings with LED type as agreed	£ 587.28
27.09.17	PAR M & E Solutions	13 New Light Fittings phase 3, remove existing lights and install new	£1,090.65
31.10.17	PAR M & E Solutions	Labour & Materials	£ 671.16
31.10.18	PAR M & E Solutions	To install lighting and install extra 2 light fittings in common areas; fixed wire test	£ 907.49
27.04.18	PAR M & E Solutions	Remedial work from fixed wire test	£2,010
10.07.17	Mdr Security	Installation 4 camera CCTV system, remote viewing setup and fitted security grill	£ 995
16.08.17	Mdr Security	Fitted internal office CCTV upgraded recorder to 16 channel	£1,985
25.10.17	Mdr Security	12 mths dual comm alarm monitoring	£ 315

Date	Issuer of invoice	Broad Description of work/goods supplied	Value
.10.17	Mdr Security	12 mths dual comm alarm monitoring, dual comm 12 channerl unit, Castle Euro 46 control panel	£ 740
.11.17	Mdr Security	Replacement digital code lock and tag reader, fitting of code lock	£ 80
.01.18	Mdr Security	Fitting camera and changing camera	£ 190
11.06.18	Mdr Security	Link wire and new external alarm box call out to reset cctv at unit	£ 180
28.6.18	Mdr Security	Fitting security lights to building	£ 295
07.09.18	Mdr Security	Callout and repair burglar alarm system	£ 110
05.11.18	Mdr Security	Replaced faulty sensors tested and working, replacement parts	£ 360
26.11.18	Mdr Security	12 mths dual comm alarm monitoring inc annual service 12 channel communicator for both areas. Police monitoring	£ 745
18.04.19	Mdr Security	Call out to recorder fault, replace power supply and hard drive, modify alarm system, replace floodlights to car park, replace faulty CCTV camera in main office	£ 860

303. As regards the work on the drains and guttering these are matters for which there was no liability on HR under either the First Lease or the Second Lease. Mr McDermott's position was that it was simply "fair" that HR should have paid for these services. The payments needed to be agreed with Mr Leutheuβer, they were not. The payments therefore were a breach of duty on the part of Mr McDermott and he is liable to recoup the full cost to HR. I do not consider that there are grounds under s1157 Companies Act 2006 to grant relief.

304. As regards the work on the lighting, again there was no obligation on HR to pay for this. There was a certain amount of evidence as to whether employees of HR had or had not complained about the lighting. I need not determine that issue. Again, there was no legal obligation on HR to pay for what was, at the end of the day, an improvement to Poppy Asset's property. No agreement was sought from Mr Leutheuβer. The payments were a breach of duty by Mr McDermott and he is obliged to recoup the relevant sums. Again, I do not consider that grounds for relief under s1157 Companies Act 2006 are made out.

305. As regards the work on the security systems, again there was a certain discussion as to the extent to which the works/services provided benefitted the entire building as opposed to just HR but to some extent this misses the point. Again, there was no legal obligation under either Lease to pay for such services/works/installations. Mr McDermott did not seek agreement of Mr Leutheuβer. The payments involved a breach of duty by Mr McDermott and he is liable to recoup HR accordingly. Again, I do not consider that grounds for relief under s1157 Companies Act 2006 are made out.

Invoices for alleged service provided

306. I now turn to invoices for sums for services that have been paid by HR but which are alleged to have been improperly paid by HR.

Allegation 13: Homestyle Invoice: £15,000

307. On 31 March 2012, an invoice in the sum of £15,000 for "consultancy" was raised by "Homestyle (2010)", at an address at 7, Halifax Road Dewsbury, a property owned by Poppy Asset, a company of Mr McDermott. This invoice was paid by HR. HR's case was that the payment was in effect for Mr McDermott's own benefit, either directly or through a company of which he was a majority shareholder. At that point it was assumed that the payment was to Homestyle (2010) Ltd, a company of which Mr McDermott had been the owner.

308. Mr McDermott's defence and counterclaim asserted that the payment was not to the company but to his son, Paul McDermott, as a sole trader. He said that Paul McDermott had been working for HR for some 15 months full time as a consultant and that Homestyle 2010 was the trading name that he was operating under. In his witness statement he asserted that "All the work that Paul did was covered by this invoice. He was not paid any other income from [HR] for the work that he did for the business."

309. At the start of the trial I dealt with an application to adduce more evidence from HR dealing with this issue. I admitted the evidence, for the reasons given by me

at the time, which was of invoices from Paul McDermott to HR which I shall go on to describe. However, again for the reasons given at the time, I refused permission to amend to bring a further claim in respect of such invoices, primarily because of the lateness of such amendment and its effect on the trial were it to be permitted.

310. The further invoices were in the name of Paul McDermott personally from an address in Jersey. They were as follows:

Date	**Main Narrative**	**Amount**
02.03.12	Consultancy regarding supply of CNC equipment (Paul Haslam Furniture)	£2,000
28.03.12	Housekeeping of database and consolidation with CRM	£1,000
20.04.12	Design, testing and initial data input of new client database	£1,000
22.05.12	Export of data; data validation; credit check; sector variation	£1,000
21.06.12	Updating of Reichenbacher CRM database to incorporate April/May sales lead data. Design and implementation of appropriate mailshot.	£1,000
19.07.12	Development of system to facilitate calling of potential clients and enable automatic mailshots	£1,000
13.09.12	Overseeing of installation of CNC machine	£1,000
21.09.12	Implement a strategic sales campaign using CRM system	£1,000
12.11.12	Investigation of potential SWIFT project	£1,000
18.12.12	Testing and documentation of all appropriate and current sales systems	£3,000

Date	Main Narrative	Amount
18.12.12	Planning of new system for routing parts using vacuum table	£1,000
21.12.12	Implementation of integrated mailing software Creation of various templates	£1,000
	TOTAL	£15,000

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311. According to Ms Owens, whose evidence I accept, there are further payments to Mr Paul McDermott revealed by HR's books and records where no corresponding invoices have yet been located. These are contained within the period of the above invoices (ie. March 2012 to December 2012) and also February and March 2013 and encompass sums totalling in excess of a further £3,000.

312. Although unclear as to precisely what was being said, in his skeleton argument for the trial Mr McDermott appeared to be saying that the £15,000 in invoices from Paul McDermott in Jersey represented work that he had done for HR but that the invoice for £15,000 from Homestyle (2010) represented a payment by Mr McDermott to his son which had then been debited to his, Mr McDermott's director's loan account.

313. In oral evidence, there was no proper explanation as to why Mr Paul McDermott was invoicing HR in his personal name from a Jersey address and at the same time under a different trading name with an address at the Halifax premises owned by Poppy Asset. It was also not explained why it was appropriate for there to be an invoice to HR rather than simply a payment to Paul McDermott recorded in the books and records as a sum to be debited to Mr McDermott's director's loan account. The only explanation as to the latter appeared to have something to do with tax but as far as I could understand it, indicated that some fraud on the tax authorities lay at the bottom of it. The evidence that Mr McDermott's loan account had in fact been debited with the £15,000 was seriously lacking and depended on bare assertion by Mr McDermott, which assertion I do not accept.

314. I am not satisfied that the payment of £15,000 for the Homestyle (2010) invoice has been properly explained. Homestyle (2010) Limited was a company owned by Mr McDermott which was dissolved in February 2012. The inference is that the payment was made for Mr McDermott's benefit (either enabling to pay his son or in some other way taken applied for his benefit). I am not satisfied that HR has, as Mr McDermott asserts, received a credit back for this payment. In those circumstances Mr McDermott is liable to account to HR for the £15,000. There is no basis for granting relief under s1157 Companies Act 2006.

Allegation 22: Payments to JF Banks

315. Between January 2012 and April 2019, Mr McDermott caused HR to incur costs of £16,155 to JF Banks, the subject of 11 invoices form the latter as set out further below. The invoices relate to two main periods, January -October 2012 and January 2017 to April 2019.

316. The invoices are as follows:

No	Date	Summary of Main narrative	Amount
1	31.12.12 (Amended to 26.1.12)	Consultancy services for December 2011: 1. Taxation issues related to proposed shareholder agreement 2. Final drafting of proposed directors service agreement 3. Review of trading contracts, profitability, costing and conditions of trade elements	£685
2	01.03.12	Consultancy Services January and February 2012: 19. Terms of lease at Halifax Road and related matters Continued review of trading contracts etc.	£1,530
3	01.07.12	Consultancy services May and June 2012: Discussions on redundancy provisions for senior management Continued review of trading contracts etc.	£1,730
4	31.08.12	Consultancy services for period ended July 2012 Continued discussions redundancy senior management and contract for future services	£1,925

		Continued review of trading contracts	
5	20.10.12	Consultancy services for period ended August 2012 \review of terms and conditions applying to sale of machinery in uk Discussions on employment position of A Mooring Meeting RM to discuss various matters Continued review of new potential trading contracts Final review Swift Group contract	£1,860
6	24.01.17	Financial and consultancy services	£1,250
7	30.09.17	Financial and consultancy services	£525
8	30.06.18	Financial and consultancy services	£2,400
9	26.01.19	Financial and consultancy services	£950
10	12.03.19	Financial and consultancy services	£1,950
11	15.04.19	Financial and consultancy services	£1,350

317. As a matter of generality, HR relied upon (a) Mr Leutheuβer's evidence that he would not have agreed to the instruction of Mr Banks if asked, because of a potential conflict of interest in his advising HR and Mr McDermott/his companies and (b) on such a conflict of interest as to why Mr McDermott could not properly have caused HR to incur any of Mr Banks' costs. I do not accept that point of generality. From Mr Banks' evidence I am satisfied that he did advise on occasion on matters on which no conflict of duty to HR and duty to Mr McDermott/Mr McDermott's companies could arise.

318. I also reject HR's case that the instruction of Mr Banks, even on HR matters where there was no conflict of duty/interest, was a breach of s172 of the Companies Act 2006. First, I am satisfied that as regards such matters, Mr McDermott would subjectively have been acting in the best interests of HR.

Secondly, I am not satisfied that there is any other relevant breach of duty applying to all such instructions. Indeed, I do not accept, as asserted, that Mr Banks was being employed to do Mr McDermott's job. Of course, his advice assisted Mr McDermott but I cannot find any agreed limitation on Mr McDermott's position as managing director which would have made it a breach of duty to instruct an outside professional for proper assistance and advice. I do not regard the dispute about whether Mr Leutheuβer was or was not providing support as throwing light on this issue.

319. However, I agree with HR that to the extent that Mr Banks was advising Mr McDermott personally then, to that extent, Mr McDermott was in a position of conflict in instructing him to do so and was in breach of duty in not seeking Mr Leutheuβer's consent to such instruction.

320. As regards the first six invoices, I consider that the foregoing analysis of conflict on the part of Mr McDermott applied as regards invoices 1 and 2. I would also consider that the payment was in effect for personal advice and therefore also amounted to a breach of ss171 and 172 Companies Act 2006.

321. I reject Mr McDermott's evidence that, in advising about the Shareholders' Agreement and any terms of a service contract for Mr McDermott, Mr Banks was in some way assisting both Mr McDermott and HR in terms of considering how the agreements impacted on both of them and in some way (as Mr Banks suggested as regards advice he gave on a lease entered into between Poppy and HR) assisting in producing an agreement that was fair to both of them. I also reject Mr Banks' evidence in his witness statement that the advice he gave about the shareholders' agreement (which was paid for by HR) was "conducted for [HR] as [Mr McDermott] was asking for advice on the shareholders agreement in order to provide a template for the other [HR] representatives in Germany".

322. I do not need to decide whether or not this was the rationale provided at the time by Mr McDermott but, if it was, it was false. There was no question of other HR representatives in Germany being given shares and the Shareholders' Agreement was an inadequate legal template for any such agreements (as opposed to a Heads of Terms type agreement). Similarly, although of course the Shareholders Agreement did indeed, as Mr Banks said in his witness statement, "include..the responsibilities for [Mr McDermott] as a Director from [HR's] point of view" it seems clear to me that Mr Banks was in reality advising Mr McDermott not Mr McDermott and HR jointly on the matter. If, contrary to my finding, he did genuinely believe that that was what he was doing then he should have been aware that he was in a position of conflict in so doing and that it was not appropriate that HR alone should be paying his invoice. In any event though the question ultimately is not Mr Banks' position but whether Mr McDermott was in breach of duty in instructing him to advise on certain matters.

323. As regards invoices 1 and 2 it might be said that the final narrative description on the invoice was a matter that Mr Banks could properly have been instructed on. However, in my view, that advice was related to Mr McDermott's personal position under the Shareholders' Agreement which was under negotiation until June 2012. Thus, a note apparently prepared by Novis in March 2011, related to the then financial position of HR, its then insolvent position and the need to deal

with the financial position. That note related to a proposed balance sheet re-organisation and can be seen as a key background factor to the negotiation of the Shareholders' Agreement.

324. Further, I do not accept that Mr Banks gave advice to both HR and Poppy Asset as to the lease of Halifax Road. Indeed, it is difficult to understand what expertise or even value he brought to that area at all. However, even on his own version of the advice and its purpose, namely the "fairness" of the lease to both parties, he was clearly instructed in circumstances where Mr McDermott was in a position of conflict to instruct him to give such dual advice.

325. As regards invoices 3 to 6, I am satisfied that they relate to advice properly given to HR in which there was no conflict of duty owed to Mr McDermott/his companies and that owed to HR.

326. As regards invoices 7 onwards, they relate to a period when, as Mr Banks agreed in oral evidence, he was advising Mr McDermott in the light of the expiry by effluxion of time of the Shareholders' Agreement and the Second Lease. During this period Mr McDermott was not simply negotiating his departure but negotiating possible scenarios in which he would retain HR and continue trading with it. As such, a number of matters that Mr Banks said he was advising upon which on their face related to the trading of HR were matters which, in my judgment, were primarily being advised upon in circumstances where Mr McDermott was not seeking the advice for the benefit of HR but, for the main part, to assist him in developing and assessing offers that he was considering making to regulate the position after the (prima facie) expiry of the Shareholders' Agreement.

327. Thus, a document from May 2017 put forward by Mr McDermott, sets out a "Proposed New Structure for HR" under which the business of HR would be split, part going to HR Germany and part to a new company of which 80% would be held by CTG Limited, apparently a company in which Mr McDermott had or was to have some equitable interest. There is also a document dated August 2017. Again, this document sets out a lot of company financial information but all directed at supporting Mr McDermott's position in negotiations with HR Germany. These documents support the view that financial advice that Mr Banks was giving was being sought in the context of Mr McDermott's personal negotiating position about the future of HR and his role in connection with it rather than as simply being advice for the benefit of HR.

328. Mr Banks suggested that he gave advice about Brexit which was a straightforward matter not requiring copious notetaking. This is somewhat surprising. However, the idea that HR (as opposed to Mr McDermott) needed advise about the impact of Brexit when the main HR Company (and the parent group Scherdel) was based in Germany and clearly well able to obtain advice, is most unlikely. In my judgment this was part of the advice that Mr McDermott sought to assist him in his negotiations with HR Germany regarding his future with HR.

329. Mr Banks confirmed that there was a gap in invoicing because any advice given in the period where there are no invoices was of a minor nature and not such as to justify raising an invoice. Re-invoicing commenced at about the time of Mr

McDermott negotiating with HR Germany. In my judgment this is no coincidence. It reflects the fact that Mr Banks thereafter was primarily being asked to advise Mr McDermott for his, Mr McDermott's benefit.

330. Accordingly, I consider that there was a conflict of interest in Mr McDermott instructing Mr Banks to advise during the periods covered by invoices 7 to 11 and that Mr McDermott is liable in respect of such costs to HR. By my calculations Mr McDermott is therefore liable in damages or equitable compensation in a sum of £9,390 in respect of the JF Banks invoices that I have identified.

331. I do not consider that grounds for relief under s1157 Companies Act 2006 are made out.

Allegation 25: Professional costs of remedying the position

332. As a result of the discovery of various matters that I have already dealt with, HR engaged Rodl & Partners, accountants, to review and where necessary correct the books and records of HR and to make necessary disclosure to HMRC.

333. The invoices in question are three in number totalling £8,060.50 (ex vat) and which can be summarised as follows:

Date	**Summary main narrative**	**Amount (ex vat)**
22.08.19	Review of bookkeeping data- Q1 and Q2 for 2019	£1,935.50
14.01.20	Review and amend transactions for 2018 VAT returns	£5,500.00
14.01.20	Preparation of error correction documents and accompanying letter to HMRC	£625.00

334. I am satisfied that these costs were reasonably incurred and on their face reasonable in amount. Clearly, the position needed investigation from a tax perspective and adjustments both to the VAT declared position and HR's accounts, by reference to which tax returns would doubtless have been made.

Allegation 21: causing HRL to incur costs in relation to Key Recruitment Litigation

335. In October 2018, a Mr Graham Cherry was recruited to work for HR through an agency called Key Recruitment (UK) Limited ("Key Recruitment"). Key Recruitment subsequently issued County Court proceedings against HR through the money claims online portal by claim form dated 19 February 2019. The

proceedings were subsequently transferred to the County Court at Manchester (the "Manchester Proceedings").

336. The claim brought by Key Recruitment was that HR had misrepresented to it that Mr Cherry's salary was £28,950 per annum when it was in fact £50,000 plus benefits. Relying on the misrepresentation, Key Recruitment issued an invoice for £5,834.70 (inc VAT) which was paid. The correct fee, based on a salary of £50,000 was £15,000 plus VAT. Key Recruitment claimed the balance of £12,615.30 (plus interest).

337. The defence, containing a statement of truth signed by Mr McDermott, was that on 20 September 2018 Mr Cherry was offered employment by HR at a basic starting salary of £28,950 per annum during a probationary period with a review after three months. Thereafter, on 26 October 2018 Mr Darren White of Key Recruitment offered a negotiated rate of 15.5% plus VAT and Mr McDermott agreed a fixed fee of £5,384.70. The claimant, it was said, was estopped from, bringing its claim. Further, it was asserted that there was no actionable misrepresentation. Mr McDermott had stated that the basic salary of Mr Cherry was £28,950 "a fact which could have been checked with Mr Cherry but was not". However, it was a true statement. Further, the representation was not made until after the contract had been performed and so could not have induced the contract. Two weeks after starting his salary Mr Cherry "re-negotiated his salary".

338. The Manchester Proceedings were ultimately compromised, HR paying £23,001.12 in full and final settlement of the claim which was then dismissed by order dated 8 August 2019.

339. The particulars of claim in the current proceedings allege that the factual position was as claimed by Key Recruitment in the Manchester Proceedings. It expands upon the facts as follows. It is alleged that Mr McDermott drafted two employment contracts with Mr Cherry which were identical in all material respects save as regards the stated salary and that Mr McDermott persuaded Mr Cherry to sign both agreements and to support his misrepresentation to Key Recruitment by confirming the lower salary figure on a telephone call with Key Recruitment in around October 2018.

340. Mr McDermott's misrepresentation to Key Recruitment is alleged to have been made dishonestly (by way of various alternative pleas). His conduct is said to amount to breaches of various duties owed to HR. The causal loss is said to be the sum of (a) the cost of instructing HR's own lawyers to deal with the claim (£7,993.60, which seems to include VAT) and (b) the agreed settlement sum paid to Key Recruitment less the balance of the recruitment fee which would have been due in any event (such balance being the £15,000 + VAT fee less the sum (inc VAT) paid of £5,834.70). It is questionable whether the VAT elements in the damage claim calculation should be included. The combined sum is said to be £18,378.42. I may need to be addressed further on whether the VAT should be recoverable as against Mr McDermott.

341. In his Defence and Counterclaim, Mr McDermott alleges:

(1) The starting salary of Mr Cherry was £28,950 but that the difference between this and Mr Cherry's "expectation" of £50,000 would be made up by "guaranteed bonus payments".

(2) Key Recruitment submitted an invoice after which Mr McDermott "negotiated" a fee of approximately £4,500 which "was not dependent on any salary level". A credit note was issued by Key Recruitment against the original invoice and an invoice issued for the new agreed amount.

(3) The "starting salary" (of Mr Cherry) was calculated by Key Recruitment to match the payment, to complete their records.

(4) Mr Cherry had originally signed the appropriate employment contract with an initial salary of £28,950. At a later date, after the dealings with Key Recruitment, he had signed a second employment contract in the sum of £50,000.

(5) After 4 weeks, Mr Cherry left employment with HR.

(6) Mr McDermott was simply doing his best to mitigate a high fee for the recruitment of an employee for a period of only one month.

342. The firm instructed by HR was Lupton Fawcett and the main solicitors there dealing with the matter were Jonathan Warner-Reed and Claire Moss.

343. By email dated 29 April 2019, Claire Moss wrote to Mr McDermott setting out a chronology that she had put together from the available documents "so that we have a clear understanding of the sequence of events regarding Mr Cherry's employment" and asking for Mr McDermott's comments/instructions on a number of issues/questions in that chronology.

344. She noted at various points that although it had been said that no terms and conditions had been received from Key Recruitment, such terms and conditions had in fact been attached to emails from them dated 10 August 2018 and 11 September 2018. Among the other key dates and questions raised are the following (using the numbering in the email):

"6. 20 September 2018-HR offered a job to Mr Cherry. How was the offer made, is there an offer letter? Was salary mentioned at this point?

7. 24 Oct 2018 – HR signed a contract of employment giving a salary of £28,950 and a start date of 1 November 2018 . This was given to Mr Cherry who subsequently signed the contract on 26 October 2018. Mr Cherry 's signature is dated 26 Oct 2018 – did he sign while he was in the office? Do you have anything that shows your payroll department were notified of the £28,950 salary and were later notified of increased salary?

8. 26 Oct 2018 – a discussion took place between HR and KR regarding the fee payable following the recruitment of Mr Cherry. HR sent KR an email enclosing the contract of employment giving a start date of 1 Nov 2018 and salary of £28,950. Mr Cherry signed that contract for £28,950.

9. 26 Oct 2018 – KR sent HR a letter confirming negotiated rate of 15 .5% plus VAT for the recruitment of Mr Cherry.

10. 30 Oct 2018 – KR sent an email to HR checking if Mr Cherry was still starting employment on 1 Nov 2018.

11 . 1 Nov 20 18 – KR raised an invoice for the agreed fixed fee .

12 . 6 Nov 2018 – HR confirmed in email that Mr Cherry's start date was 1 Nov 2018.

13. Date? – Mr Cherry re-negotiated salary.

14. 12 Nov 2018 – contract of employment amended to reflect re-negotiated salary of £50,000 and start date of 24 Oct 2018. Mr Cherry and HR signed the amended contract and backdated signatures to 24 Oct 2018 so correct for accountants and ISO9001 . How and when did Mr Cherry sign the document i.e. did he sign it while in the office?

15. 21 Nov 2018 – HR paid KR invoice.

16. 30 Nov 2018 – Mr Cherry terminated employment with HR.

I look forward to hearing from you_ If it is easier to discuss by phone, I can be contacted this afternoon on my mobile, [ ] or tomorrow through to and including Thursday at the office,[phone number]."

345. Things then began to get complicated when Mr McDermott sent a number of documents to Ms Moss. The confusion is expressed clearly by her email dated 30 April 2019:

"I am confused . In your email to me of yesterday's date – attached for ease of reference – you state that the first contract that Mr Cherry signed was dated 26/10/2018 and was for the lower amount. You attached a copy of that signature page.

The contract attached to your email below, however, is for the lower amount but Mr Cherry signature is dated 24/10/2018. In other words, the signature page is different to the one you sent to me yesterday.

I also note that the start date in the contract attached to your email below is 24/10/2018 however our understanding is that the original contract gave a start date of 01/11/2018. An unsigned copy of that contract i.e . the one giving a start date of01/11/2018, was sent to Key Recruitment by email on 26/10/2018.

Please can you clarify the position."

346. That there was not an answer to the many questions raised is demonstrated by an email from Ms Moss to Mr McDermott dated 19 June 2019 when she expressed

concern that she had not received responses to emails from her dated 30 April, 7 May, 20 May, 21 May, 23 May, 6 June and 10 June 2019. As she stated:

"*We need to get to the bottom of what happened when issuing contracts to Mr Cherry and Mr Cherry signing the contracts. This is of vital importance to your defence.*

…

Please can you therefore review the documentation that you hold relating to Mr Cherry and let me have your instructions in respect of the dsame without further delay."

347. By email dated 3 July to Ms Owens, Ms Moss wrote further having been notified that Mr McDermott no longer worked for HR:

"*Prior to Bob leaving, I was trying to get instructions from Bob on various questions that had been raised by KR's solicitor regarding Mr Cherry's employment and his contract of employment. I was also trying to understand the position regarding the contracts that Mr Cherry had signed . In a nutshell, Bob had originally said that Mr Cherry had signed a contract providing for a salary of £28,950 with a start date of 1 Nov. He had subsequently signed a second contract for the higher salary of £50,000 . KR have asked us to provide them with a copy of the signed contract for the lower sum . Providing this is key to our defence but Bob subsequently sent through 3 different versions of the contract for the lower salary:*

1 unsigned with the start date of 1 Nov 2018 which was sent to KR on 26 Oct 2018;
1 signed on 24 Oct 2018 with the start date of 24 Oct 2018; and
1 signed on 26 Oct 2018 with the start date of 24 Oct 2018 .

I was trying to understand from Bob why Mr Cherry signed 2 contracts for the lower sum on 2 separate dates and why these had a different start date to the contract sent to KR. I never received a response from him.
To further complicate matters, Bob sent an email to KR on 6 Nov 2018 confirming to them that Mr Cherry's employment had started on 1 Nov 2018. He would have been aware by that date however that Mr Cherry had in fact been working since 24 Oct 2018. This may have been a mistake on Bob's part but he did not respond to my emails when I raised this with him."

348. Settlement was agreed at the figure sought by Key Recruitment (which included interest and costs) as HR had no clue as to what Mr McDermott would say if summonsed to give evidence.

349. The production of differing contracts with different details signatures and which were apparently signed at different dates is par of the course so far as Mr McDermott is concerned. He was unable to explain why, if the matter was so simple, he was unable to give straight answers to the straight questions of Ms Moss. As I have said, I infer that there were no straight honest answers that could be given. In my judgment true answers would simply have revealed Mr

McDermott had manipulated documents with the aim of misleading Key Recruitment and/or winning HR's defence in the proceedings subsequently brought. Further, his refusal to engage with HR's solicitors was also a breach of duty increasing the relevant costs incurred by HR.

350. At the end of the day it was perfectly clear that Mr McDermott has a tenuous grip on the truth. In his witness statement he persisted in the assertion that he had never been sent the terms and conditions of Key Recruitment which is clearly incorrect in the light of Ms Moss's emails. Even more remarkably, he asserted that he understood that "there were legal proceedings by Key Recruitment against [HR] but no one at [HR] contacted me and I was not asked to provide any evidence." He was fully aware that there were proceedings against HR and he completely failed to answer HR's lawyers requests for instructions and information during a period of some months.

351. His witness statement was to the effect that the agreement with Mr Cherry from inception was that Mr Cherry would be paid £50,000 per annum, a salary of £28,950 and a "guaranteed bonus" each year of £21,050 so as to bring the remuneration package up to £50,000. The only renegotiation (if any) was to change the contract so that instead of a "guaranteed bonus" there was a "salary" of £50,000 per annum. The contract signed with Mr Cherry showing a salary of £28,950 did not in fact disclose any guaranteed bonus. My conclusion is that Mr McDermott made a misrepresentation to Key Recruitment about Mr Cherry's remuneration package telling Key Recruitment that it was £28,950 a year when in reality it was £50,000 per annum. He did this to keep the recruitment fee low. Although it may not be necessary for me so to find, I find that factually there was no "renegotiation" with Mr Cherry. Rather, two contracts were created, one to be shown to Key Recruitment and one for Mr Cherry's own use which correctly showed his salary as £50,000.

352. Mr Cherry may well have been party to this deception, there is certainly a suggestion in emails that he may have been. Thus, in an email dated 25 April 2019 from Mr Warner-Reed of Luptton Fawcett LLP to Key Recruitment's solicitors, Mr Warner-Reed said:

"*So, Mr Cherry witnessed Mr McDermott's conversation with your client in which he purportedly told your client an untruth about Mr Cherry's salary and Mr Cherry did nothing about it until he left. With respect, this would suggest, at the very least, that Mr Cherry was happy to go along with it."*

353. The relevant response was:

" I completely disagree, Mr Cherry would have been in fear for his job if he had said anything and therefore under duress, which I am sure both you and a judge can understand".

354. However, Mr Cherry's position is not relevant for the conclusions that I have reached.

355. In light of the findings of fact that I have made, there was a clear breach of duty as pleaded by Mr McDermott in misrepresenting the factual position of Mr Cherry's remuneration package to Key Recruitment and then in the manner he conducted (or failed to conduct) the resulting litigation. I consider that Mr McDermott in presenting the false picture that he did to Key Recruitment knew he was not acting in the best interests of HR but dishonestly. Further, his conduct was a breach of the duty set out in s171 Companies Act 2006. That breach of duty led to the damage claimed by HR (subject to the question of whether VAT is properly claimed). Grounds for relief under s1157 of the Companies Act 2006 are not made out.

Conclusion

356. A summary of my conclusions are set out below:

Allegation/ Counterclaim (CC)	**Description**	**Paras of judgt**	**Finding**	**Award to C (allegations) or to D (counterclaims)**
1.	Service of car	140-159	Breach of duty	£ 594.00
2.	Service of car	140-159	Breach of duty	£4,712.16
3.	False lease	281-296	Established but no loss claimed	-
4.	RCS Doors invoice	297-300	Breach of duty	£2,252.64
5.	Inhome invoice	301	Not pursued	-
6.	Drain and gutter charge	302-305	Breach of duty	(see 8)

Allegation/ Counterclaim (CC)	**Description**	**Paras of judgt**	**Finding**	**Award to C (allegations) or to D (counterclaims)**
7.	Lighting charges	302-305	Breach of duty	(see 8)
8.	Security charges	302-305	Breach of duty	**£13,623.44** (Allegations 6-8)
9.	Server	221-226	Breach of duty	Delivery up or damages to be assessed
10.	Mrs McDermott's mobile phone charges	176-181		£1,857.00
11.	Disposal of company Audi	227-239	Breach of duty	£9,000.00
12.	Disposal of company VW Transporter	240-251	Breach of duty	£4,000.00
13.	Homestyle (2010) Payment	307-314	Breach of duty	£15,000.00
14.	Fuel for private vehicles	165-175	Breach of duty	£2,721.52
15.	Lenovo Laptop	252-258	Breach of duty	£853.33

Allegation/ Counterclaim (CC)	**Description**	**Paras of judgt**	**Finding**	**Award to C (allegations) or to D (counterclaims)**
16.	Jaguar Tyre Repair	160-164	Breach of duty	£199.99
17.	Sony Camera	259-267	Breach of duty	£514.99
18.	Samsung Mobile Phone	268-269	Not pursued	-
19.	Pension payment	183-195	Breach of duty	£24,000.00
20.	Payments in lieu of holiday	196-204	Breach of duty	£14,884.00
21.	Losses arising in relation to Key Recruitment claim against HR	335-355	Breach of duty	[£18,378.42] VAT to be confirmed
22.	J F Banks invoices	315-331	Breach of duty (some cases)	£9,390.00
23.	Items missing from fixed asset register	272-274	Not pursued	-

Allegation/ Counterclaim (CC)	**Description**	**Paras of judgt**	**Finding**	**Award to C (allegations) or to D (counterclaims)**
24.	Dividend payment	217-219	Not pursued	-
25.	Rodl & Partners professional costs of remedying the position	332-334	Loss established as flowing from other breaches	£8,060.50
26.	Orbital Polisher	270-271	Not pursued	-
Counterclaims				
CC 1	Dilapidations	278-279	Not pursued	-
CC 2	Rental	278-279	Not pursued	-
CC 3	Service charges	278-279	Not pursued	-
CC 4	Work-related stress	212-216	No entitlement	-
CC 5	Mileage allowance	165-175	No entitlement	-

Allegation/ Counterclaim (CC)	**Description**	**Paras of judgt**	**Finding**	**Award to C (allegations) or to D (counterclaims)**
CC 6	Balance of pension payment	183-195	No entitlement	-
CC 7	Payment of value for shares	205-211	No entitlement	-

357. There are some outstanding matters. First, I have not heard detailed arguments on which items should include a sum for the VAT paid by HR. Where the claim was not properly VAT deductible it seems to me that VAT should be included which covers most of the items above. The above so far as VAT is included or not should be taken as indicating my initial view, subject to further argument.

358. There is also the question of whether interest should be paid and at what rate(s) and for what periods.

359. I leave both these matters to be addressed further as part of the consequentials hearing if they cannot be agreed.

360. The parties should contact the court to make arrangements for a remote hearing to deal with the form of order and any consequential matters, providing their availability for the period until the end of April 2022. They should attempt to agree as much as possible as to the draft order in the meantime. The time for appealing will run from the handing down of this judgment and I do not extend the time for appealing, nor reserve the question of my granting of any permission to appeal.