Neutral Citation Number: [2022] EWHC 2941 (Comm)

Case No: CL-2021-000460

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2022

**Before** :

**MISS JULIA DIAS KC**

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**Between :**

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| **(1) GUY'S & ST THOMAS' NHS FOUNDATION TRUST**<br>**(2) RITA FITZPATRICK** (suing on behalf of herself and all other employees of EMSM Global Limited excluding the 2nd-5th Defendants) | **Respondents/ Claimants** |
| **- and -** | |
| **(1) ESMS GLOBAL LIMITED**<br>**(2) RAJESH KUMAR SOOD**<br>**(3) SIMON PHILIP WEBSTER**<br>**(4) SARITA SOOD**<br>**(5) JENNIFER ANN WEBSTER**<br>**(6) KAVNISH LIMITED**<br>**(7) S. LONDON LIMITED**<br>**(8) TRIDENT TRUST COMPANY (GUERNSEY) LIMITED** | **Applicants/ Defendants** |

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**Mr Lance Ashworth KC and Mr Gregor Hogan** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Second to Seventh Defendants**
**Mr Patrick Talbot KC, Ms Zahler Bryan and Mr Max Marenbon** (instructed by **Bingham Mansfield Solicitors Ltd**) for the **Claimants**

Hearing dates: 11,13 and 17 October 2022

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# Approved Judgment

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**Julia Dias KC sitting as a Deputy High Court Judge:**

## Introduction

1. This is an application by the Second to Seventh Defendants to strike out the claim against them and/or for reverse summary judgment. The application was made on 21 September 2021 although it was not ultimately listed for hearing until 11 October 2022.

2. On 5 October 2022, the day on which the applicants' skeleton argument was due to be served, and 11 months after evidence in relation to the application had been exchanged, the Claimants served proposed draft Amended Points of Claim. At just after 1600 the same day, the Second to Seventh Defendants were notified that an application to amend had been issued, albeit not served, and that I would be asked to determine both applications at the forthcoming hearing.

3. On behalf of the Second to Seventh Defendants, Mr Lance Ashworth KC (who appeared with Mr Gregor Hogan) complained vociferously (and with no little justification) about the lateness of the application generally and, specifically, about short service in breach of the CPR which gave his clients no opportunity to file evidence in response. He therefore objected to any suggestion that I should determine the amendment application.

4. This led to a lively debate as to whether I could hear the strike out application in isolation without reference to the proposed amendments at all and, if not, whether I should adjourn both applications (a course to which Mr Ashworth objected) or whether it was possible to find a way of proceeding which enabled the court to make some headway but preserved the Second to Seventh Defendants' right to object to the proposed amendments.

5. In the event, counsel indicated that they were content to proceed with the strike out application on the basis that both the original Points of Claim and (*de bene esse*) the Amended Points of Claim were in play. If the Second to Seventh Defendants persuaded me that the Claimants' case raised no arguable issue of law, or had no real prospect of success on the basis of the evidence adduced, that would be the end of the matter since the claim would be struck out on either basis and the amendment application would simply fall away. If, on the other hand, I were to hold that (i) the strike out application failed – but only in relation to the Amended Points of Claim and (ii) the Claimants had adduced sufficient evidence to make out a more than fanciful case to support the amendments, then the amendment application would remain live and the Second to Seventh Defendants would need to be given an opportunity to consider whether or not to object to it. It was accepted by both parties that nothing I decided could bind either the First or Eighth Defendants. This, therefore, is the basis on which I have approached the matter.

6. I was referred by Mr Patrick Talbot KC (who appeared with Ms Zahler Bryan (albeit remotely in her case) and Mr Max Marenbon on behalf of the Claimants) to the Court of Appeal decision in *Sofer v SwissIndependent Trustees SA*, [2020] EWCA Civ. 699 in support of the proposition that there was in fact no need for the court to look at the factual basis of the claim since for the purposes of a strike out application, the pleaded facts must be assumed to be true. In that case, the application to strike out was brought solely under CPR Part 3.4(2) on the basis that the statement of case disclosed no reasonable grounds for bringing the claim. It was common ground that on that type of application, the pleaded facts must be assumed to be true. However, as Arnold LJ pointed out at paragraph 44:

*"The application to strike out was based on CPR 3.4(2)(a) which excludes consideration of the evidence. Although it is true that the Claimant seeks permission to amend the Particulars of Claim, the only basis upon which the application is resisted is that the amended statement of case would also be strikeable. There is no application for summary judgment dismissing the whole claim as having no real prospect of success on the facts."*

7. In the present case, of course, the application is not limited solely to striking out pursuant to Part 3.4(2)(a) but includes an application for summary judgment on the grounds that the claim has no real prospect of success. In *KKK Ltd v James Kemball Ltd*, [2021] EWCA Civ. 33 at [18], the Court of Appeal clarified that the same test applies to both applications for summary judgment and applications to amend and that:

   *(1) "It is not enough that the claim is merely arguable; it must carry some degree of conviction:* ED & F Man Liquid Products Ltd v Patel, *[2003] EWCA Civ 472 at paragraph 8;* Global Asset Capital Inc. v Aabar Block SARL *[2017] 4 WLR 164 at paragraph 27(1).*

   *(2) The pleading must be coherent and properly particularised;* Elite Property Holdings Ltd v Barclays Bank Plc *[2019] EWCA Civ 204 at paragraph 42.*

   *(3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test. It is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct:* Elite Property *at paragraph 41."*

8. I therefore accept the submission of Mr Lance Ashworth KC that I am not precluded from examining the factual basis of the claim; indeed, for the purposes of the summary judgment application I am not only entitled but also bound to consider the extent to which the pleaded case and, in particular, the draft amendments, are supported by the evidence adduced. If I conclude that the Claimants' evidence does not establish a sufficiently arguable case that the pleaded allegations are correct, then that is a basis upon which I can properly strike out the claim and/or give summary judgment even if it is otherwise legally coherent.[1] I do not accept that it is sufficient in this respect for the Claimants to point to the mere fact that their pleadings are attested by a statement of truth**.** If that were so, then the test in *KKK* would be satisfied in every case. Moreover, while a statement of truth may technically have the effect of making a pleading evidence of its contents, in this particular instance it was signed by the Claimants' legal representative. It is therefore not first-hand testimony and cannot in my judgment prevail where it is not supported by the statements of the relevant witnesses themselves.

9. In this respect, I also bear in mind that the strike out application was issued as long ago as 17 September 2021 and that exchange of evidence was completed by the end of November 2021. The Claimants have therefore had ample time not only to issue the amendment application but also to adduce any further supporting evidence had they so wished. In the event, they have chosen to rely only on the evidence served in October 2021. Given the lapse of time, they should in my judgment be held to that, and if I conclude that there is insufficient evidence before me to support the proposed amendments, it would be unfair to

[1] The case of *NHBC v Vascroft Contractors Ltd*, [2022] EWHC 1881 (TCC) does not suggest the contrary. That was a case where there was clearly an arguable factual basis for a case of estoppel by representation. However, it had not been properly pleaded and in those circumstances, the court was prepared to allow the defendant an opportunity to amend to correct the deficiencies in its pleading.

the Defendants for me to reject their application on the speculative basis that further evidence might nonetheless be forthcoming in the future.

## The Parties

10. The First Claimant ("GSTT") is the well-known Guy's & St Thomas' Hospital Trust. The Second Claimant, Mrs Fitzgerald, is a former employee of GSTT and currently the General Manager of the First Defendant ("ESMS") and leader of its management team. The Second and Third Defendants, Mr Sood and Mr Webster, are directors of ESMS. The Fourth and Fifth Defendants are their respective wives and, since 2018, also directors of the company. The Sixth and Seventh Defendants are companies affiliated to Mr Sood and Mr Webster. The Second to Seventh Defendants collectively are the majority shareholders in ESMS.

11. The Eighth Defendant ("Trident") is a Guernsey-based trust company which is the trustee of an Employee Benefit Trust (the "EBT") which was established by ESMS in the circumstances described in more detail below.

## The nature of the claim

12. Prior to 2010, GSTT operated a specialised business providing healthcare services to the pharmaceutical and veterinary industries. In about 2010, it concluded that it was not in a position to run this business at a profit consistently with its charitable objectives and accordingly started to look for a buyer.

13. In 2011, an offer was received from Ivy Partners Ltd ("IPL"), a company owned and controlled by Mr Sood and Mr Webster, for the business to be purchased by a special purpose vehicle yet to be incorporated. On 26 August 2011, ESMS was incorporated as the purchasing company, of which Mr Sood and Mr Webster were the initial shareholders and directors.

14. GSTT was concerned about the position of its existing employees who worked for the business since Mr Sood and Mr Webster had indicated that they were not prepared to accept a TUPE transfer. Accordingly, any employees who agreed to transfer to the new owning company would be relinquishing valuable benefits, including the right to participate in a defined benefit pension scheme. In the event, it was agreed in the circumstances set out in more detail below that (to put it as neutrally as possible), 20% of the equity of ESMS would be put into an employee benefit trust instead so as to provide a compensating long-term incentive.

15. On 30 September 2011, GSTT and ESMS concluded a Business Purchase Agreement (the "BPA") whereby the business was sold to ESMS. The BPA included an obligation to establish the EBT (the "EBT Obligation") within a stipulated timescale.[2] It is common ground that ESMS did not fully comply with the BPA in this regard. However, any claim against ESMS for breach of contract seems likely to be long since time barred, although that is not an issue which arises on this application.

16. The present claim was issued on 30 July 2021 – nearly 11 years after the sale of the business and 10 years after the EBT should have been established. In it the Claimants seek to avoid the application of any time bar by:

[2] The BPA contained inconsistent provisions as to whether this was 9 months or 12 months.

(1) Seeking specific performance by the First to Seventh Defendants of the obligation to establish the EBT, an obligation to which they say no limitation period applies;

(2) Claiming equitable compensation against the First to Seventh Defendants for breach of fiduciary duty, at least some of such breaches having allegedly been committed within the last six years;

(3) Arguing that the Second to Seventh Defendants are subject to a constructive trust of shares in ESMS and that the Claimants can therefore bring themselves within the exemption in section 21(1)(b) of the Limitation Act 1980 which provides that:

*"No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action – […]*

*(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use."*

17. The proposed Amended Particulars of Claim further particularise these causes of action and also raise a wholly new case of proprietary estoppel which is said independently to support the imposition of a constructive trust.

18. The thrust of Mr Ashworth's submissions on behalf of the Second to Seventh Defendants is that the Claimants' only claim lies against either the First Defendant for breach of contract, or against the Eighth Defendant for breach of its duties as trustee. In so far as they now seek, very belatedly, to pursue the Second to Seventh Defendants, he submits that the whole exercise is an impermissible attempt to pierce the corporate veil which is doomed to fail both on the original Particulars of Claim and on the Amended Particulars of Claim.

19. By contrast, Mr Talbot on behalf of the Claimants sought to persuade me that any decision to strike out the claim was not a pure question of law but turned on factual matters as to which there were (at least if the amendments were allowed) serious issues to be tried.

## The facts

20. The following is intended to be a non-contentious summary of the factual background in so far as it appears from the documents which have been put before me. I will have to consider below the extent to which the Claimants' case is supported by the evidence, and in particular by its witness evidence, so as to raise triable issues of fact.

21. Mr Sood and Mr Webster first became aware of the opportunity to purchase the business in 2010. At that time, they were the sole shareholders and directors of IPL which they had jointly established as an investment vehicle. On 1 April 2011, Mr Webster wrote to Mr Scarborough (the Defence Contracts Controller of GSTT) on IPL headed notepaper setting out a proposal for the acquisition of the business. The letter commenced by setting out the background to the formation of IPL and the reasons why *"the experience within Ivy Partners team represents a unique fit with the requirements of the MTIS opportunity"*. The proposal itself provided for a new company to be formed by IPL to develop the business and for IPL to provide initial capital by cash investment in the company.

22. At this stage a TUPE transfer of the existing staff was contemplated. However, the business was not profitable, and the financial implications of a TUPE transfer were such that Mr Sood and Mr Webster were unwilling for the purchase to proceed on that basis. On 29 June 2011, an internal email discussion took place between Mr Scarborough and Mr Hugh Risebrow, GSTT's Commercial Director, in which Mr Risebrow stated that:

*"Ivy (or any other bidder) really have two choices:*

*A) comply with fair deal, offering a GAD approved pension with the 35-50% employer contribution.*

*B) Persuade all transferring employers* [scil: employees] *to enter a compromise agreement, whereby:*

- *employees waive their rights to a GAD approved/equivalent final salary pension*
- *they are compensated by sharing equity in some form, eg a significant employee share ownership scheme*
- *they don't receive any compensation or redundancy payment as part of the compromise agreement (which would make the sale non viable to us)*
- *their length of service is considered as continuous from when they join Guy's*
- *this would require agreement of all affected employees on the basis that the alternative is closure of the business and redundancy*

*…*

*You should advise Ivy of these two options asap, before they invest in an option which the trust wouldn't support."*

23. By email dated 18 July 2011, Mr Webster emailed Mr Nuttall of Field Fisher Waterhouse LLP ("FFW"), who had been retained at GSTT's expense to provide independent legal advice to the employees of the business, confirming on a without prejudice basis that:

*"the allocation for the share option pool will be equivalent to 20% of the equity. We are very happy to consider an employee trust as an alternative to a traditional option pool. As discussed, we would need to be comfortable that an employee trust offers the same flexibility and motivational benefits to management and staff as an option scheme and that the board of directors would not be constrained when managing the business. We would also want to ensure that the company is not loaded with bureaucracy and cost that is inappropriate for a sub £1m company.*

*We will take advice on the differences between the two structures and please feel free to send through any relevant information. We do hope that the size of equity pool we are creating will be seen positively by the staff and management."*

24. This email was copied to Mr Scarborough who informed Mr Nuttall the following day that GSTT was happy for him to progress the proposal in line with the wishes of the staff. On 20 July 2011, Mr Nuttall replied to Mr Webster, raising a number of questions on behalf of

the employees, including questions as to how any share option scheme would work as compared with a trust arrangement, and as to any changes in employment terms.

25. On the same day, Mr Webster emailed Mr Risebrow to inform him that:

*"We are consulting with staff and their legal representatives over the terms of a compromise agreement. The staff are in a position to accept either this compromise, voluntary redundancy or the possibility to be considered to other posts available within the trust… I am pleased to confirm that allocation of share options or shares for an employee trust will be 20% of the equity of the business.*

*Finally, I am pleased to confirm that there will be no major changes to our original offer in outline commercial terms. The cost of closure to the trust will be c. £2m and the cost of Ivy Partners will be in the order of £750k-£1m. We understand your constraint and we will endeavour to meet this target of £750k…"*

This email was sent by Mr Webster from his IPL email address.

26. In an internal email from Mr Risebrow sent on 21 July 2011 and probably triggered by Mr Webster's email, Mr Risebrow commented as follows:

*"The reality is that the alternative to the Ivy deal is closure/redundancy… The deal is only viable for Ivy if t&c's change – I understand that Ivy have now set out specific proposal re salary and other aspects as well as pension, as well as an equity interest of 20% for staff to offset this. The Ivy deal is only acceptable to us if enough staff agree to these new terms.*

*…*

*Could I ask that you and Alastair find a way through this that is acceptable to staff, Ivy and the trust."*

27. On 27 July 2011, Mr Warren of FFW emailed Mr Sood and Mr Webster (with copies to Mrs Fitzpatrick and Mr Scarborough) setting out certain key concerns of the staff in relation to their employment terms and conditions. He also stated:

*"One further matter which I should raise and which I understand my colleague Graeme will be in touch with you upon is the share option / equity incentive and equity stake possibilities. This is a matter which remains a key issue for the staff and which will need to be addressed in conjunction with the proposed changes to the terms and conditions of the contracts of employment."*

28. It appears that a meeting then took place with the staff on 28 July 2011, following which Mr Sood emailed Mr Warren and Mr Nuttall on 29 July 2011 (again with copies to Mrs Fitzpatrick and Mr Scarborough) recording that the employee group would prefer a trust option notwithstanding that they might incur individual tax losses as a result. He continued:

*"From Ivy's perspective we are comfortable either way…*

*We would propose to transfer upon completion the agreed 20% of the shares of newco to yourselves for later transfer to the trust. We are happy to have this done within 6 months of transaction completion."*

29. On 26 August 2011, ESMS was incorporated for the purpose of acquiring the business. Its original name was Medical Toxicology and Information Services Ltd, but its name was changed by resolution on 20 January 2017. I will refer throughout this judgment to it as ESMS.

30. The BPA was concluded on 30 September 2011. GSTT and ESMS were the only parties to the BPA, which contained the following material terms:

*"11.1.1 The parties agree that the sale and purchase pursuant to this agreement will constitute a relevant transfer.. for the purposes of TUPE and, accordingly, that it will not operate so as to terminate the contracts of employment of any of the employees…*

*11.1.2 The Buyer shall be entering into new contracts of employment (the* ***New Employment Contracts****) … with some or all of the Employees subject to the employment of such Employees being terminated and then being re-employed on the New Employment Contracts. The New Employment Contracts will only be offered to Employees on the basis they sign appropriate compromise agreements before and after the Transfer waiving any employment rights they may have against both the Seller and the Buyer.*[3]

*…*

*12* ***BUYER INDEMNITY AND PAYMENTS BY THE SELLER***

*12.1 The Buyer undertakes to the Seller:*

*12.1.1 that it shall after the Effective Time, comply with all of its obligations (whether or not legally binding or in respect of which it would be expected to comply by any regulatory or other body to which it is subject) due to or in connection with the Employees or any body representing them;*

*…*

*12.1.3 that in accordance with Schedule 6, within 9 months from the Completion Date, it shall (a) establish an employee benefits trust in favour of the employees of the Buyer and (b) issue 20% of its issued share capital to the trustees of such employee benefits trust…*

*26* ***THIRD PARTY RIGHTS***

*26.1 Save for the provisions in Clause 26.2 this agreement and the documents referred to in it are made for the benefit of the parties to them and their successors and permitted assigns, and are not intended to benefit, or be enforceable by, anyone else.*

*26.2 Notwithstanding the provisions of Clause 26.1 above, any and all employees of the Buyer following Completion (whether or not current or former employees) will be entitled to enforce the provisions of clause 12.1.3 and Schedule 6.*

*26.3 Notwithstanding the Contracts (Rights of Third Parties) Act 1999, the provisions of Schedule 6 shall not be capable of amendment, variation or termination by the parties*

[3] The term *"Employees"* was defined in the BPA to mean the specific identified employees transferring to the new company from GSTT.

*prior to an employee benefit trust being established in accordance with clause 12.1.3 and that Schedule, and following such establishment, the provisions of Schedule 6 shall not be capable of amendment, variation or termination by the parties without the prior written consent of the Trustees (as defined in Schedule 6).”*

31. Schedule 6 to the BPA enshrined the EBT Obligation in the following terms:

*“2 **ESTABLISHMENT OF TRUST***

*2.1 In order to ensure the employees of the Buyer have a stake in the business of the Buyer and the development of that business, the Buyer will establish a trust to be known as the Medical Toxicology and Information Services Employee Benefit Trust (the **Trust**) within 12 months of the date of this agreement with such independent trustees as may agreed* [sic] *between the Employees and the Buyer as its initial trustees (the **Original Trustees**). The deed establishing the Trust (the **Trust Deed**) shall be in such form as the Original Trustees shall require provided it is for the benefit of all or most of the employees of the Buyer and complies reasonably with the provisions of section 86 of the Inheritance Tax Act 1984 … In this Schedule the **Trustees** are the Original Trustees or the trustees for the time being of the Trust. The Buyer, Rajesh Kumar Sood and Simon Philip Webster (nor any Privileged Relation[4] of these two individuals) shall neither be Trustees nor beneficiaries of the Trust.*

*2.2 The Buyer will on the execution of the Trust Deed transfer to the Original Trustees the sum of £200 or such other amount as is required to enable the Original Trustees to subscribe for or otherwise acquire 20% of the issued share capital of the Buyer (the **Share Acquisition**), such shares to be ordinary shares of the same class and with the same rights as all other ordinary shares in the Buyer.*

*3 **GUIDING PRINCIPLES***

*3.1 The Buyer… shall be operated in accordance with the following principles:*

*3.1.1 that employees are encouraged to assume responsibility for maximising their contribution to the Group in their capacity as employees having regard to the interests of future as well as present employees of Group companies;*

*…*

*3.1.5 such other principles as may from time to time be agreed in writing between the Trustees and the board of directors of the Buyer (the **Board**).*

*3.2 In order to promote the integrity of the business of the Group, the Buyer shall procure that, except where the consent of the Trustees is received, the Buyer shall not in the period after Completion make any change in the share capital structure of the Buyer or to the Articles of Association of the Buyer where such change would constitute a material adverse change to the class rights attaching to any shares held by the Trust (where those shares form a separate class from any other shares in issue).*

…

[4] Defined to include spouses, civil partners, children and grandchildren.

*3.4 The Buyer shall:*

*3.4.1 ensure that the Buyer is operated in accordance with the principles set out in this paragraph 3; and*

*3.4.2 (to the extent that it is able to) procure that its shareholders hold their shares subject to and in accordance with the rights set out in paragraphs 4 and 5 below.*

32. It is to be noted that:

(1) All parties were independently advised throughout the negotiation and consultation process leading up to the conclusion of the BPA: GSTT were advised by Bird & Bird, ESMS by Cripps Harries Hall LLP and the employees by FFW.

(2) Although expressed to be signed as a deed, the BPA did not in fact comply with the requirements for a deed because it was only signed by one director. There is no evidence that this was other than an oversight.

(3) While clause 12.1.3 of the BPA imposed an obligation to "issue" 20% of ESMS' share capital to the EBT, paragraph 2.2 of Schedule 6 provided for the Original Trustees either to *"subscribe for or otherwise acquire"* 20% of the issued share capital;

(4) Clause 12.1.3 of the BPA and paragraph 2.1 of Schedule 6 contained inconsistent provisions regarding the time limit for the establishment of the EBT: 9 months in the former as against 12 months in the latter.

33. On 26 April 2012, Mr Sood emailed from his IPL email address to enquire whether GSTT wished to be involved in the establishment of the EBT *"as per the BPA we have a few requirements to meet."* He asked whether GSTT would be appointing a firm of solicitors to look at it from the trust end and said that *"we have actually asked Cripps, FFW and Bird and Bird to quote so just want to make sure we are cleanly complying with the BPA."* Mr Scarborough replied that he needed to remind himself of the BPA details but would get back to him, which he duly did the following day stating that it would be helpful if he could see an execution copy of the EBT before and after signature but that he did not believe GSTT needed any further involvement beyond that.

34. In May 2012, Mr Sood and Mr Webster gave a "Business Overview" presentation to explain the current position and future direction of the company. The slides of the presentation show that assurances were given that:

(1) an employee benefit trust would be established at the end of June;

(2) 20% of ESMS's ownership would be transferred to the trust;

(3) the EBT would receive 20% of any dividends and, if the company were sold, any proceeds of sale, of which a minimum of 90% was to be distributed to the employees;

(4) neither Mr Sood nor Mr Webster benefited from the EBT.

An organogram included in the presentation showed Mr Webster as Head of Sales of ESMS and Mr Sood as Head of Finance.

35. On 26 June 2012, Mr Sood sent what was described as a final version of the proposed EBT deed to Mrs Fitzpatrick and Mr Scarborough (amongst others), again from his IPL email address. He highlighted certain areas to consider, including the identity of the individuals who would be trustees. He said that Cripps Harries Hall, who had drafted the deed on behalf of ESMS, would be attending a company meeting that week and could answer any questions on the legal side. He also stated that as per the BPA they would be providing a copy of the EBT to GSTT and that they had followed the requirements contained in the BPA.

36. In their evidence neither Mrs Fitzpatrick nor Mr Scarborough can specifically recall receiving this email but do not positively aver that they did not. They each speculate that they would not have read the attached draft EBT deed at that stage but would have waited until actually asked to sign something, at which point Mrs Fitzpatrick says that she would have sought advice either from GSTT or FFW.

37. In the event, it seems that during a conversation with Mr Webster on 28 June 2012, Mrs Fitzpatrick said that most of the questions from the employees at the meeting would be basic. Mr Sood and Mr Webster therefore decided that they would deal with these themselves without the need for attendance by Cripps Harries Hall and on 29 June 2012, Mr Sood asked Cripps Harries Hall to send him some flyers containing basic information about EBTs which he could make available at the meeting later that day.

38. On 24 July 2012, Mr Sood confirmed to Cripps Harries Hall that no further changes to the EBT had been requested by the management team and that the last version of the deed was therefore the final one. At this stage, the prospective trustees included both Mrs Fitzpatrick and Mr Scarborough.

39. During the course of August 2012, further steps were taken towards establishing the EBT but in the event, this never happened. According to Mr Sood's witness statement, ESMS took further tax advice in relation to the EBT in mid-2013 and were told that it might be more efficient for the trust to be administered offshore. Following this, Mr Sood and Mr Webster were introduced to Trident as a potential trustee based in Guernsey and by email dated 3 February 2014, Mr Sood asked Cripps Harries Hall to look at the necessary revisions which would need to be made to the existing documentation in order to establish an offshore trust.

40. A draft deed was sent to Trident in April 2014 and it is clear that by May 2014 Mr Sood and Mr Webster were becoming frustrated at the lack of progress. In June 2014, a number of exchanges took place between them and Trident discussing the draft EBT deed, in which Trident confirmed that they held full due diligence documentation but needed to see a copy of any relevant tax advice received by ESMS before agreeing the final terms.

41. Throughout June 2014, further correspondence took place between Mr Sood and ESMS's tax advisors, Kingston Smith, in relation to the latter's formal tax advice. In an email dated 24 June 2014, Mr Sood stated that:

*"1.6 The total value to transfer to the trust is effectively going to be the value of the 20% of shares. The letter is misleading in that it states that a total transfer of £2 million is expected to happen at day 1. The first tranche of the transfer/sale will be for 10% of the share capital and will be at the value used for HMRC EMI valuation purposes.*

…

*3.5 There will be no dividends payable on the trustee shares, we can separate the BPA from this and all staff are aware of this."*

42. On 30 June 2014, following a meeting with Kingston Smith, Mr Sood further set out his understanding of the amount of equity to be provided to the EBT, including the following. Kingston Smith's comments in response are shown in bold.

*"1.2 As discussed this should be upto 20%, if people leave their shares lapse and our intention is to provide upto 20% if there was no people movement it would be 20%*

***Noted, as long as you are happy that this in accordance with the BPA.***

*1.6 This is factually incorrect, we do not know the total amount that will need to provided/gifted to the trust. The intention is to sell upto 20% of the shares in the company to the trust as was intended. The first tranche of 10% will be as per the EMI valuation letter. Please can you amend the letter accordingly.*

***I agree, initial amount is 10% followed by further smaller tranches up to 20%.***

*2.4: We are excluded from the EBT and GSTT believe this is the case as well so please re state this or state what the ambiguity is.*

***This is in relation to point 4.5.***

*4.5 The comments from your end state that there is potential for Simon and I to be beneficiaries under the trust deed. This is not the intention and the GSTT trust as stated spent considerable sums of money with their legal teams to ensure that we were not able to benefit. We don't believe the clause is not clear on this, so we will ask for your team to amend the letter or states where the ambiguity is.*

***Clause 5 of the Deed reads:***

***If any Property has been transferred to the Trust Fund by any close company (as defined in section 102(1) of IHTA 1984), and that disposition would have been a transfer of value but for section 13(1) of IHTA 1984, no part of that Property shall be applied for the benefit of any person falling within any of the categories specified in section 13(2) of IHTA 1984 (as modified by section 13(3) of IHTA 1984), <u>except to the extent permitted by section 13(4) of IHTA 1984</u>.***

***Andrew is suggesting that the exception highlighted in yellow[5] is also excluded."***

43. Kingston Smith's final letter was issued on 4 July 2014 and included the following salient points:

(1) Clause 12.1.3 of the BPA and paragraph 2 of Schedule 6 were inconsistent as to the manner in which shares could be acquired by the EBT.

[5] I.e., the underlined words.

(2) The existing draft EBT deed provided for the trustees to waive all rights to dividends from their 20% shareholding in the company and to refrain from voting unless instructed to do so by the company. While these were standard provisions in EBTs, the latter provision relating to voting might not comply with Schedule 6 to the BPA.[6]

(3) It was proposed that ESMS should initially provide c. £1 million to the EBT to fund the purchase by the EBT of 5% of the issued shares from each of the current shareholders (ie. 10% in total) with further tranches to be acquired from the shareholders up to 20%.

(4) They recommended that the current shareholders be entirely excluded from the EBT.

(5) The reason for the waiver of dividends by the trustees was to avoid UK income tax and for that reason should continue.

44. The Kingston Smith letter was provided to Trident as proposed trustee of the EBT. It is in dispute whether Trident was also provided with a copy of the BPA, albeit the letter clearly referred to the BPA.

45. The EBT was finally established by deed concluded between ESMS and Trident dated 18 August 2014. It is common ground that it was a fully discretionary trust as to both capital and income and was governed by Guernsey law. Clause 4 had the effect of excluding Mr Sood and Mr Webster from any benefit under the trust. Further material provisions included:

*"7* ***WAIVER OF DIVIDENDS***

*Until the Company directs the Trustee otherwise, the Trustee shall waive its entitlement to dividends on Shares held in the Trust Fund for which the Trustee holds the whole of the beneficial interest.*

*…*

*11* ***VOTING***

*11.1 Unless the Company directs that the Trustee may vote on any particular occasion, the Trustee shall abstain from voting at any general meeting of any member of the Group any Shares held in the Trust Fund for which the Trustee holds the whole of the beneficial interest.*

*…*

*14* ***PROTECTION OF TRUSTEE***

*14.1 The Company shall keep the Trustee … fully indemnified against any actions, claims, costs, demands, expenses and all other liabilities to which it is (or becomes liable) as Trustee because of any act, event or thing except: where such actions, claims, costs, demands, expenses and other liabilities are attributable to fraud, wilful misconduct or gross negligence by that person.*

[6] There was no warning that waiver of the right to dividends might likewise be a breach of the BPA.

*…*

*17 **POWER TO AMEND***

*17.1 Subject to clause 17.2, the Trustee shall have power to amend, restrict, release or extend the trusts, powers and provisions of this instrument in any manner by deed during the Trust Period.*

*17.2 No exercise of the power contained in clause 17.1 may:*

*17.2.1 breach or remove the restrictions in … clause 7 or clause 11; …"*

46. Thereafter, however, a concern arose on the part of ESMS as to whether an EBT was necessarily the best or most tax efficient way of passing shares to employees. On 4 November 2014, Mr Sood emailed Mr Scarborough (with a copy to Mrs Fitzpatrick) informing him that they had run into a problem with the UK tax authorities in relation to the EBT and that they wished to replace it with normal Employment Management Incentive ("EMI") options. He stated that there would be no change from the staff perspective as they would be receiving option agreements from ESMS rather than benefits under the trust and sought confirmation that *"no issues from you* [sic] *end with this"*.

47. By email dated 11 November 2014, Mrs Fitzpatrick replied directly to Mr Sood asking to be provided with all the documents so that she could consider the matter. In particular, she enquired whether any changes to Schedule 6 to the BPA were proposed. Mr Sood replied the same day stating that there was no proposal to change the BPA which had, in any event, been executed and so could not be altered. He told Mrs Fitzpatrick that the trust had been asked to allow the EMI *"as the grant mechanism"* and that therefore the only change would be that the EMI contract would be granted directly by ESMS rather than the trust. Mrs Fitzpatrick was also sent a copy of the signed EBT deed.

48. Discussions then took place with the management team (including Mrs Fitzpatrick) regarding the possible benefits of establishing an EMI scheme. What was proposed was in essence a share option scheme, under which ESMS could grant an option to an individual employee over a specific number of shares and then request Trident to fulfil the option if it were exercised. In this way, the employee acquired rights in relation to specific shares which he or she did not currently possess (having only a right to be considered for distribution under the discretionary EBT).

49. On 1 December 2014, Mr Sood sent both Mr Scarborough and Mrs Fitzpatrick copies of the proposed EMI scheme rules and a sample option agreement. Mr Scarborough responded on 8 December 2014 as follows:

*"Below is what was included in the ETO notice to employees and I assume is what I have a duty to sign off from an employment perspective. It appears to have taken 3 years for the long term plan to emerge and most of the intended beneficiaries have left. I am not sure where that leaves things but I will find out. I have no evidence either way with respect to the short term scheme.*

*…*

| | |
|---|---|
| *Short Term incentive Scheme* | *Establishment of a non contractual annual bonus plan based on a share of profit above a base case.* |
| *Long Term Incentive Plan* | *Establishment of an equity option scheme to align the interests of staff and investors."* |

50. On 8 December 2014, Mr Sood emailed Mr Scarborough setting out his understanding of what was required from a GSTT perspective to approve the EMI scheme. This included a Board Minute confirming allocation of up to 20% of the share capital of ESMS for the benefit of employees. Mr Sood asked for confirmation of these requirements and for a draft wording for the proposed board minute.

51. The following day, Mr Scarborough responded as follows:

*"This (below) is what was signed up to at the time of the deal along with the view of someone a little more experienced in these matters. It looks as though it was not "up to" but rather a flat 20% always at the disposal of either employees and /or the Employee Benefit Trust, I guess that without a Trust there is no body which could hold the shares on behalf of existing or future employees. Are you able to explain how any unallocated (at any time) shares within the 20% will be held and by whom."*

Although the document "below" is illegible in my papers, the relevant content is set out in the witness statement of Mr Scarborough and consists of advice from Bird & Bird in the following terms:

*"Apart from the fact that this plan has not been put in place within 12 months from Completion, they have also not established an EBT at all. It appears that they are offering employees EMI options. However, when those options lapse for example if the employees leave, the shares will revert to the Company and although they can be recycled, they may not be. In other words, they have not created a permanent pool of 20% of the share capital for the Trustees of the EBT to hold and deal with. If an EBT was in place and there we* [sic] *an exit, i.e., a sale, 20% of the proceeds of this sale would be in the hands of the Trustees for the benefit of the employees."*

52. Further exchanges then took place between Mr Sood and Mr Scarborough over the ensuing days in which Mr Sood confirmed that the EBT had in fact been established but stated that HMRC would not allow the transfer of any shares to it. All the exchanges between Mr Sood and Mr Scarborough over this period were copied to Mrs Fitzpatrick.

53. On 12 December 2014, Mr Scarborough sought advice from Helen Down of Bird & Bird. Ms Down advised that since Mr Sood and Mr Webster were 100% shareholders in the ESMS, the only way to ensure that 20% of the equity was set aside for employees was to use the existing EBT. She said that she did not quite understand what the tax concerns were about the use of the EBT. In his response, Mr Scarborough told her that:

*"Apparently they tried the EBT route and once the transfer of shares to the EBT became due HMRC intervened and tax was then to become liable (I have to assume that this was because the thing was not set up on day 1) - hence the change of direction to the EMI. My*

*objective is to ensure that 20% is set aside for employees. I have been offered a Board minute to that effect which I said l did not think was enforceable."*

54. On 16 December 2014, Mr Scarborough forwarded to Mr Sood the advice he had received from Ms Down and indicated that he had a duty to ensure that 20% of equity was made available to the employees. Mr Sood's response accepted that there was therefore no option to simplify the structure and that the matter was now closed off.

55. On 5 January 2015, Mr Sood emailed a number of people, indicating that *"we would like to conduct a new share issue in favour of the ESMS Employee Benefit Trust for 10% of the current issued share capital of MTIS. This will be for nominal value. Please can you fill out the appropriate secretarial forms and let me know what is required from our end... We would like to complete the share option exercise by the end of January please let me know by return if there are any issues stopping this."*

56. The reference to a "share option exercise" was to the proposed EMI Scheme then under discussion with the management team (including Mrs Fitzpatrick) and Trident.

57. On 19 January 2015, 800,000 shares in ESMS were issued to the EBT. This was the first and (in the event) only transfer of shares into the EBT. However, a separate option scheme was established pursuant to which options were granted as follows:

    (1) 719,698 options to 14 employees, including 399,969 to Mrs Fitzpatrick, in April 2015;

    (2) 410,207 options to 18 employees, including 220,350 to Mrs Fitzpatrick, in November 2018.[7]

58. In June 2017, ESMS took advice from PWC as to how its balance sheet could be restructured to segregate out surplus cash. The reasons for this were said to be threefold: (i) to ensure that there was less opportunity for suppliers to negotiate discounts; (ii) to ensure the right level of working capital at all times; (iii) to assist management in being more profit driven.

59. At that date, the issued share capital of ESMS consisted of 8,800,000 ordinary shares, of which 800,000 were held by Trident and 4,000,000 each by Mr Sood and Mr Webster. PWC's advice was to restructure the shareholdings so as to create two new classes of shares and on 18 March 2018, Mr Sood and Mr Webster passed a special resolution to give effect to that advice. As a result, the company's share capital was sub-divided into:

    (1) 800,000 ordinary A shares of nominal value £0.0001;

    (2) 8,000,000 ordinary B shares of nominal value £0.00004;

    (3) 8,000,000 ordinary C shares of nominal value £0.00006.

    The ordinary A and B shares carried full voting, dividend and capital distribution rights, while the ordinary C shares additionally had attached to them *"dividend rights from surplus*

[7] Half of Mrs Fitzpatrick's options were granted in June 2020 for reasons which are irrelevant to the present dispute. A further grant of 554,l886 share options under the EMI scheme has not proceeded in the light of the present claim.

*cash at the discretion of the Directors".* However, unlike the A and B shares, the C shares did not have any capital distribution rights.

60. Following the re-organisation, the shares in ESMS were held as follows:

    (1) 800,000 ordinary A shares by Trident;

    (2) 2,000,000 ordinary B shares by Mr Sood;

    (3) 2,000,000 ordinary B shares by Mr Webster;

    (4) 2,000,000 ordinary B shares by Mrs Sood;

    (5) 2,000,000 ordinary B shares by Mrs Webster;

    (6) 4,000,000 ordinary C shares by the Sixth Defendant (these having been sold to it by Mr Sood in consideration for the issue by the Sixth Defendant of 30 ordinary shares);

    (7) 4,000,000 ordinary C shares by the Seventh Defendant (these having been sold to it by Mr Webster in consideration for the issue by the Seventh Defendant of 30 ordinary shares).

61. PWC's advice contemplated that any dividends paid to the Sixth and Seventh Defendants could be offset against inter-company loans, including a loan made by ESMS to IPL. In his witness statement, Mr Sood explains that Trident was aware of and consented to the restructuring and that while it could have applied to convert its shares into C shares, it did not do so.

62. On 23 April 2018, the Fourth and Fifth Defendants were appointed as directors of ESMS in accordance with PWC's advice.

63. During the course of 2020, it became apparent that the relationship between the senior management team and Mr Sood, in particular, had broken down. Various grievances were raised, the details of which do not matter for present purposes, which were addressed to the Board, i.e., to Mr Sood and Mr Webster (and by then also Mrs Sood and Mrs Webster) in their capacity as directors of the company. In due course a response was sent signed by all four directors which indicated, that having considered the matter in the round, they had decided to sell the business and hoped to complete a sale by the end of the year.

64. One of the specific questions raised by the management team during the course of the ensuing correspondence – and again addressed to the Board - was for proposals:

    *"for ensuring that employees are entitled to and will receive the full economic benefit of 20% of the share capital (whether by way of options or otherwise) as envisaged at the time of the business transfer in 2011."*

    In response, the Board stated that it had *"always been committed to the level of 20% of economic benefit and has already allocated c15% of the share capital of the business to the employees. We do envisage a further allocation of economic benefit pre or at the sale completion."*

    The management team then replied demanding:

*"a legally binding commitment that the unsatisfied requirement to issue 20% of the shares to the EBT will be honoured, either by the grant of options to employees over the unallocated balance of shares in excess of the circa 15% in respect of which options have already been granted, or by the distribution of the proceeds of sale of those unallocated shares to employees."*

65. A meeting took place with the management team on 10 November 2020 at which the Board reaffirmed its commitment to distribute 20% of the company to staff.

66. On 11 December 2020, Bingham Mansfield, solicitors acting on behalf of Mrs Fitzpatrick and Mr Scarborough (who was by now also an employee of ESMS, having joined the company in July 2017), sent a letter before action to ESMS asking, amongst other things, for an explanation of the share reorganisation which had occurred in 2018, expressing dissatisfaction that ESMS had not given an unambiguous assurance that clause 12.1.3 of the EBT would be satisfied before purchase offers were sought and querying the waiver of dividends by Trident. In summary they demanded that:

    (1) ESMS comply immediately with clause 12.1.3;

    (2) ESMS agree to amend the EBT deed to exclude Mr Sood and Mr Webster and their Privileged Relations from the employee beneficiaries, and to give Trident an unfettered right to vote its shares;

    (3) ESMS direct Trident not to waive its dividend entitlement;

    (4) ESMS immediately terminate a Share Supply Agreement whereby Trident was required to satisfy any share options out of shares held in the EBT.

67. Following further correspondence between solicitors acting for the various parties (which it is not necessary to rehearse), a Claim Form was issued on 30 July 2021. The Second to Seventh Defendants issued the present strike out application on 17 September 2021.

***The Issues***

68. Numerous criticisms were made by the Second to Seventh Defendants in their written evidence and in their skeleton argument of both the original Points of Claim and the draft Amended Points of Claim. It seems that at least some of these criticisms were accepted by the Claimants to have merit, since their case underwent considerable refinement following exchange of skeleton arguments. In particular, a claim for specific performance against the Second to Seventh Defendants was abandoned, as was a claim for breach of fiduciary duty in relation to the initial establishment of the EBT, since this was clearly time barred.

69. Ultimately, Mr Talbot advanced his clients' case by means of what he described as three orthodox routes and one less orthodox route:

    (1) Orthodox Route 1: Mr Sood and Mr Webster gave assurances in their personal capacity (i) prior to incorporation of ESMS that the employees of the business would receive 20% of the equity in the business; and (ii) following conclusion of the BPA that they would ensure that ESMS fulfilled the EBT Obligation. The employees relied on these assurances to their detriment, thereby giving rise to a proprietary estoppel which is to be vindicated by the imposition of a constructive trust (or some other appropriate

remedy). Such a cause of action falls within the scope of s.21(1)(b) of the Limitation Act 1980 being *"an action to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use"* and so is not time barred.

(2) Orthodox Route 2: Mr Sood and Mr Webster owed a fiduciary duty to the employees of ESMS (for the time being) from the date on which the BPA was signed until such time as the EBT Obligation was complied with to act in the interests of, and for the benefit of, the employees in relation to 20% of the company's shares. The capital reorganisation and distribution of dividends in 2018 was a breach of that duty giving rise to a claim for equitable compensation and an account of profits.

(3) Orthodox Route 3: Benefits received as a result of the breach of fiduciary duty referred to in Orthodox Route 2 (namely, the additional shares issued and the dividends received) are held by the Second to Seventh Defendants on constructive trust for the employees of ESMS for the time being. The court should make a declaration to that effect and order appropriate ancillary accounts, inquiries and directions.

(4) Less Orthodox Route: There is a constructive trust over 20% of the company's shares for the benefit of the employees for the time being arising from the terms of the BPA and/or the circumstances in which Mr Sood and Mr Webster came to control the company's business (i.e., those giving rise to the fiduciary relationship asserted under Orthodox Route 2) and their unconscionable retention of the promised share capital. Similar relief is sought as under Orthodox Route 3.

70. Accordingly, I shall address the case on this basis.

**Orthodox Route 1: Proprietary estoppel**

71. There was no dispute between the parties as to the ingredients of a proprietary estoppel. These are set out in *Thorner v Major*, [2009] 1 WLR 776 at [29]:

(1) a representation or assurance;

(2) made to the claimant; which is

(3) reasonably relied on by the claimant;

(4) to his or her detriment.

72. In this case, the estoppel is pleaded as having arisen in favour of the employees[8] as a result of either or both of two categories of assurance:

(1) Assurances given prior to the incorporation of ESMS that, in order to compensate the employees for detrimental changes to their terms of employment if they chose to transfer to the new company, they would receive a total of 20% of the equity in the business (the "Pre-incorporation Assurance");

[8] This is not a claim which is asserted on behalf of GSTT.

(2) Promises and/or assurances given after the conclusion of the BPA that Mr Sood and Mr Webster would ensure that ESMS fulfilled the EBT Obligation.

73. I address each category of assurance separately. Before doing so, however, it is appropriate to consider the basis on which Mr Sood and Mr Webster can be made personally liable for statements made by them in their capacity as either directors or shareholders of IPL and ESMS.

74. It is trite law that a director of a company is only personally liable for things said or done by him or her in that capacity if there has been an assumption of personal responsibility such as to create a special relationship between them and the claimant. Such assumption is to be determined objectively: see *Williams v Natural Life Health Foods Ltd,* [1998] 1 WLR 830.

75. So far as shareholders are concerned, the well-established doctrine of separate corporate personality dictates that a company is a distinct legal entity separate from its shareholders, and that the latter cannot be held liable for the acts and omissions of the former or vice versa unless the law allows the corporate veil to be pierced.

76. Mr Talbot protested that there was no need to pierce any corporate veil in this case because Mr Sood and Mr Webster were the "real actors" behind both IPL and ESMS. He relied in this regard on *Prest v Petrodel Resources Ltd*, [2013] UKSC 34. In my judgment, however, while I agree that no question of piercing the veil arises on the present facts, far from assisting his argument, the decision only served to demonstrate the difficulties in his way.

77. In *Prest*, the Supreme Court attempted to rationalise a doctrine which they all agreed existed but which was of uncertain ambit and lacking any coherent principle. As I read the speeches, they accepted that the underlying justification for the doctrine was to prevent the abuse of corporate legal personality for some relevant wrongdoing. However, they were also clear that the principle of separate corporate legal personality laid down in *Salomon v Salomon Ltd*, [1897] AC 22 was the default position and that any piercing of the corporate veil should be confined to very limited and carefully defined circumstances and only deployed when all other more conventional remedies had proved to be of no assistance.

78. Lord Sumption, who gave the leading speech, analysed the authorities and concluded that they reflected two separate principles, albeit that failure of precise analysis and indiscriminate use of terminology such as "façade" or "sham" had sometimes blurred the distinction between them. The first was what he termed the "concealment" principle, which he described in the following terms:

*"the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them,* ***assuming that their identity is legally relevant****."* (Emphasis added).

This, he said, was not a case of piercing the corporate veil at all. The court was not disregarding the "façade" but rather looking behind it to identify the facts which the corporate structure was concealing.

79. The second principle was the "evasion" principle, which he regarded as a true instance of piercing the corporate veil to be invoked:

*"if there is a legal right against the person in control of it* ***which exists independently of the company's involvement****, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement."* (Emphasis added).

80. However, as Lady Hale pertinently pointed out at [90], whenever a question of potentially piercing the corporate veil arises, it is helpful to consider the purpose for which the doctrine is being invoked. Is it in order to sue the owner/controller of the company for a liability which is properly that of the company itself? Or is it in order to seek a remedy against the company for a liability of the owner/controller? As she pointed out, the latter situation is often more appropriately accommodated within orthodox principles of agency and attribution of knowledge, although the cases of *Gilford Motor Co. Ltd v Horne,* [1933] Ch. 935 and *Jones v Lipman,* [1962] 1 WLR 832 were both analysed by Lord Sumption as applications of the evasion principle insofar as they imposed liability on the company.

81. It is fair to point out that Lady Hale and Lords Wilson, Mance and Clarke cautioned against foreclosing the categories of case in which the court would pierce the corporate veil. But the Supreme Court was unanimous that any extension beyond the categories identified by Lord Sumption would be limited and rare. What is implicit in all the speeches (and, indeed, explicitly stated by Lord Sumption at [34]) is that it is objectionable to use the doctrine to create a new liability which would not otherwise exist. Either liability must exist in the company, for which it is sought to make the controller liable, or vice versa.

82. In the present application, the argument is not that the Second to Seventh Defendants are personally liable in respect of any liability of ESMS[9], nor that ESMS is liable for the acts or omissions of Mr Sood and Mr Webster. What is said is that their words and conduct render them personally liable in their own right. However, in circumstances where Mr Sood and Mr Webster were at all times directors (and therefore agents) of either IPL or ESMS, their representations and assurances were *prima facie* those of the relevant company. They could accordingly only be held personally liable if there was some objective assumption of personal responsibility by them (see *Williams v Natural Life (supra)*). I agree that this has nothing to do with piercing the corporate veil.

83. If, on the other hand, they were not acting on behalf of the company there can be no attribution of their actions to the company and therefore no liability on the part of the company. It must therefore be established that the representations/assurances were made in a personal capacity such that Mr Sood and Mr Webster are legally responsible for them. Again, no question of piercing the corporate veil technically arises unless it is sought to make ESMS liable for Mr Sood and Mr Webster's actions although, as stated above, that is not the nature of the claim which is before me on this application.

84. However, what is clear is that, whichever way the Claimants seek to put their case, the claim against the Second to Seventh Defendants rests on establishing some sort of personal assurance or personal assumption of responsibility on the part of Mr Sood and Mr Webster, whether as directors of IPL/ESMS or otherwise. This, ultimately, is the critical issue underlying the entire application.

85. I accept that whether the alleged assurances were given by Mr Sood and/or Mr Webster personally is a question of fact. However, I have all the relevant documents before me

[9] No doubt because any such claim is now time-barred.

together with such evidence as the Claimants have chosen to rely on in opposition to the strike out/summary judgment application. As stated above, they could have bolstered or supplemented that evidence in the 12 months since the application was first issued but they have not done so, notwithstanding that the application clearly attacked the factual basis of their case. In those circumstances, and bearing in mind the overriding objective and the need to ensure appropriate allocation of the court's resources, if I conclude that the evidence presently before me discloses no arguable case on the facts, I see no reason why I should not grasp the nettle and dismiss the claim.

***The Pre-incorporation Assurance***

*Representation*

86. It is clear from the factual narrative set out above, and indeed it was not significantly disputed, that the staff were given to understand, both in correspondence via GSTT and at the meeting on 28 July 2011, that 20% of the equity of the business would be transferred to the employees in one form or another, and that the employees in due course elected for it to be put into a trust.

87. The Claimants' pleaded case (see paragraph 12C of the draft Amended Particulars of Claim) is that the Pre-incorporation Assurance was made in writing by Mr Webster in his email of 20 July 2011 to Mr Risebrow and in the table comparing the employees' existing and proposed terms of employment. The evidence before me does not disclose when the table was compiled, or to whom it was sent but I assume in the Claimants' favour that it was seen by the employees prior to the incorporation of ESMS. Mrs Fitzpatrick in her evidence also refers to Mr Sood's email of 29 July 2011 (see paragraph 28 above). This is not expressly pleaded in support of the Pre-incorporation Assurance but I likewise take it into account.

88. I have no doubt that nothing in the 20 July 2011 email was said by Mr Webster in a personal capacity. The email was sent from his IPL address as a follow-up to the purchase offer made on 1 April 2011 by IPL on IPL headed paper, which itself described Mr Sood and Mr Webster as partners in IPL. At no stage was any suggestion made that Mr Sood and Mr Webster were intending to purchase the business personally. On the contrary, the 1 April 2011 offer clearly stated that the purchaser would be a new company to be formed *by IPL* and capitalised initially by IPL. This is incompatible with any offer being made by Mr Sood and Mr Webster in their personal capacity, whether as shareholders or directors of IPL or otherwise, and Mr Webster's email of 20 July 2011 must be read in this context. Mr Sood's email of 29 July 2011 is even clearer since not only does he sign off expressly as a "Partner" in IPL, but he also speaks about matters *"From Ivy's perspective"*. In my judgment no reasonable person receiving this email could have thought that Mr Sood and Mr Webster were acting otherwise than as directors and on behalf of IPL.

89. This conclusion is entirely consistent with and supported by the other correspondence passing between Mr Webster and GSTT/Mr Risebrow at around this time which (although not seen contemporaneously by Mrs Fitzpatrick) makes it quite clear that what was being discussed was a deal between GSTT and IPL, not Mr Sood and Mr Webster personally.

90. As for the comparison table, it does not seem to me that this supports the Claimants' case at all. It referred to the *"Establishment of an equity employee trust scheme"* and what *"the Company"* (i.e. ESMS) would be doing. There is nothing to suggest any personal

undertaking by Mr Sood and Mr Webster; it was simply a tabulated statement of the terms of employment which were on offer to the employees.

91. Nothing daunted, Mr Talbot argued that even if the written communications were all sent on behalf of IPL, he could nonetheless establish an arguable case that oral representations were made personally by Mr Sood and Mr Webster in consultations with the affected employees and that this was sufficient to defeat the strike out application.

92. It is of course possible that Mr Sood and Mr Webster might have given personal undertakings at face-to-face meetings notwithstanding that all their written communications were sent on behalf of IPL or ESMS. However, this is hardly a likely scenario and, in any event, any oral communications have to be construed in the light of the written correspondence which was taking place simultaneously. In my judgment it would require exceptionally clear evidence if an oral assurance were to be reasonably understood as having been given personally when all other correspondence relied on by the employees had been written on behalf of IPL.

93. As it is, the only evidence to support these alleged oral representations is to be found in Mrs Fitzpatrick's witness statement which, unfortunately, I find wholly inadequate to support the Claimants' pleaded case that any personal assurances were given orally by Mr Sood and Mr Webster prior to incorporation:

    (1) By the time Mrs Fitzpatrick became aware of the proposed sale to IPL/ESMS, the basic terms of the deal had already been agreed. Mrs Fitzpatrick says that she understood from what she was told by GSTT (not, it should be noted, by Mr Sood and Mr Webster) that: (a) the purchaser was proposing to cut the employees' salary and benefits but would instead offer alternative long-term compensation in the form of equity; (b) the latter was paying for independent legal advice for the employees; and (c) the employees had a choice whether or not to consent to the transfer, in other words an effective veto over the sale. There is no suggestion that Mrs Fitzpatrick derived her understanding in these respects from reliance on anything said by Mr Sood or Mr Webster. Mrs Fitzpatrick also says that she believed that the business had the potential to grow and that an equity stake would be very valuable. This appears to have been a view formed on the basis of her own intimate knowledge of the business rather than anything said or done by Mr Sood or Mr Webster.

    (2) Mrs Fitzpatrick recalls a meeting which was almost certainly the meeting of 28 July 2011. Very fairly, she accepts that she cannot now recall the detail of what was said and that her evidence is in part a matter of reconstruction. She explains that the purpose of the meeting was to explore the alternatives of an EBT and share options as the mechanism by which the employees would benefit from the 20% equity stake. While Mrs Fitzpatrick recalls a strong sense that the employees were unanimous in wanting a trust, it is clear that the meeting took place before any formal decision to this effect had been made. It therefore seems inherently unlikely that any specific assurances would have been given as to the precise mechanics of how a trust would operate.

    (3) Moreover, Mrs Fitzpatrick expressly states that she cannot recall any express assurances being given by either Mr Sood or Mr Webster at the meeting. The thrust of her evidence is that her *subjective* understanding was that an EBT meant that *"shares were issued and owned by the trust and thereby by us as employees through the trust and voting and dividend rights would be stapled to the 20%."* However, her

subjective understanding (which in any event was not entirely accurate) does not establish that a specific assurance had been given to this effect – certainly not when she has explicitly stated that she cannot recall any such assurance.

(4) Nor does Mrs Fitzpatrick say anywhere in her evidence that she understood Mr Sood and Mr Webster to be acting at this meeting in a personal capacity. Her witness statement states that she draws no distinction between Mr Sood and Mr Webster on the one hand and IPL on the other. But that is an argument which cuts both ways. IPL may very well be a vehicle for Mr Sood and Mr Webster, but they are perfectly entitled to arrange their affairs in that way. Every corporate entity must perforce act through human agency, but ever since *Salomon* it has been the law that the company is to be treated as a distinct legal entity separate from its shareholders. As Lord Sumption said in *Prest* at [34], it is not an abuse to cause a legal liability to be incurred by a company or to rely on the fact that a liability is not the controller's because it is the company's.

94. Mr Talbot suggested alternatively that Mr Sood and Mr Webster could be held personally liable as "promoters" of ESMS. I reject this suggestion. The authorities on the liabilities of promoters all concern either duties owed by the promoters to the company being promoted, or the liability of promoters on pre-incorporation contracts made ostensibly on behalf of the company. The first category is not in issue here and none of the cases referred to me goes so far as to say that the second category extends beyond contracts to pre-incorporation assurances. But even assuming in favour of the Claimants that it does,[10] and even assuming further that Mr Sood and Mr Webster rather than IPL are properly to be regarded as the promoters of ESMS, they can only be liable for an assurance given by the company being promoted, i.e., by ESMS, whereas I have found that any assurances given by Mr Sood and/or Mr Webster prior to incorporation were in fact given on behalf of IPL, not ESMS.

95. For all these reasons, I am satisfied that the Claimants have no real prospect of demonstrating that the alleged Pre-incorporation Assurance was made by either Mr Sood or Mr Webster in a personal capacity so as to give rise to a proprietary estoppel enforceable against the Second to Seventh Defendants. It is therefore not strictly necessary to consider the other ingredients of the estoppel and I only do so briefly for completeness.

*Made to the Claimants*

96. Had I held, contrary to my findings above, that there was an arguable case that Mr Sood and/or Mr Webster personally gave the Pre-incorporation Assurance, I would have accepted that there was at least a plausible case that Mrs Fitzpatrick was sufficiently aware of the email correspondence to support the assertion that it was made to her.

97. However, there was no evidence before me from any other transferring employee that such an assurance was made to them. The other employees who have given statements all joined ESMS much later and so cannot have relied on the alleged Pre-incorporation Assurance. This led to a further debate as to Mrs Fitzpatrick's entitlement to sue on behalf of other employees and, if so, which. I can see scope for argument here but even if Mrs Fitzpatrick

[10] The liability of promoters in respect of pre-incorporation contracts is expressly covered by statute. Mr Talbot suggested that the statute may not reflect the full width of the EU Directive which it was intended to enact. However, this was a point which was not argued before me and on which I was expressly not invited to rule.

was only ultimately held entitled to sue on her own behalf, that would have been sufficient to justify the proceedings and prevent them from being struck out or dismissed.

*Detrimental reliance*

98. I consider detriment and reliance together.

99. Whatever Mrs Fitzpatrick may have understood from the meeting on 28 July 2011, her unequivocal evidence in her witness statement was that *"We (me and the rest of the employees) relied on F(ield)F(isher) and B(ird)&B(ird) to make sure the transaction included appropriate arrangements for the creation of a trust for our benefit."* Nowhere does she say that she relied on any assurance from Mr Sood or Mr Webster. Indeed, she says that the employees wanted an EBT rather than options *"not because we distrusted RS and SW but because we did not know them and were more comfortable with an arrangement that ringfenced our 20%."* Not distrusting Mr Sood and Mr Webster is not the same as affirmatively placing reliance on anything they said. In fact, it suggests the precise opposite.

100. Furthermore, as pleaded, the Pre-incorporation Assurance is in my judgment an assurance as to the contractual commitment to be made by ESMS in the BPA. Indeed, the Claimants' pleaded case is that the employees relied on the alleged Pre-incorporation Assurance in giving consent to GSTT to proceed with the sale and in transferring their employment to the new company on detrimental terms. To my mind, this indicates that their main concern was to ensure that the BPA was concluded on terms which created an EBT along the lines agreed. There is no evidence to suggest that Mrs Fitzpatrick or any other employee was relying on anything said by Mr Sood or Mr Webster as having any independent continuing life once it had been crystallised into a binding contractual obligation. On the contrary, Mrs Fitzpatrick's evidence set out in paragraph 99 above clearly demonstrates that the employees were looking to FFW and Bird & Bird to ensure that the contractual arrangements for the EBT were adequate and, once an appropriate contractual commitment had been obtained, were relying on that contractual commitment. This is consistent with Mrs Fitzpatrick's evidence that she only ever asked Mr Sood and Mr Webster to see that the company did what was promised in the BPA and that she made clear in 2012 that she expected the trust arrangements to comply with the BPA.

101. The contractual commitment was made as promised and I therefore accept Mr Ashworth's submission that even if the Pre-incorporation Assurance had been given by Mr Sood and/or Mr Webster in a personal capacity, it was superseded and effectively discharged upon the conclusion of the BPA in the agreed terms. Whether this is because the representation itself was exhausted, or because it was not relied upon once a binding contractual commitment had been secured does not make any practical difference.

102. Mr Ashworth also argued that there was no satisfactory evidence that the employees had suffered any detriment as a result of their alleged reliance on the Pre-incorporation Assurance in circumstances where:

(1) The only alternative to transferring was either to leave the business or to veto the sale, in which case the unequivocal evidence of Mr Scarborough was that they would have been made redundant in any event as no interest had been expressed by any prospective purchasers other than IPL. However, no evidence had been put before the court to suggest that they could have obtained better terms of employment elsewhere.

(2) The EBT created a discretionary trust and accordingly no individual employee could have had a legitimate expectation of any particular equity participation. All that can be said is that 20% of the equity of ESMS was to go to the EBT and each employee had a right as a discretionary beneficiary to be considered by the trustee for distribution. Accordingly, the appropriate claimant, if any, is Trident as trustee.

103. There may or may not be force in these arguments, but if I had been otherwise satisfied that the Claimants had an arguable case that representations had been made for which Mr Sood and Mr Webster were personally responsible, I would not have struck out the claim on either of these grounds.

104. The first plainly raises triable issues of fact which I cannot resolve on the material before me. But even without evidence as to specific alternative employment, Mrs Fitzpatrick's evidence was clear that she regarded an equity stake in the company as important. The recent decision in *Guest v Guest,* [2022] UKSC 27 authoritatively states that detriment need not be capable of valuation in monetary terms, still less that it has to be financially equivalent to the value of the promise and it seems to me that this would have been sufficient basis to allow the claim to go to trial.

105. The second of Mr Ashworth's arguments goes as much to the question of remedy as to detriment. Again, there is plainly an argument to be had which I would have been prepared to allow to go to trial.

106. In summary on the Pre-incorporation Assurance, therefore, I am not satisfied that the Claimants can establish a real prospect of showing that any personal assurance was given by either Mr Sood or Mr Webster and, even if they could, any such assurance was in my view exhausted by the conclusion of a binding contractual commitment in the BPA as to the establishment of the EBT.

***Subsequent promises/assurances***

107. The next way in which the Claimants put their case on proprietary estoppel is to say that it arose from assurances given by Mr Sood and Mr Webster at the presentation in May 2012. Again, the only evidence as to this presentation comes from Mrs Fitzpatrick.

108. I am prepared to assume in her favour that she understood the presentation and such other communications as she saw around this time (i.e., up to about August 2012) as containing assurances that ESMS would abide by the EBT Obligation.

109. Again, however, I can see nothing in the presentation to suggest that anything to this effect was said or could reasonably have been understood as having been said by Mr Sood or Mr Webster in a personal capacity:

(1) Mrs Fitzpatrick does not say this in her statement;

(2) The slides of the presentation purport on their face to be a company presentation talking about the position of the company;

(3) The organogram contained in the slides shows that Mr Sood and Mr Webster held positions within the company structure and not separately from it;

(4) The presentation would reasonably have been understood to be a presentation by the company's directors in that capacity. I reject the suggestion made by Mr Talbot that the statement that *"20% of the Firms Ownership will be transferred to the trust"*, taken in isolation, can reasonably be construed as a personal commitment by Mr Sood and Mr Webster as shareholders to transfer their own shares. This would require an intention on the part of Mr Sood and Mr Webster to have been consciously distinguishing between "transfer" and "issue", which is altogether more weight than the mere use of the word "transfer" can bear.

(5) I likewise reject the suggestion that the statement *"Simon and I don't benefit from the EBT"* somehow indicates that the assurances were given personally. This was a lay person's explanation to other lay people as to the meaning and effect of the EBT and a reasonable observer would not have understood it to be distinguishing in a precise legalistic way between their capacities as directors and shareholders.

110. In my judgment, therefore, the evidence does not disclose any arguable case that personal assurances were made by means of the presentation.

111. As to reliance and detriment, the Claimants face the same problem of having to show that they relied to their detriment on the alleged assurances rather than on their contractual rights against ESMS (see in this context also paragraphs 99 and 100 above). Their pleaded case is that they continued to work for the company under worse terms and conditions of employment than they could have obtained elsewhere. However, there is no evidence at all to support this averment.

112. Finally, there is a pleaded case that Mr Sood and Mr Webster subsequently continued to assure the employees that the EBT Obligation would be fulfilled by the issue of shares. Despite the opportunity afforded to the Claimants since the application was issued to support this averment with evidence, no specific occasion is identified at which such assurance was given other than a meeting which took place on 10 November 2020.

113. In my judgment this is a hopeless contention:

(1) The meeting took place against the background of a series of communications addressed by the management team (which included Mrs Fitzpatrick) specifically to "the Board", i.e., to the Second to Fifth Defendants in their capacity as directors, rather than personally. There is nothing in those communications to indicate that the management team was seeking personal assurances and the whole tenor of the correspondence is inconsistent with any such suggestion. For example, there is a specific request to "the Company" to fund legal support for the staff.

(2) Even if assurances were given as pleaded at this meeting, there is nothing beyond mere assertion to show that the employees relied on it to their detriment. The same points can be made here as in paragraph 111 above. Moreover, Mrs Fitzpatrick does not say that she relied on anything said at this meeting and, indeed, it is difficult to see how she could have done given that solicitors were instructed to send a letter before action on her behalf barely one month later.

(3) Reference was made during the course of argument to the witness statement of Mr Corteen who joined ESMS in May 2014. He does not say anything specifically about the November 2020 meeting but states that Mr Sood told him about the EBT at his job

interview and that this was an important attraction for him in accepting employment with the company. However, that tells us no more than that the EBT was one of the benefits provided as part of the employment package which he found attractive. Mr Corteen nowhere suggests that he was given any personal representation or assurance by Mr Sood or that he would not have joined the company but for such assurance.

114. For all these reasons, I hold that the Claimants have no real prospect of proving that any personal assurances were given or representations made by Mr Sood or Mr Webster subsequent to incorporation.

115. It follows that the Claimants likewise have no real prospect in my judgment of establishing a proprietary estoppel against Mr Sood or Mr Webster personally.

***Vindication by constructive trust***

116. In the light of these findings, it is unnecessary to grapple with the difficult question of whether it would in any event be appropriate to give effect to any proprietary estoppel by imposing a constructive trust. Not only does there need to be some element of unconscionability, but an exercise of discretion is involved which would have to take into account a number of factors, including the following:

(1) Subsequent employees would *prima facie* have different rights and interests from those of Mrs Fitzpatrick and the other transferring employees. A question therefore arises as to whether a representation to a single employee or a small group of transferring employees can justify the imposition of a constructive trust in favour of all employees, past, present and future, including those who did not exist at the date of the transfer and may not have been aware of the relevant assurances, let alone relied on them as opposed to the contractual commitment in the BPA.

(2) There is an interrelated question as to the extent to which it is permissible or appropriate for Mrs Fitzpatrick to represent, without their consent, other employees whose interests are not identical to hers.

(3) As discretionary beneficiaries, the employees had no entitlement to any specific parcel of shares. At most, they had a right to be considered by Trident for the exercise of its discretion. There is therefore a question as to how, if at all, that right can appropriately be vindicated: see *Lewin on Trusts (20th ed.) (Sweet & Maxwell)* §41-073.

(4) Whether repudiation of the assurance was unconscionable in circumstances where, as here:

116.4.1. The EBT Obligation was partly fulfilled in that around 10% of the equity in ESMS was put into the trust;

116.4.2. Some, at least, of the employees benefitted from an EMI scheme which ESMS was under no contractual obligation to implement and which it might not have set up had the employees insisted on strict compliance with the EBT Obligation in the BPA. The Second to Seventh Defendants could therefore be expected to argue that the EMI scheme was, if not contractual compliance, at least an appropriate substitute which had tax benefits for the employees and precludes any suggestion of unconscionability.

116.4.3. On the other hand, it is not entirely clear why Mr Sood apparently thought the obligation of ESMS under the BPA was only to transfer *"up to 20%"* of the company's shares into the EBT (see his correspondence with Kingston Smith in the summer of 2014 referred to paragraphs 41-42 above).

(5) The appropriateness of declaring a constructive trust over a full 20% of the company's shares in the hands of the Second to Seventh Defendants when: (i) the trust already holds some shares; and (ii) Mr Sood and Mr Webster's personal shareholdings are sufficient in themselves to satisfy the shortfall.

117. These are all difficult questions raising issues of fact which would no doubt be hotly contested, and plainly it is inappropriate to deal with such a fact-sensitive balancing exercise on a summary basis. Suffice it to say that if I had been satisfied that there was real substance in the claim of proprietary estoppel, I would have allowed the claim to go to trial on the question of appropriate remedy. As it is, however, I have found that the Claimants have no real prospect of success for other reasons, principally the lack of any assurances or representations by Mr Sood or Mr Webster personally.

***Limitation***

118. The question of limitation is only live as regards the proprietary estoppel claim, since the other ways in which Mr Talbot advances the Claimants' case are now limited to events in 2018 and subsequently.

119. It was not disputed that a proprietary estoppel arises at the date of the detrimental reliance. The Claimants would therefore have had to rely on section 21(1)(b) of the Limitation Act 1980 in relation to any reliance prior to September 2015. This in turn raises a difficult question as to whether a claim for a declaration of constructive trust falls within the section. Given the status of the employees as discretionary beneficiaries only, and the fact that they have no interest in any identifiable parcel of shares, it is not entirely clear (at least to me) that they would be claiming to recover trust property or the proceeds of trust property. However, the point is distinctly arguable and I would not have struck the claim out on this ground.

**Orthodox Route 2: Breach of fiduciary duty – equitable compensation**

120. The allegation here is that Mr Sood and Mr Webster owed a fiduciary duty to the employees for the time being from the date of signature of the BPA until the EBT Obligation had been complied with in full to act in the interests of and for the benefit of the employees in relation to 20% of the company's shares. This duty, it is said, required Mr Sood and Mr Webster not to profit at the expense of the employees and not to put themselves in a position where their interests were in conflict with those of the employees. It is alleged to have been breached by virtue of the share capital reorganisation in 2018 and subsequent distribution of dividends. The remedy sought is equitable compensation and an account of profits.

121. As to when a fiduciary relationship exists, both parties accepted the statements of principle set out in: *Bristol & West Building Society v Mothew*, [1998] Ch.1 at 18:

*"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.*

*The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work* Fiduciary Obligations *(1977), p.2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."*

and in *Arklow Investments Ltd v McLean,* [2000] 1 WLR 594 at 598:

*"... a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal."*

122. In *Breen v Williams*, [1997] 1 LRC 212 at 245, the High Court of Australia identified certain established categories of fiduciary relationship, including the relationship of trustee/beneficiary, principal/agent, solicitor/client, employee/employer, director/company and partnership. However, it went on to point out that the categories of fiduciary relationship are not closed and that:

*"the courts have identified various circumstances that, if present, point towards, but do not determine, the existence of a fiduciary relationship. These circumstances, which are not exhaustive and may overlap, have included: the existence of a relation of confidence…, inequality of bargaining power…, an undertaking by one party to perform a task or fulfil a duty in the interests of another party…, the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interest of another…, and a dependency or vulnerability on the part of one party that causes that party to rely on another…"*

123. I accept on the one hand that the categories of fiduciary relationship are not closed and, on the other, that the circumstances identified in *Breen* are only indicia and not in themselves determinative. However, it is clear from *Bristol v Mothew* that the touchstone of a fiduciary relationship is some undertaking by the putative fiduciary to act for or on behalf of another (i.e., an assumption of responsibility) such as to give rise to a relationship of trust and confidence and a legitimate expectation of single-minded loyalty. Whether or not such a relationship exists is to be assessed objectively: *Snell's Equity (24th ed.) (Sweet & Maxwell)* §7-005.

124. The basis on which a fiduciary relationship is alleged to have arisen in this case consists of:

(1) The fact that the employees allegedly gave up more generous terms and conditions of employment in reliance on the Pre-incorporation Assurance and the contractual commitment in the BPA;

(2) The fact that Mr Sood and Mr Webster as the only shareholders and directors of ESMS were solely responsible for whether ESMS fulfilled the EBT Obligation or not;

(3) The vulnerability of the employees in circumstances where Mr Sood and Mr Webster were in a position to control the level of bonus that they received, their career progression and their continued employment.

125. I have, of course, held above in relation to proprietary estoppel that the Claimants have no real prospect of showing that any assurances or representations were given by Mr Sood or Mr Webster personally. This is an unpromising start from which to infer a fiduciary relationship.

126. I am in any event not impressed with (1). Even if the alleged reliance were established (as to which see paragraphs 102-103 above), it demonstrates only that the employees were relying on the contractual commitment by ESMS which they had a legitimate expectation of obtaining and did in fact obtain.

127. As to (2), it is undoubtedly true that Mr Sood and Mr Webster were (at least prior to 2018) solely responsible for whether ESMS complied with its obligations, but *prima facie* only in their capacity as directors. However, I cannot see how this alone is sufficient grounds for inferring a fiduciary relationship with the employees. As directors, Mr Sood and Mr Webster primarily owed fiduciary duties and duties of loyalty to ESMS giving rise to legitimate expectations that they would not utilise their position adversely to the interests of the company. It is not easy to see how they can simultaneously have undertaken fiduciary obligations to the company's contractual counterparties whose interests might not be aligned with those of the company such as to give rise to any legitimate expectation that the directors would prefer the interests of the employees to those of the company. If it were otherwise, then every board of directors would owe fiduciary duties to the company's counterparties simply by dint of being in control of the company. In my understanding at least, this is not and never has been the law. Mr Sood and Mr Webster's status as shareholders is likewise irrelevant in the absence of some personal assumption of responsibility: see paragraph 82 above.

128. I accept that (3) gives rise to a question of fact which it would be inappropriate to determine now, although it is right to say that the position of the employees in this case was not obviously more vulnerable than the position of any employee in any other company. Moreover, the transferring employees such as Mrs Fitzpatrick had a veto over the sale of the business and so arguably were not vulnerable at all. Nonetheless, even assuming that the employees were in a position of particular vulnerability, this is only a circumstance which *might* indicate a fiduciary relationship. It is not determinative and in the absence of any personal assumption of responsibility or undertaking by Mr Sood or Mr Webster, it cannot on its own have the effect of creating a relationship of trust and confidence. After all, the employees were employed by ESMS, not by Mr Sood and Mr Webster personally and their vulnerability was vis-à-vis their employer. In truth, therefore, this ground adds nothing to (2).

129. A further objection raised by Mr Ashworth was that recognition of a fiduciary relationship would have the effect of grafting equitable obligations on to carefully negotiated commercial agreements in circumstances where all parties had had the benefit of expert legal advice and so should not be treated as being vulnerable at all. There was some debate before me as to whether the imposition of fiduciary obligations would "distort" the contractual bargain between ESMS and GSTT and I was referred in this context to *F&C Alternative Investments Ltd v Barthelemy (No. 2),* [2011] Ch. 613:

*"[223] … The touchstone is to ask what obligations of a fiduciary character may reasonably be expected to apply in the particular context, where the contract between the parties will usually provide the major part of the contextual framework in which that question arises…*

*[225] … Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another. As between the parties to a contract, the existence of express or implied contractual terms may be directly inconsistent with the imposition of such duties, and hence exclude them; and that may also be true where a person who is not a party to the relevant contract… accepts appointment to carry out functions defined by the contract and on the basis of the terms set out in the contract. It may also be the case that the overall contextual framework created by the contract simply means that it is not appropriate for the law to impose the whole range of possible fiduciary duties or fiduciary duties of particular types in that specific context – in other words, it may be found that the parties could not reasonably expect that some particular duty of a fiduciary character should apply in the context of their particular relationship or in the context of their relationship with a person accepting appointment as a manager or board member."*

See also *Ross River Ltd v Cambridge City Football Club Ltd,* [2008] 1 All ER (Comm) 1028 at [197]-[198].

130. These passages confirm that any fiduciary obligation should be moulded to the contract, not only in a two-party situation, where the question is whether one contracting party has undertaken a fiduciary obligation to the other, but also in a three-party situation such as this. On any view, it must therefore be relevant to any objective assessment of the alleged undertaking that:

(1) A, who is said to owe a fiduciary duty to C, is the agent of and undoubtedly owes fiduciary duties to B in circumstances where the interests of B and C may not always coincide;

(2) C has its own contractual rights not only against B, but also against a third party trustee, T;

(3) T has the benefit of a right of indemnity against B under clause 14.1 of the EBT deed, thus suggesting that the objectively contemplated route for redress primarily lies against T rather than anyone else;

131. In response, it might be said that there can be no objection to imposing a fiduciary duty on a director in favour of the employees where the company itself owes a co-extensive duty to them: see, for example, *Ross River Ltd v Waveley Commercial Ltd,* [2013] EWCA Civ. 910. However, *Ross River* was a case where it was held that both the company and its controller owed co-extensive fiduciary duties and in the present case, I cannot see any scope for the imposition of a fiduciary duty on ESMS. By the BPA, ESMS undertook a contractual obligation, which the employees were given an express right to enforce, and which was intended to be embodied in a deed giving rise to a 12 year limitation period. In the end, the BPA was not signed as a deed but that appears to have been by oversight rather than design. Nonetheless, the fact that the employees had their own express contractual right undermines the suggestion of any particular vulnerability which needed equitable protection by the further imposition of a fiduciary duty.

132. In truth, the alleged fiduciary duty does not go any further than the contractual commitment, and the employees cannot in my judgment have had any legitimate expectation of an obligation of loyalty on the part of ESMS over and above that contractual commitment. The present case is therefore a long way from *Ross River* which concerned a joint venture more akin to a partnership giving rise to mutual obligations of good faith than to an arm's length contract between opposed negotiating interests.

133. Nor is it clear to me why, having undertaken to secure and having in fact secured the contractual commitment requested by the employees, Mr Sood and Mr Webster should be regarded as having undertaken *on a personal fiduciary basis* to ensure the fulfilment of that obligation when the employees could simply rely on their independent contractual rights.

134. Ultimately, therefore, it seems to me that Mr Talbot's Orthodox Route 2 has no better prospect of success than his Orthodox Route 1 for essentially three reasons:

(1) It suffers from the same fatal flaw as the proprietary estoppel case, namely that there was no undertaking by Mr Sood or Mr Webster personally;

(2) The employees cannot objectively have had a legitimate expectation of single-minded loyalty from Mr Sood and Mr Webster when they had a direct contractual right to enforce the EBT Obligation;

(3) In the light of that contractual right which it was open to the employees to assert at any time, there is no necessity for the intervention of equity.

135. There are also further difficulties which arise on this way of putting the case:

(1) To whom was any undertaking given? Ms Robinson, for example, gives no evidence that she relied on anything said or done by Mr Sood or Mr Webster. On the contrary, her understanding was derived solely from what she was told by Mrs Fitzpatrick.

(2) Recognising the potential problems with time bar, Mr Talbot only relied on the 2018 share capital reorganisation and subsequent distribution of dividends as constituting a breach of the alleged fiduciary duty. However, as Mr Ashworth pointed out, Mr Sood and Mr Webster still hold sufficient shares by value in their own names to satisfy any shortfall in the EBT. It is therefore difficult to see how there can have been a breach of fiduciary duty by virtue of any dealings with the shares now held by the Fourth to Seventh Defendants, or, indeed, how the Fourth to Seventh Defendants can have been under any fiduciary obligations at all. There was certainly no suggestion of any personal undertakings by Mrs Sood or Mrs Webster or on behalf of the Sixth or Seventh Defendants. Moreover, any exercise by Mrs Sood and Mrs Webster of their discretion to distribute dividends was made in their capacity as directors only and so faces the same obstacles to the imposition of a fiduciary duty as discussed in paragraph 127 above.

(3) Finally, I am not entirely convinced by the argument that Mr Sood and Mr Webster received a benefit or made a profit by sub-dividing their existing shares. If I have a bar of chocolate, breaking it into four pieces does not change the amount of chocolate. I do not receive any benefit by the division even if I now have more, albeit smaller, pieces than before. Nor do I receive a benefit by giving two of them away.

136. Nonetheless, if I had held that there was an arguable case that Mr Sood and Mr Webster were fiduciaries, I would have held that the Claimants had an arguable case as to breach of duty as against them alone (but not as against the Fourth to Seventh Defendants) and that the question of remedy should go to trial. As it is, however, my conclusion is that the Claimants cannot show a real prospect of success for the reasons already stated.

**Orthodox Route 3: Breach of fiduciary duty – constructive trust of profits**

137. Orthodox Route 3 is merely an extension of Orthodox Route 2, seeking a declaration that the benefits received as a result of the alleged breach of fiduciary duty are held on constructive trust. If there is no foundation for Orthodox Route 2, it follows that this way of putting the case is likewise flawed. It would also raise the difficulties identified in paragraph 116 as to whether it would be appropriate to impose a constructive trust at all.

**Less Orthodox Route: Constructive trust based on unconscionable retention of property**

138. Mr Talbot's final, less orthodox, way of putting the Claimants' case was to argue that a constructive trust in favour of the employees should be recognised arising from the Second to Seventh Defendants' unconscionable retention of the company's share capital given: (i) the terms of the BPA; (ii) the circumstances relied upon above as giving rise to the alleged fiduciary relationship; (iii) the detriment allegedly suffered by the employees in reliance on the promise that the EBT Obligation would be fulfilled; and (iv) the corresponding personal advantage to the Second to Seventh Defendants in failing to fulfil that obligation.

139. The classic exposition of constructive trusts is to be found in *Williams v Central Bank of Nigeria*, [2014] UKSC 10; [2014] AC 1189 at [9]-[11] endorsing what was said by Millett LJ in *Paragon Finance plc v DB Thakerar & Co.*, [1999] 1 All ER 400 at 408-409. In summary, there are two distinct types of constructive trust:

*"The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees de son tort, who without having been properly appointed, assume to act in the administration of the trusts as if they had been; or trustees under trusts implied from the common intention to be inferred from the conduct of the parties, but never formally created as such. These people can conveniently be called de facto trustees. They intended to act as trustees, if only as a matter of objective construction of their acts. They are true trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed. Others, such as company directors, are by virtue of their status fiduciaries with very similar obligations. In its second meaning, the phrase "constructive trustee" refers to something else. It comprises persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in a misapplication of the funds by the trustee, or they have received trust assets knowing that the transfer to them was a breach of trust. In either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not. These can conveniently be called cases of ancillary liability. The intervention of equity in such cases does not reflect any pre-existing obligation but comes about solely because of the misapplication of the assets. It is purely remedial."*

140. Outside these two types of constructive trust, it is clear – for the time being at least – that a purely remedial constructive trust is not a creature known to English law: see *FHR European Ventures LLP v Cedar Capital Partners LLC*, [2014] UKSC 45; [2015] AC 250 at [47]; *De Bruyne v De Bruyne*, [2010] EWCA Civ. 519 at [50].

141. The Claimants' case was not advanced as a type 2 constructive trust on the basis that the Second to Seventh Defendants had participated in any unlawful misapplication of trust assets. I was told that allegations of fraud had been made in correspondence only to be dropped shortly before the hearing. They were not pursued before me and formed no part of either the pleaded case or the draft amendments. I therefore ignore them.

142. Rather (although this was not immediately clear from the Claimants' skeleton argument), the case was put as a type 1 constructive trust.

143. As to this, I accept that the circumstances in which property is acquired may justify the imposition of a constructive trust and that it is not necessary to show either detrimental reliance or fraud. However, the property must have been transferred on the basis of some understanding or agreement to hold it for the benefit of a third party *and* it must be unconscionable for the transferee to assert his own beneficial interest and deny that of the third party. In other words, unconscionability is a necessary ingredient, albeit not sufficient on its own: *"possession of the property must be coloured from the first by the trust and confidence by means of which he obtained it"*: see *Paragon Finance (supra)* at 409; *De Bruyne v De Bruyne (supra)* at [51].

144. In my view, there are many reasons why the argument cannot succeed in this case:

(1) Mr Sood and Mr Webster were not parties to the BPA. Accordingly, it would only be unconscionable for them to retain their shares if they had undertaken personal responsibility for the fulfilment by ESMS of the EBT Obligation. As I have held above, they did not.

(2) Having held that the circumstances relied upon by the Claimants did not give rise to any fiduciary relationship on the part of Mr Sood or Mr Webster, it is difficult to see how the same circumstances can be any more efficacious when marshalled in support of this less orthodox argument.

(3) No property was ever transferred to Mr Sood or Mr Webster. They already owned their shares in ESMS before the EBT Obligation arose. If no constructive trust existed when they first acquired their shares, it is difficult to see how one can have arisen merely because they split those shares and subsequently divested themselves of part: see paragraph 135(3) above.

(4) Moreover, there was no agreement or undertaking by Mr Sood or Mr Webster personally (let alone by the Fourth to Seventh Defendants) to hold their shares for the benefit of the employees.

(5) There is no obvious unconscionability in the retention by the Fourth to Seventh Defendants of their shares in circumstances where Mr Sood and Mr Webster have sufficient in their own names to satisfy any outstanding obligations under the BPA.

(6) In any event, the Sixth and Seventh Defendants have no power to bring about fulfilment of the EBT Obligation.

145. Mr Talbot submitted that I should not strike out this way of putting his case if I was persuaded by his more orthodox routes. He referred to *Clarke v Meadus*, [2010] EWHC 3117 (Ch) where Mr Justice Warren allowed a case of proprietary estoppel to go to trial and accordingly declined to strike out a claim for a purely remedial constructive trust. In comparable circumstances, I might well have been prepared to take the same course. However, the converse must also be true and, having held that Mr Talbot's orthodox routes have no real prospect of success, there is no basis for maintaining this less orthodox route which has all the hallmarks of a pure – and impermissible – remedial constructive trust.

**Specific performance**

146. As already stated, the claim for specific performance is no longer pursued against the Second to Seventh Defendants. Mr Talbot argued that I should nonetheless maintain the claim against them on the basis that they are necessary and proper parties to the claim for specific performance against the First Defendant.

147. I fail to see why. If, as I have found, there is no arguable claim against the Second to Seventh Defendants on any basis, the proceedings against them should be dismissed.

**Conclusion**

148. The real underlying complaint in this case is that ESMS did not perform its contractual obligations. The employees have known or should have appreciated ever since 2012 that the obligation had not been performed timeously. They could have sued ESMS at any time after that but chose not to do so. The reasons for this were not canvassed before me although I note Mrs Fitzpatrick's evidence that by late 2014 it was obvious that the business was becoming increasingly successful and that the lack of urgency in the creation of the EBT was therefore not concerning to her. Be that as it may, this is not a case where the employees were unprotected.

149. The considerable passage of time since then has resulted in some inventive causes of action being advanced as a means of circumventing the time bar. These causes of action all depend on the intervention of equity and there are limits to the extent to which equity will bend over backwards to assist a litigant in circumstances where perfectly good legal remedies were available to it.

150. But in my judgment and for the reasons given, the Claimants' claims against the Second to Seventh Defendants fail at the first hurdle primarily on the basis that the evidence on which they rely does not disclose a real prospect of establishing any assurances or assumption of responsibility by Mr Sood or Mr Webster or any of the other shareholders personally.

151. It follows that the Second to Seventh Defendants' application succeeds. I will invite counsel to agree an appropriate form of order.