Neutral Citation Number: [2019] EWHC 1 (Ch)

Case No: C40MA058

IN THE HIGH COURT OF JUSTICE
PROPERTY AND BUSINESS COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT

Manchester Civil Justice Centre
Manchester M60 9DJ

Date: 09/01/2019

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

(1) MENTAL HEALTH CARE (UK) LIMITED	**Claimant**
- and –	
(1) EDWARD LUPEN HEALTHCARE LIMITED	
(2) DR DEVAN MOODLEY	
(3) W-I TECHNOLOGY LIMITED (IN LIQUIDATION	**Defendants**

- -

Ms Lesley Anderson QC (instructed by **Knights PLC**) for the **Claimant**
Dr Richard Wilson QC (instructed by **Bond Adams LLP**) for the **First and Second Defendants**
The **Third Defendant** did not appear and was not represented.

Hearing dates: 3-7, 10-14,17-19 and 24 September and 11 October 2018

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Approved Judgment

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

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

Parties

1. The claimant ("MHC") was a wholly owned subsidiary of Castlebeck Care (Teasdale) Limited ('Castlebeck') until November 2012, when its shares were acquired by Mr. Michael Adey-Jones, who is referred to universally in these proceedings and, therefore, in this judgment, as Mr. Adey. It is a company that provides private residential and healthcare services for service users and patients with autism, learning and mental health disabilities from various sites in England and Wales either itself and through its various subsidiaries.

2. The first defendant ("ELHL") is a company of which the second defendant ("DM") is the sole director and shareholder.

3. DM is a registered medical practitioner and consultant psychiatrist. He was MHC's Medical Director between October 2011 and 4 April 2016. Between May 2012 and 4 April 2016, DM was authorised to approve registered medical practitioners for Approved Clinician status for the purpose of compulsorily admitting someone with a mental disorder to a hospital as required by s.12(2) of the Mental Health Act 1983. Between about August 2012 and 4 April 2016, DM was also MHC's Responsible Officer within the meaning of the Medical Profession (Responsible Officer) Regulations 2010 ("2010 Regs".). In that capacity, DM was responsible for the evaluation of the fitness to practise of every medical practitioner with a prescribed connection to MHC – see Reg. 11 of the 2010 Regs. This task included carrying out regular appraisals of such practitioners and maintaining records of medical practitioners' fitness to practice evaluations including records of appraisals. Between 2014 and 4 April 2016, DM was also MHC's '*Caldicott Guardian*' – responsible for protecting the confidentiality of patient and service user information and advising on when it is appropriate to share such information. The role included "*... representing and championing information governance requirements and issues at Board and management team level*".

4. ELHL is DM's service company through which his services were ostensibly provided to MHC. I say '*ostensibly*' because a major issue in these proceedings is whether in fact that was how DM's services were provided or whether, as DM contends, the Consultancy Agreement on which MHC relies in these proceedings was a sham, void and of no effect because DM was in reality employed under a contract of employment between him and MHC.

5. There are two consultancy agreements on which MHC relies in support of its contention that at all times DM was a free-lance practitioner who provided his services to MHC through ELHL. DM signed the first on 11 October 2011 and Mr. David Beattie signed it on behalf of MHC (then a wholly owned subsidiary of

Castlebeck) on 14 October 2011 ("1st Consultancy Agreement"). The second consultancy agreement is dated (erroneously) 17 July 2011, was made between MHC and ELHL and was supposedly entered into in substitution for the 1st Consultancy Agreement. It is common ground that this agreement was signed only sometime in 2014 ("2nd Consultancy Agreement"). It is this agreement on which MHC relies in these proceedings but which ELHL and DM maintain is a sham, void and of no effect. MHC's case is that DM is jointly and severally liable with ELHL for any breach of the 2nd Consultancy Agreement.

6. The relationship of MHC with DM and ELHL came to an end on 4 April 2016 as a result of what MHC maintains was the termination of the 2nd Consultancy Agreement. DM characterises the ending of his relationship with MHC as a summary dismissal because, as I have said, he maintains that that he was an employee.

7. The third defendant ("WIT") is a limited company whose business was the provision of nurse re-validation products and services. It is now in liquidation and did not appear and was not represented at the trial. Its main importance in this litigation is that MHC maintains that DM had a commercial or financial interest in it at a time when it entered contractual relations with MHC. I explain the significance of this further below.

Claim in Summary

8. MHC contends that ELHL and DM have acted in breach of various duties that it alleges arise:

(a) As contractual duties under the terms of the 2nd Consultancy Agreement;

(b) As fiduciary duties allegedly owed by DM by reason of him allegedly being a *de facto* director of MHC and/or by reason of DM's role as Medical Director; Responsible Officer and/or Caldicott Guardian;

(c) At common law; and/or

(d) As a consequence of the regulatory duties owed by DM to MHC by reason of his roles as MHC's Medical Director or Responsible Officer or Caldicott Guardian;

by failing to declare to MHC DM's alleged financial and commercial interests in various companies with which MHC entered into agreements for the provision to it of the services and products that I describe in more detail below. MHC alleges that in consequence, ELHL and/or DM are liable in damages to MHC. MHC also alleges that ELHL and/or DM are liable in damages in tort and/or as conspirators, and/or DM is liable to pay equitable compensation for accessory liability in respect of ELHL's alleged breaches of fiduciary duty, in each case for the same sums as are claimed as damages for breach of duty.

9. Dr Wilson QC, counsel for DM and ELHL, submits that if I conclude that in fact DM was an employee then it necessarily follows that the 2nd Consultancy Agreement is a sham, void and of no effect and in consequence the claim must be dismissed. It is common ground that if the 2nd Consultancy Agreement is a sham, MHC will not be able to rely on its terms to found this claim. Dr Wilson argues that if the 2nd Consultancy Agreement is valid, DM is not personally liable for any breach of the 2nd Consultancy Agreement that might be proved because he was not a party to it. MHC has not pleaded an alternative case that DM owed the duties relied on or some of them under or by virtue of any contract of employment between him and MHC if (contrary to its case) he was an employee. Whilst arguing that (i) DM was not MHC's employee and (ii) the 2nd Consultancy Agreement is not a sham, Ms Lesley Anderson QC, counsel for MHC, submits that these points are immaterial to the outcome of these proceedings. She submits this is so given the alternative ways in which MHC's claim has been pleaded and given in particular MHC's case that DM was a *de facto* director of MHC. Ms Anderson submits that whichever route succeeds, the result is the same. She maintains that in reality the employment issue is material only to some Employment Tribunal proceedings commenced by DM against MHC that are stayed pending determination of these proceedings.

10. In my judgment there are three issues that should be resolved ahead of all others. The first is whether the 2nd Consultancy Agreement is a sham and void. The second is whether DM can be liable in law for any breaches of the 2nd Consultancy Agreement that might have been proved. The third is whether, as MHC asserts, DM was at all material times a *de facto* director of MHC. Although MHC's pleaded case is that either DM or ELHL was a *de facto* director, the case that ELHL was a *de facto* director was not pressed at trial. This is unsurprising given the terms of the 2nd Consultancy Agreement and the factual basis on which the *de facto* directorship allegation is advanced, which depends exclusively on the alleged personal involvement of DM in the general management of MHC. If I conclude that DM was a *de facto* director of MHC then it will be necessary for me to decide whether DM owed MHC any of the alleged fiduciary duties on which it relies in these proceedings. It will then be necessary to make factual findings relevant to the alleged breach of those duties.

11. MHC's alternative case - that ELHL and/or DM owed relevant fiduciary and other duties to MHC by reason of DM being its Medical Director and/or its Responsible Officer and/or its Caldicott Guardian - arises only if I conclude that the 2nd Consultancy Agreement is void and of no effect or MHC's case that DM is jointly and severally liable with ELHL for breach of the 2nd Consultancy Agreement should be rejected and DM was not a *de facto* director of MHC.

12. There are various other allegations made against ELHL and DM in relation to alleged misuse of confidential information, a failure to obtain and maintain insurance cover and in relation to DM's management of a patient known in these proceedings as '*Patient X*'. It is not necessary for me to summarise these at this stage. They are

relatively insignificant both in terms of the monetary value attributed to them and the time taken up at trial in investigating them. I address them at the end of this judgment.

Re-validation

13. The General Medical Council ('GMC') was at all times material to these proceedings, and is, the primary regulator for medical practitioners. On 3 December 2003, the GMC Licence to Practise and Revalidation Regulations 2012 ("Revalidation Regs.") came into force. The Revalidation Regs imposed on medical practitioners a requirement to demonstrate continued fitness to practice by means of a revalidation process. Retention of a licence to practice was conditional upon compliance with, and satisfactory completion of, the revalidation process. The Nursing and Midwifery Council ("NMC") was at all times material to these proceedings, and is, the primary regulator for nurses including mental health nurses. On 8 October 2015, the NMC decided to adopt a similar revalidation procedure to that adopted by the GMC with effect from 1 April 2016. MHC was responsible for assisting its medical and nursing practitioner staff to comply with their revalidation obligations.

MHC's Core Breach allegations

14. MHC alleges that ELHL and DM acted in breach of the various duties allegedly owed to MHC by, or are otherwise liable under the various other causes of action relied on for, failing to disclose to MHC DM's alleged financial and commercial interests in various companies with which MHC entered into agreements for the provision to it of revalidation services and products to MHC and/or the provision of e-learning products and services to MHC for use by its staff. It is alleged that had DM disclosed that information then MHC would not have entered into those agreements, summarised in more detail below. In consequence, MHC alleges, it is entitled to recover by way of damages or equitable compensation (i) the whole of the sums it paid under the supply agreements and (ii) the salary of its staff for the whole of the time they were engaged in activity relating to the negotiations leading to the agreements and in facilitating the provision of services under those agreements thereafter. MHC also seeks to recover a portion of the sums paid by it to ELHL under the 2nd Consultancy Agreement on the basis that a portion of his time paid for by MHC was spent in furthering the interests of the service providers.

15. DM was heavily involved in introducing processes that enabled MHC's medical and nursing staff to comply with their revalidation obligations. Prior to the coming into force of the relevant regulations there was a significant amount of preparatory work. He was placed on a circulation list maintained by Independent Health Care Advisory Service of those at MHC concerned with preparing for the coming into effect of the Revalidation Regs – see the email from Dr Farooq on behalf of Castlebeck to Andrew Wilby of Independent Health Care Advisory Service dated 2 December 2011. DM was copied in to all communications from the GMC concerning revalidation – see the email from Mr. Beattie to DM dated 28 March 2012. Ultimately it was DM who

finalised the arrangements within MHC for the revalidation of medical practitioners working for MHC – see his email of 7 August 2012.

16. MHC's case is that at the same time as leading for MHC on these issues, in breach of the various fiduciary and other duties summarised above, DM failed to disclose that he was commercially and financially involved in the companies that were offering, and eventually agreed with MHC, to provide revalidation and e-learning products and services to MHC. This central allegation is made specifically in relation to the following contracts and services:

    i) A contract between MHC and Symbio Scientific Limited ('Symbio Scientific') made on or about 3 December 2012 ('Contract 1') pursuant to which Symbio Scientific was to supply to MHC '*Revalidation Wizard*' software for a fixed fee of £38,000 (ex VAT) and £1,000 per month (ex VAT). '*Revalidation Wizard'*, which later became known as '*Revalidation Connect'*, was a revalidation product for GMC regulated medical practitioners;

    ii) A contract between MHC and Symbio Connect Limited ('SCL') made on or about 11 December 2014 ('Contract 2') pursuant to which SCL was to develop for and supply to MHC on a pilot basis for use by 200 users a product called "*Achieve Connect*" for a fee of £30,000 (inc VAT) and an annual subscription based on the number of enrolled staff at £9.99 per month (in VAT). Achieve Direct was an e-learning platform that provided clinical staff working for MHC with mandatory specialist training for CPD, regulatory compliance and revalidation purposes;

    iii) A contract between MHC and WIT made on 8 October 2015 ('Contract 3') pursuant to which WIT was to supply '*Nurse Connect*', which was described in the contract as being a *"... a complete Nurse Revalidation Solution using our Nurse Connect Platform ...*at a price of £648 per month for 100 licensees; and

    iv) A contract between MHC and Symbio Connect made on 28 October 2015 ('Contract 4') under which Symbio Connect was to provide Revalidation Connect and post-pilot Achieve Connect to MHC at a price of £95,000 (inc VAT) and £1,000 per month for a 12-month period.

Relief Sought by MHC

17. Although the trial bundle runs to some 69 lever arch files of material, the trial lasted 14 days, MHC's written opening ran to 231 paragraphs over 37 pages, ELHL and DM's opening ran to 103 paragraphs over 36 pages, MHC's closing written submissions ran to 615 paragraphs over 76 pages and ELHL and DM's closing submissions were contained in 332 paragraphs over 112 pages, the monetary value of the claim is modest.

18. It is a notable feature of this case that there were no submissions made on behalf of the claimant in either the written opening or closing submissions as to how the assessment of damages or equitable compensation should be approached as a matter of fact or law, other than a submission from Ms Anderson to the effect that since none of the evidence advanced by MHC relevant to loss was challenged it necessarily followed that I should assess damages in the sum asked subject to the issues of liability. I do not accept that as correct and indeed Ms Anderson accepted it was not correct in the course of her oral closing submissions when I pressed her on the point. She accepted that it remained for her client to prove the loss claimed and also that the sums claimed were recoverable as a matter of law. It was necessary for me to request additional written submissions on the wasted employee costs loss issues from each party and then to request that they be augmented by cross referencing to documents said to support the submissions made.

19. Many of the heads of loss are described in the Schedule of Loss prepared by MHC as "*to be assessed"*. One of the sums left to be assessed concerns a claim for repayment to MHC of part of the sums paid to ELHL for the period between 4 December 2012 and 23 May 2016. The Schedule of Loss in effect invites me to select a percentage of the total sum paid over the relevant period. Dr Wilson submitted that was an impermissible approach. Ms Anderson maintained that I had to do the best I could with the material presented and if that involved a broad-brush assessment then that is what had to be done.

20. The other '*to be assessed*' item is a claim for the loss of use by MHC of their employees' time while engaged on activity in connection with the various Symbio companies identified above and WIT on the instructions or with the consent of DM. Although an attempt has been made to calculate the value of this claim in respect of Ms Gemma O'Malley, its value is modest - £25,819.35. The claims for other employees are even more modest. The sum claimed in respect of (a) Mr. Sandick is £142.24, (b) Mr. Shields is £426.75, (c) Mr. Bromfield is £759.82, Ms Edwards is £407.78, Ms Williams is £216.78 and Ms Ward is £569. In relation to Mr. Williams, Ms Johnson, Ms Harrison, Mr. Clive Jones, Mr. Colin Short, Mr. John Evans, and Ms Lisa Bessal, the court is again invited to select a percentage of the sums paid by MHC to the person concerned.

21. MHC also claims sums paid to various employees by way of bonus totalling £9,104, the sum of £250 paid to Patient X, it being alleged that (i) Patient X was unlawfully detained, (ii) DM was responsible for that occurrence and, therefore, (iii) is liable in damages for breach of duty in the sum paid by MHC to Patient X on an *ex gratia* basis and the cost incurred by MHC in obtaining legal advice in connection with Contract 1 quantified in the sum of £4,340.00 plus VAT. It is entirely unclear why a company such as MHC that will be registered for VAT should be recovering the VAT as damages in any event. No attempt has been made to justify this claim either factually or legally. Finally, the sum of £6,000 plus VAT is claimed in respect of costs allegedly incurred in instructing a third party to carry out a review of DM's

professional email account. Again no attempt has been made to justify this claim either factually or legally.

22. The total value of these claims (ignoring at this stage those claims in respect of which a percentage recovery is sought) comes to £203,737.72 without including any sum for VAT. The costs of these proceedings have been budgeted for MHC at £549,698 and for ELHL and DM at £471,454.

23. Unfortunately, these proceedings appear to have been driven by a remarkable level of animosity between MHC (in reality, I infer, Mr Adey, since he is the sole shareholder in MHC) and its witnesses (most of whom remain employed by, or have services agreements with, it) on the one hand and DM on the other. There is a hint of this in what Ms Lourdes Holgate says in paragraph 14 of her initial witness statement, where she quotes Mr. Adey as having allegedly told her, following the termination of the relationship between DM and MHC, that he would "*... destroy Dr Moodley and be willing to spend millions of pounds of his own personal money to sue and pursue Dr Moodley through the courts to destroy him ...*". There is also a hint of this to be found in repeated references during DM's cross-examination to the fact that as a medical practitioner DM was regulated by the GMC, which expects such practitioners to observe the highest standards of probity, a theme that MHC returned to in its closing submissions, where, aside from submitting that DM "*... has been exposed to be dishonest in all respects ...*" It adds that " *he is a doctor, a member of one of the most honourable of professions subject, as he accepted, like barristers, to the special privileges and responsibilities which that brings (T ...8/1026) ...*". It probably also explains the unusually combative way in which this litigation and this trial has been conducted by both sides, manifesting itself for example in the number of preliminary applications made at the start of the trial for directions that in most cases would have been resolved without difficulty and by agreement and by the charged and aggressive interchanges between counsel during the trial, which continued into the final oral submissions. I regret all of this as antithetical to the Overriding Objective.

Missing Witnesses

24. Another feature of this case is that although MHC's primary case is that DM was a *de facto* director of MHC, and that it would never have entered into the supply agreements with Symbio Scientific, SCL or WIT had DM disclosed what it is alleged he should have disclosed, Mr. Adey (the sole shareholder in, and one of the two statutory directors of, MHC at all times material to these proceedings) has not been called as a witness by MHC and no explanation has been offered as to his absence. This led Dr Wilson to submit that I should draw adverse inferences against the claimant from this absence, applying Wisniewski v. Central Manchester Health Authority [1998] PIQR 324, where at page 340, Brooke LJ summarised the applicable principles as being:

> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

Since no explanation has been offered for the absence of Mr. Adey, in principle it would be open to me to draw adverse inferences from his absence, but whether I can do so will depend on the evidence adduced by DM in relation to the issues on which Mr Adey might have been expected to have material evidence to give. I return to this issue therefore later in this judgment when considering the evidence relevant to that issue in detail.

25. Dr Wilson makes a similar submission concerning Mr. Pino, who during the period material to these proceedings was first the company secretary then the Finance Director then the Chief Executive of MHC. On MHC's case, Mr Pino was the only person other than Mr. Adey who was a statutory director of MHC and was Mr. Adey's right-hand man. The evidence suggests that Mr. Pino left MHC following differences between him and Mr. Adey. That might have explained why MHC has not produced him. However, that was not suggested and there is no evidence that such is the reason for his absence. Indeed, there is no explanation offered for his absence. It is submitted by Dr Wilson that I should draw similar inferences in relation to his absence to those that he invited me to draw in respect of Mr Adey. In my judgment the position in relation to Mr. Pino is the same as I have concluded is the position in relation to Mr. Adey.

The Trial

26. The trial took place between 3-7, 10-14,17-19 and 24 September and 11 October 2018. 24 September 2018 had been fixed for oral submissions with directions being given for the exchange of written closing submissions by 4 p.m. on Sunday 23 September 2018, so as to permit pre-reading by everyone including me prior to the resumption of the hearing. Dr Wilson did not offer his written closing submissions to either Ms Anderson or me until shortly before the planned resumption of the hearing on 24 September. Ms Anderson quite rightly objected to this on the basis that she had completed her submissions as directed, that the purpose of the oral submissions was to enable each advocate to answer what the other had said in their written closing submissions and that the failure by Dr Wilson to serve his closing submissions as directed precluded her from doing so. Dr Wilson accepted that this was so. There was

nothing that could be done therefore other than to adjourn the hearing of oral submission to the next date when Ms Anderson could be available – 11 October 2018. Following the completion of the oral closing submissions on that date, Ms Anderson applied for an order that DM and/or ELHL pay MHC's costs thrown away by all this. I directed that all questions concerning the costs resulting from this would be dealt with following the hand down of this judgment.

27. During the trial, I heard oral evidence on behalf of MHC from:

i) Mr Ryan Sandick, who has been employed by MHC since October 2013 initially as its Head of Clinical Governance and who has been a statutory director of MHC since April 2017;

ii) Mr Kevin Shields, who was employed by MHC from May 1997 and who was employed at MHC's Head of Regulation and Compliance from November 2011and from September 2014, a statutory director of MHC's subsidiary companies though not of MHC itself. He retired as a full-time employee on 5 July 2017 but from 14 August 2017 has been a part time worker for MHC;

iii) Ms Kerry McKevitt, a Human Resources professional who started working at MHC on a consultancy basis in November 2015, who became full time Head of People services in or around Spring 2016, a post she held until 1 July 2017 when she became Head of Partner Engagement. She resigned that position in January 2018 but continues to perform project consultancy work for MHC on an *ad hoc* basis;

iv) Mr Mark Selwyn, a solicitor who was a partner in a large regional practice until November 2015, when he was employed by MHC as its Head of Legal Affairs. He continues in that role, which became a part time one in January 2018;

v) Ms Gemma O'Malley, who was employed by MHC in various roles between October 2011 and December 2015. She returned to employment by MHC in March 2016. Ms O'Malley was heavily involved in the provision to MHC by the Symbio companies of the revalidation and e-learning products and services to which I refer in summary above. She gave evidence from behind screens. The application for an order that she be permitted to do so was made at the outset of the trial and is the subject of a separate ruling I gave at the time. I need say no more about it in this judgment. Ms O'Malley is a significant figure in this dispute. Her credibility has been heavily challenged by DM and ELHL. During the period material to these proceedings she had a very close working relationship with DM that strayed across the boundaries that would normally be found in a professional or working context. The extent to which that was so will be apparent from various emails and text messages that I refer to in detail later in this judgment. In summary, her evidence is that DM "… *gradually developed a hold over me by making me feel special, both in a personal*

capacity (see paragraphs 178 to 193 below) and professional capacity. At work, he continued to put me forward for more responsibility and give me tasks that he knew I would be keen to take on and that would interest and enthuse me, and in relation to which he provided any necessary direction or authority ...", that he was *"very manipulative"* and that she is *"... extremely embarrassed by the whole situation between me and ...*" DM;

vi) Dr Christopher Hanna, a software developer employed by Symbio Connect during the period material to these proceedings;

vii) Ms Janice Meadows, the mother of Ms Gemma O'Malley, a former finance controller and Finance director of Beechdale Homes Limited and currently the Chief Operating Officer of British Sub-Aqua Club. She was responsible for forming and became the sole director and shareholder of WIT. It is common ground that she was requested to do so by Ms O'Malley. The issue that I have to decide is whether that request was made by Ms O'Malley for the benefit of herself or at the request of DM;

viii) Mr John Bromfield, who has been employed by MHC since December 2009, first as head of nursing and clinical services at one of the hospitals operated by MHC (New Hall) and, since April 2013 as the manager of new Hall Hospital;

ix) Dr Marie-Therese Charles, the sole director and shareholder of Silverfish Studios Limited ("Silverfish") and Symbio Connect. She is another witness of importance in these proceedings, whose credibility has been heavily challenged;

x) Dr Kuldeep Kumar, a registered medical practitioner who became the sole director of and shareholder in Achieve E-Learning Academy Limited on its incorporation on 26 October 2015;

xi) Mr. Michael Macartney, a software developer who provided services at various times material to this dispute to (i) Silverfish, (ii) Symbio Connect and (iii) WIT;

xii) Mr. Darron Mark, who for a period material to these proceedings provided services to Symbio Connect as its Business Development Manager;

xiii) Mr. Jonathan McKinney, a software engineer who was employed at all material times by Silverfish until June 2014 when he was transferred to Symbio Connect;

xiv) Mr. Jim Steele, a software developer who was employed at all material times by Silverfish until June 2014 when he was transferred to Symbio Connect;

xv) Mr. David Williams, a manager employed by MHC who at the time material to these proceedings led a working group concerned with the introduction of an e-learning platform to MHC's business; and

xvi) Dr Anthony Dean, a registered medical practitioner who is currently employed as the medical Director of one of MHC's subsidiaries but from 1 March 2017 has been employed as MHC's Medical director.

28. I heard oral evidence on behalf of ELHL and DM from:

i) DM;

ii) Ms Lourdes Holgate, who was employed by MHC as a clinical administrator from 2006 until 31 October 2017 and as Mr. Adey's personal assistant between 2013 until August 2016;

iii) Dr Muhmmad Qureshi, a registered medical practitioner, who provided medical consultancy services to MHC between March 2014 and 27 April 2016, who is currently the CEO of Medical Support Union, a body that carries out annual appraisals and revalidations for medical practitioners and the medical Director of an agency that supplies locum medical practitioners to NHS and private healthcare providers;

iv) Ms Victoria Smith, DM's wife, who is alleged to have acted in effect as DM's *alter ego* in relation to his alleged financial and commercial interests that MHC allege DM should have been failed to disclose to it. Her credibility is heavily challenged by MHC as is that of DM;

v) Mr. Dale Ward, who was employed by MHC between December 2014 and December 2015, as its Head of Contracts and Tenders and whose line manager initially was DM; and

vi) Ms Nicola Johnson, a registered mental Health nurse who was employed by MHC between June 2014 and 2 May 2016, initially as a deputy hospital manager then as a hospital manager, who maintains that she resigned following the making of a total of eight public interest disclosures concerning MHC.

Credibility – General Principles

29. This dispute relates to events that took place between October 2011 and April 2016. A number of witnesses made clear that their recollection was limited to the material in contemporaneous documents because of the passage of time. Although it is possible that witnesses will resort to answers of that sort as a strategy for avoiding giving unpalatable answers, I am satisfied that none of the witnesses adopted that course in this case.

30. There were wide ranging challenges to the credibility of certain of the witnesses, in particular by MHC in relation to DM and Ms Victoria Smith and by DM in relation to Dr Charles and Ms O'Malley. A number of witnesses had highly polarised views concerning the parties. One example is Dr Charles who has a very hostile view of DM based on what she perceives to be unfair and duplicitous dealings on his part with her that led to the insolvency of her companies. Another is Ms O'Malley whose views concerning DM led her to request MHC's advisors to apply for her evidence to be given from behind a screen in order that she might not be observed or have any contact with DM. By the same token, a number of the witnesses who gave evidence on behalf of ELHL and DM were hostile to MHC because of the manner in which their relationship with MHC had come to an end. One example is Ms Nicola Johnson. Another is Ms Lourdes Holgate.

31. Given these factors, the features of this case mentioned in paragraph 23 above and that this is a heavily documented dispute, I have approached the factual issues between the parties that are material to this dispute by testing the oral evidence of each of the witnesses wherever possible against contemporary documentation, admitted and incontrovertible facts, and inherent probabilities. This is entirely conventional - see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 431 – and is particularly appropriate where (as here) the allegations relate to events that occurred years ago and the oral evidence is based on recollection of such events - see Gestmin SGPS SA v. Credit Suisse (UK) Limited [2013] EWHC 3560 per Leggatt J at paragraphs 15-22. It was this factor that led Leggatt J (as he then was) to observe at paragraph 22 that:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

32. Notwithstanding this being my primary approach, it will be necessary for me to reach conclusions concerning the credibility of some of the witnesses from whom I heard oral evidence. However, in my judgment that is an exercise that is best conducted by reference to the evidence given in relation to the substantive issues between the parties considered below, rather than attempting a wide ranging and free standing assessment of the credibility of particular witnesses before turning to the substantive issues, not least because my conclusions concerning credibility will depend in large part on a review of the contemporaneous documentation.

33. Before turning to the issues that matter in this case, it is necessary to note that some serious allegations of dishonest wrong-doing have been made by MHC against DM. Ms Anderson summarised these in her written opening submissions by characterising DM as "*… a serial liar and manipulator with magpie tendencies for stealing other people's ideas …*". In those circumstances, I remind myself of three basic principles.

34. First, the legal and evidential onus of proof rests throughout on MHC to prove on the balance of probabilities the claims they make in these proceedings. However, the evidential burden rests on DM to prove the positive factual allegations he relies on.

35. Secondly, whilst the standard of proof in a civil case is always the balance of probabilities, the more serious the allegation, or the more serious the consequences of such an allegation being true, the more cogent must be the evidence if the civil standard of proof is to be discharged – see Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 per Lord Nicholls at 586, where he said:

> "'The balance of probabilities standard means that a court is satisfied that an event occurred if a court considers that on the evidence the occurrence of the event was more likely than not. In assessing the probabilities, the court will have in mind as a factor to whatever extent it is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before court concludes that the allegation is established on the balance of probabilities. Fraud is usually less likely than negligence...Built into the preponderance of probabilities standard is a generous degree of flexibility in respect of the seriousness of the allegation.'"

36. Finally, it is necessary to remember that it does not necessarily follow from the fact that a witness has been shown to be dishonest in one respect that his evidence in all other respects is to be rejected. Experience suggests that people may give dishonest answers for a variety of reasons including an entirely misplaced wish to strengthen a true case that is perceived to be evidentially weak as opposed to a desire to advance a dishonestly conceived case in a dishonest manner. What such conduct will usually mean however is that the evidence of such a witness will have to be treated with great caution save where it is corroborated, either by a witness whose evidence is accepted or by the contents of contemporaneous documentation or is against the witness's interests or is admitted.

Findings and Conclusions On the Issues Between the Parties

37. The parties have between them identified a list of 86 issues that they consider it is necessary for the court to resolve. In my judgment it is not necessary to consider all the issues that have been identified in order to resolve the dispute between the parties. In consequence, it is neither necessary nor desirable that I should work my way through the list of issues in the order they have been set out.

The Consultancy Agreement Issues

38. ELHL and DM's case in relation to the 1st Consultancy Agreement, as summarised by Dr Wilson in his written opening submissions, is that it was a mere *"label"* that the parties sought to attach to their relationship and that *"The substance of their relationship ... was that Castlebeck employed [DM] as a consultant surgeon under a contract of service ...*" – see paragraph 75. It will be necessary for me to make findings about that because if ELHL and DM are right then it is more likely that the agreement that replaced it – the 2nd Consultancy Agreement on which MHC relies in these proceedings - would not reflect reality, it not being suggested that the 2nd Consultancy Agreement gave effect to a negotiated change of status from that which had applied before it was concluded.

39. In relation to the 2nd Consultancy Agreement, the defendants' case is that DM entered that agreement because he had no choice but to do so, the substance of the relationship between DM and MHC was that of employee and employer and, in consequence, I should hold the 2nd Consultancy Agreement *"... to be a sham and hold it to be ineffective"*. As Dr Wilson put it in his written closing submissions, DM was an employee under a contract of service and "*... as a result of his true status as an employee at all material times, the Second Consultancy Agreement was invalid and of no legal effect"*. Ms Anderson did not really grapple with this issue in her opening submissions but in her closing submissions she accepted implicitly that whether the 2nd Consultancy Agreement is valid and binding depends on whether I conclude that in substance DM was an employee – see paragraphs 116-123 of her written closing submissions. Ms Anderson submits that since DM was not in substance and reality an employee, it follows that the answer to the question whether the 2nd Consultancy Agreement was valid and binding is *"plainly yes*" – see paragraph 123 of Ms Anderson's written closing submissions.

Liability for Breach of the 2nd Consultancy Agreement

40. Dr Wilson submits that if the 2nd Consultancy Agreement is valid and enforceable, then it is in principle enforceable only against ELHL and not DM*" ... given the absence of any privity of contract with Dr Moodley.*". In paragraph 82 of his closing submissions, Dr Wilson adds that:

> "The claimant pleads that [DM] is jointly liable with [ELHL] for any breaches of contract and/or fiduciary duty owed by [ELHL] merely because he was the sole director and sole directing mind of [ELHL]. … This is wrong in principle and fails to respect the long established principle that directors and shareholders have separate legal personalities to that of their companies."

Dr Wilson returned to this point at paragraph 133 of his closing submissions, where he submitted that the principle that a company was to be treated as a legal personality separate and distinct from its directors was one that had to be respected – a proposition which he submits is supported by HMRC v. Holland [2010] UKSC 51 *per*

Lord Saville at paragraphs 97-99 and Lord Hope at paragraph 25. Ms Anderson did not address this point in either her written opening or her written or oral closing submissions. It is convenient to deal with this short point at this stage.

41. MHC alleges that both ELHL and DM have breached clause 7.1 of the 2nd Consultancy Agreement and that ELHL has breached clause 3.2(a) – see paragraphs 56 and 57 of the re-re-amended Particulars of Claim ("RRAPC"). MHC's case as to how DM is liable for the acts and omissions of ELHL is pleaded at paragraphs 59 and 60 of the RRAPC in these terms:

> "59. As the sole director of [ELHL] and its sole directing mind, [DM] caused the said breaches and is jointly liable with [ELHL] for such breaches of contract or duty.
>
> 60. In particular [DM] (as principal officer and agent of the first defendant) assumed responsibility within the claimant for identifying and implementing appropriate products or systems in relation to the revalidation and training of doctors and nurses employed or retained by [MHC]. This included establishing an evaluation committee to evaluate and make recommendations about products and services."

Clause 7.1 of the 2nd Consultancy Agreement provided:

> "Nothing in this Agreement shall prevent the Consultancy Company or the Individual from being engaged, concerned or having any financial interest in any Capacity in any other business, trade, profession or occupation during the Engagement provided that:
>
> (a) such activity does not cause a breach of any of the Consultant Company's obligations under this Agreement; and
>
> (b) the Consultant Company shall not, and shall procure that the Individual shall not, engage in any such activity if it relates to a business which is similar to or in any way competitive with the business of the Company or any Group Company without the prior written consent of the Company"

The "*Consultant Company*" is ELHL. In those circumstances, it is obvious that the *"Individual"* is someone else. There is a dispute about the meaning of the word "*Individual"* although it was not advanced by Dr Wilson in the course of his oral closing submissions. In the definitions provision within the 2nd Consultancy Agreement it is defined as meaning ELHL. That is plainly wrong and should have defined "*Individual"* as meaning DM. The contrary is not realistically arguable. That this is so is obvious from the 2nd Consultancy Agreement, when read as a whole. It is particularly apparent from clause 2.1, which provides that "*The Company shall engage the Consultant Company and the Consultant Company shall provide the Services (which shall be carried out on behalf of the Company by the Individual) on the terms of this Agreement …*". ELHL is not an individual. The *"Services"* could only be provided by a medically qualified individual. The only individual involved is DM and there would be no need to phrase clause 2 as it has been drafted if it had been intended that ELHL would provide the services without any restrictions. There is no

need for formal rectification. I can safely reach this conclusion as a matter of construction applying the principles in Chartbrook Limited v. Persimmon Homes Limited [2009] 1 AC 1101.

42. In the absence of a claim that this is one of those rare cases where it would be appropriate to lift the corporate veil (and there is no suggestion of such a claim in the pleadings or Ms Anderson's written submissions and the facts and matters alleged in paragraph 59 of the RRAPC quoted above do not begin to found such a submission had it been made), I accept Dr Wilson's submission. Assuming (without at this stage deciding) that the 2nd Consultancy Agreement is a valid agreement, I conclude no contractual liability can attach to DM for any proved breach of the 2nd Consultancy Agreement because he was not a party to the 2nd Consultancy Agreement – see Salomon v. A. Salomon & Co Limited [1897] AC 22 and Holland v. HMRC [2010] UKSC 51 *per* Lord Hope at paragraph 25, Lord Saville at paragraph 97 and Lord Clarke (dissenting in the result but not on this point) at paragraph 140.

43. It follows that the only person that could be liable for breach of the 2nd Consultancy Agreement is ELHL. MHC can have no complaints on this score for it was willing to enter into the 2nd Consultancy Agreement as the contractual mechanism by which it would obtain DM's services and its case in these proceedings is that it was a valid and binding agreement - see the final sentence of paragraph 39 above. In reaching this conclusion, it has not been necessary for me to decide whether on MHC's case there has been a breach of clause 7.1 of the 2nd Consultancy Agreement. That is now material only to the claim against ELHL. It will be necessary for me to return to that issue at greater length if I conclude that the 2nd Consultancy Agreement is valid.

The Employment Issue

44. I accept the submission made by Ms Anderson in paragraph 2 of Appendix 1 to her closing submissions, that *"invariably in the context of employment related litigation, there is a concession that the parties have entered into a legally binding agreement …"*. That much is obvious since employment is a contractual relationship. However, here, if DM was an employee, the relevant contract cannot be the 2nd Consultancy Agreement because DM was not a party to it.

45. I accept Dr Wilson's submission that an issue concerning whether someone is an employee is one that requires the court to focus on the true intentions or expectations of the parties - see Firthglow Limited v. Szilagyi [2009] EWCA Civ 98 [2009] ICR 835 and Autoclenz Limited v. Belcher [2011] UKSC 98 [2011] ICR 1157. I accept too that there will be cases where such an exercise leads to the conclusion that the written documentation does not represent "*… the true intentions and expectations of the parties …"* – see Firthglow Limited v. Szilagyi (ante) at paragraph 50. In a case where it is alleged that a written agreement does not reflect the true intentions of the parties, the only question is what objectively the parties actually agreed at the time when the contract was entered into – see Autoclenz Limited v. Belcher (ante) at paragraph 32.

46. All of that said, there is my judgment a significant difference between a contract negotiated between two parties such as respectively MHC (or Castlebeck) on the one hand and DM (whether on behalf of himself or on behalf of ELHL) on the other and the situation described in Firthglow Limited v. Miklos Szilagyi (ante) at paragraphs 9-14, where the respondent had sought work from the Appellant, had been offered work and was "*... told ... he must sign some documents ...*" which "*... were not explained to him ...*" and in respect of which he was told " *... Mick get in here and sign this. You are looking for work, wife to support, men to pay, sign these*". The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed – see Autoclenz Limited v. Belcher (ante) at paragraph 35. The weight to be given to this factor depends on the circumstances. The more akin the genesis of the agreement is to that of an arm's length commercial agreement, the more likely it is that a court will conclude that the terms of a written agreement in truth represent what was agreed – see Autoclenz Limited v. Belcher (ante) at paragraphs 33-35. As Smith LJ summarised the position Firthglow Limited v. Miklos Szilagyi (ante) at paragraph 57:

> "In a case involving a written contract, the tribunal will ordinarily regard the documents as the starting point and will ask itself what legal rights and obligations the written agreement creates. But it may then have to ask whether the parties realistically intended or envisaged that its terms, particularly the essential terms would be carried out as written."

47. It is necessary to start with the 1st Consultancy Agreement because as I said earlier it establishes the factual context in which the 2nd Consultancy Agreement came to be signed. This was entered into at the outset of DM's relationship with MHC. The 1st Consultancy Agreement was made on 15 July 2011 between "*Mental Health Care (UK) (a division of Castlebeck Care (Teasdale) Limited"* and *"Dr Devan Moodley ... t/a Edward Lupen Healthcare Services Limited"*. The description of DM is clearly misconceived since an individual cannot trade as a registered limited liability company and the description of MHC is only correct if MHC had not at that stage been incorporated. In fact it had been as is apparent for example from the Strategic Business Plan 2011-2014, which describes MHC as "*Mental Health Care (UK) Limited*". The footer describes the entity simply as *"Mental Health Care (UK)*". The latter was merely the style or title under which MHC traded at that time.

48. On DM's own evidence this was not an agreement offered to him on a take it or leave it basis. It was a freely negotiated agreement entered into because one party (MHC) wanted the services of DM and the other party (DM) was willing to provide his services providing agreement could be reached on terms that were satisfactory to him. As such the agreement is more akin to a commercial agreement than to an employment contract.

49. DM's case is that the parties entered the 1st Consultancy Agreement for specific reasons. The explanation that DM offers as to why this agreement (as opposed to a contract of employment) was entered into is set out in paragraphs 17 and following of his witness statement. The background is that some very serious allegations of patient

abuse had been made against staff employed at various facilities operated by Castlebeck prior to it engaging DM. It is not necessary that I set out the detail. It is sufficient to say that an exposé by an edition of Panorama, a BBC Television programme, was followed by a criminal trial in which a number of Castlebeck's former employees were convicted of various offences relating to the treatment of its patients and some of those convicted were sentenced to terms of imprisonment. DM claims that he was concerned about the reputational damage he might suffer by being employed by Castlebeck. He maintains at paragraph 22 of his statement that:

> "In the end Mr. Beattie and I were able to agree that one way of getting round the 'bad press/association' problem was for us to use the device of a service company. The idea was that I would set up a personal service company and provide my professional services to Castlebeck in my personal capacity but 'trading as' the name of my service company."

He adds that:

> The use of [ELHL]'s name in the contract of employment was simply a device to avoid the true nature of my employment relationship with Castlebeck being readily apparent to the outside world given my understandable discomfort about having any visibly direct association with the Castlebeck Group at that time."

50. Although I accept that the 1st Consultancy Agreement was fully and freely negotiated between DM and Mr Beattie, I reject DM's explanation as inherently improbable. Aside from the fact that ELHL was incorporated before the broadcast of the Panorama programme, the nomenclature used in the 1st Consultancy Agreement does not disguise the visibility of DM's "*direct association"* with Castlebeck at all. The party with whom he is contracting is expressly identified as being "*Mental Health Care (UK) (a division of Castlebeck Care (Teasdale) Limited"*. Had it been desired to remove any reference to Castlebeck, the contract could and should have named only MHC as the engaging party. MHC was incorporated and a wholly owned subsidiary of Castlebeck at the date of the 1st Consultancy Agreement as I have explained. If for some reason Castlebeck had to be the contracting party, then another way of disguising DM's relationship with Castlebeck would have been to make ELHL Castlebeck's counterparty whereas in fact the agreement identifies DM on the face of the agreement as being the party contracting with Castlebeck. The reality is that it is as obvious on the face of the 1st Consultancy Agreement that the parties are Castlebeck and DM as it would have been on the face of a contract of employment between Castlebeck and DM. In my judgment these facts negative the true intention of entering into the 1st Consultancy Agreement being as alleged by ELHL and DM.

51. In my judgment it is inherently more likely than not that the parties chose consultancy over employment because it suited the commercial interests of each party. It eliminated the payment by Castlebeck or MHC of Employer's National Insurance contributions and ELHL had only to pay Corporation Tax on its profits. Neither Castlebeck nor MHC paid DM. ELHL invoiced for DM's services – see by way of example the invoice dated 1 December 2011 raised by ELHL, which expressly

requested that payment be made *"... within 10 days to [ELHL]*". It was signed by DM but in his capacity as *"Company Director*". The other invoices raised by ELHL were in similar format – see the run of invoices from 1 December 2011 to 29 April 2016. There is no evidence of any payments being made other than pursuant to these invoices. There is no evidence of any payment being made unless and until an invoice had been submitted and of invoices not being submitted entirely regularly. DM accepts that he was not taxed as if he was an employee.

52. As Ms Anderson points out in her closing submissions, when DM was asked whether he had offered to account to HMRC on the basis he was an employee, he confirmed that he had not done so – see T5/11/940/2-15. DM was entitled to adopt this position only if the relationship in reality and substance was as set out in the consultancy agreements. It is inconsistent with the relationship between DM and MHC being one of employee and employer. Whilst this point is not decisive, it is a highly material factor in deciding what the true intentions of the parties were.

53. Dr Wilson places some reliance on the fact that the invoices were submitted to Castlebeck rather than to MHC. I regard this point as immaterial. Although Dr Wilson maintained that the fact the invoices were sent to Castlebeck rather than MHC was relevant to the employment/consultancy issue, I do not agree. Although in my view the description of the retaining party as "*Mental Health Care (UK) (a division of Castlebeck Care (Teasdale) Limited"* meant that in fact MHC was the retaining entity, that is only clear once it is understood that MHC was incorporated and used "*Mental Health Care UK"* as its trading style or title. Clause 4.1 of the 1st Consultancy Agreement provided for *"the Company"* to pay. The Company was defined as being *Mental Health Care (UK) (a division of Castlebeck Care (Teasdale) Limited"*. It is understandable that the invoices were sent to Castlebeck in those circumstances. In any event that issue does not assist in resolving whether the relationship was one of employer and employee.

54. Dr Wilson refers to a number of factors which show DM interacting with employees of Castlebeck rather than MHC in relation to his engagement. That is material only to who the retaining entity might have been. It does not assist DM to show that the true nature of the relationship was one of employer and employee. If and to the extent that it is suggested that the invoicing to Castlebeck and interaction with Castlebeck staff shows that the true contract was with Castlebeck that takes matters no further. It is common ground that the nature of the services or service to be provided at the outset was as described in the 1st Consultancy Agreement. If and to the extent that the scope of the service or services provided broadened over time that does not assist in discerning whether the contract under which the service was, or services were, provided was one of employment or not.

55. As part of the due diligence exercise undertaken when Mr. Adey acquired the MHC shares, DM was asked by an email dated 7 September 2012:

> "... regarding your employment contract with MHC:

> 1. Is the company that you invoice MHC through registered at Companies House as a limited company and if so what is the company number;
>
> 2. Do you have anything by means of paperwork that was given to David Beattie when you first commenced that clearly outlined that you would be responsible for paying your own income tax? Usually this would be in the form of a letter from your accountant;
>
> 3. There is a reference in some of the early documentation that you would be responsible for your own insurances etc. Can you advise what those insurances are?
>
> 4. Do you pay your own professional registration/MDU fees or are those paid by MHC? …"

DM replied the same day by email in these terms:

> "…
>
> 1. Company is registered through Companies House; registration number 06542966
>
> 2. I did send letter through. I don't have a copy I am afraid. This was all sent through to Castlebeck;
>
> 3. Discussion was around company insurance and if there was need for the company to have separate insurance then this would be my responsibility and not that of MHC to pay for;
>
> 4. I pay my own registration fees
>
> I will check my contract and communications later and confirm if any of the above is different to what I have stated … "

The reference to *employment contact"* in the requesting email is immaterial – what matters is the substance not how the parties characterised the relationship. The more significant point arises from DM's response to request 2 – which was to confirm implicitly but clearly that he was responsible for paying tax not MHC. That is consistent with the substance of the relationship being regarded by both parties as a services provider relationship not an employment relationship. This is unsurprising since there were significant fiscal benefits to both parties from the arrangement.

56. DM's responses in his 7 September 2012 email concerning insurance are equally consistent with that being the position. The references to "*company insurance*" in DM's response 3 are to insurance for the benefit of ELHL. Such a discussion (and the agreement that MHC would not be responsible for such costs) is consistent with the relationship being that of a services provider not employment and in my judgment incidentally inconsistent with the reason for entering into the 1st Consultancy Agreement being as alleged by DM. Had it been an arrangement driven by the reputational issues that DM relies on, I would have expected him to have pressed for

any additional costs caused by the arrangement to be met by MHC or Castlebeck. There is no evidence that such issues were even discussed.

57. Dr Wilson submits that the points I have so far considered are outweighed by the terms of the 1st Consultancy Agreement, most of which he submits are consistent with the true relationship being one of employer and employee, by the fact that DM conducted himself as if he was an employee as for example by asking for leave, by the fact that he was subsequently offered a car leased by MHC and by the fact that his invoices were submitted to Castlebeck rather than MHC.

58. As I have said already, I accept Dr Wilson's submission that deciding whether someone is an employee requires the court to carry out a multi-factorial enquiry, focusing on reality and the true intentions or expectations of the parties. I also accept that this will involve looking at the effect of the terms of the agreement under consideration. Dr Wilson placed particular emphasis on what Mckenna J called in Ready Mixed Concrete (South East) Limited v. MPNI [1968] 2 QB 497 at 515C "*... the…. Freedom to do a job either by one's own hands or by another's …"*. Freedom of this sort is inconsistent with a contract of service but "*...a limited or occasional power of delegation may not be …"*. The more limited the right of substitution, the more likely it is that the contract will be construed as being one of service rather than services – see Pimlico Plumbers Limited v. Smith [2018] UKSC 29at paragraph 34.

59. Dr Wilson also placed particular reliance on clause 3.1.1, which required the services provider to provide them using all due care and skill, 3.1.2, which required the services provider to devote 5 days a week to carrying out the services as defined by the agreement and clause 3.2, which provided that if the services provider was unable to provide the services due to illness or injury he was to advise the Line Manager of that fact.

60. I accept that those are provisions that it is necessary to take account of in arriving at a final conclusion as to the substance of the relationship. However, although I accept that they may arguably suggest that the services provider was intended to be DM and not ELHL, in my judgment those provisions do not outweigh the factors I have identified already in resolving the question whether the contract was intended to be an employment contract as opposed to a services agreement. My reasons for reaching that conclusion are as follows.

61. First, the ambiguity of expression of some of the clauses may be explained by the fact that the parties have chosen to use a pre-drafted form to record their agreement. This is reflected in the definition of DM at the start of the 1st Consultancy Agreement as "*Consultant Psychiatrist"* but the use thereafter of the word "*Consultant*", which is undefined.

62. Secondly, as I have said, the parties intended the agreement to be a consultancy agreement and negotiated its terms on that basis.

63. Thirdly, many of the terms of the 1st Consultancy Agreement are consistent with the agreement being what it purports to be.

64. Fourthly, although Dr Wilson relies on clause 3.1.2 and 3.2 as being consistent only with a contract of employment, I do not agree because each has to be read with clause 3.3, which provides:

> "During the Engagement [DM] …:
>
> …
>
> 3.3 To cover any period where the Consultant cannot provide the Services the Consultant may, with the prior written approval of the Company or Line manager … appoint a suitably qualified and skilled Substitute to perform the services on his behalf, provided that the Substitute shall be required to enter into direct undertakings with the Company including with regard to confidentiality …"

Whilst I accept that the more limited the right of substitution, the more likely it is that the contract will be construed as being one of service rather than services, this provision has to be read in its context. The position that DM was being retained to fill was a senior, responsible and regulated one where the duties being undertaken had to be performed in a highly regulated environment. The impact of limitations on a right of substitution have to be considered in the context in which the employment / service provider issue arises. In my judgment qualifications to a right of substitution in relation to a highly qualified and regulated professional operating in a highly regulated environment may have less impact than it might in a factual context such as that which arose in Pimlico Plumbers (ante). In my judgment the impact of the qualification on the right of substitution imposed in this case on the overall assessment that I have to make is of limited significance for this reason, particularly given that it is contained in a contract that has been freely negotiated between two parties of approximately equal bargaining power.

65. Fifthly, other clauses within the 1st Consultancy Agreement are either not consistent with the contract being one of employment or are consistent with it being either an employment contract or services agreement. Examples include (i) clause 4.3, which shows the parties arranging their tax affairs on the basis that the contract was one of services not employment, (ii) clause 5.1, which provided that if DM was required to travel abroad pursuant to the 1st Consultancy Agreement he would be responsible for all "*… necessary insurances, inoculations and immigration requirements"*, (iii) clause 6.1, which entitled DM to undertake other business as long as it did not involve a breach of any of his obligations under the 1st Consultancy Agreement and was not for a business that was in competition with MHC and (iv) clause 10.1, which provided that DM would have personal liability for loss, liability or costs incurred by MHC in connection with the provision of the Services and *"… shall accordingly maintain in force during the engagement full and comprehensive Insurances Policies in respect of the provision of the Services.*" In relation to clause 5.1 it is immaterial that in the event DM did not have to travel abroad – what is relevant are the legal obligations

that bind the parties, not how the contract is actually performed – see Express & Echo Publications Limited v. Tanton [1999] IRLR 367 and Autoclenz Limited v. Belcher (ante) at paragraph 19(iii).

66. Finally, at no stage did DM suggest that he was dissatisfied with the 1st Consultancy Agreement. He had an opportunity to do so when he was asked to agree the terms of and sign the 2nd Consultancy Agreement. As I explain below in relation to the 2nd Consultancy Agreement, he was fully aware of the distinction between a services agreement and an employment contract and even though he expressly recognised that it was an appropriate option for some of MHC's professional service providers. As I explain below, far from objecting, he approved the terms of the 2nd Consultancy Agreement when it was sent to him in draft and signed it when he was asked to do so.

67. In those circumstances, if I concluded that the true relationship created by the 1st Consultancy Agreement was one of employment, I would not be giving effect to the intentions of the parties. I would be defeating them. In my judgment the 1st Consultancy Agreement was (and was intended by both parties to it from the outset to be) a contract for the provision of services.

68. Turning now to the 2nd Consultancy Agreement, it is material to note that it was not intended by the parties that the 2nd Consultancy Agreement should record some agreed change of status. It was simply replacing the 1st Consultancy Agreement with what had become the standard form of consultancy agreement used by MHC. Secondly, the points made already concerning invoicing and the fiscal implications of the relationship apply with equal force to the period after the 2nd Consultancy Agreement was signed as they do to the position down to that date. In addition, in my judgment the following points also suggest that the 2nd Consultancy Agreement reflected the reality of the relationship between DM, ELHL and MHC.

69. The 2nd Consultancy Agreement was sent by Mr. Pino to DM in draft in August 2013 – see the email of 28 August 2013 captioned *"Contract for services"*. The final version was sent to DM for approval under cover of an email dated 29 April 2014. DM responded to Mr. Pino the following day by email in which DM said that he had gone through the draft the previous evening and that it was *"... fine with me ...*". At no stage did DM object (a conclusion I reach because there is no contemporaneous documentation recording him objecting) to the contents of the drafts, nor is there any contemporaneous documentation recording his view that that it did not reflect the reality of the relationship or that what he required or at least desired was a contract of employment.

70. This is a significant omission for at least two reasons. First, DM maintains that the only reason that he entered into the 1st Consultancy Agreement was to reduce the risk of reputational damage caused by being associated with Castlebeck. I have rejected that as the true explanation for reasons I have given already. However, had that been the reason, it had ceased to be of any application after Mr. Adey acquired MHC and MHC ceased to be associated with Castlebeck. That being so, if the only reason for

not having a contract of employment at the outset had been to avoid that risk, it had ceased to be relevant by the time DM was sent the 2nd Consultancy Agreement for approval and when he signed it. This supports my conclusion reached earlier concerning DM's case as to the reasons for entering the 1st Consultancy Agreement and suggests that whatever motivated the 1st Consultancy Agreement continued to be applicable. As I have explained, it is probable that it was the fiscal advantages that each party gained from the arrangement. If the truth had been that DM would have preferred an employment contract from the outset and both parties had agreed to a services agreement only reluctantly and for the reasons identified by DM, then in my judgment DM would have so stated when the 2nd Consultancy Agreement became an issue. Equally, if the true intention had been that the contracting party would be DM and not ELHL, DM would have stated that fact when he was asked to review the 2nd Consultancy Agreement in draft. Whilst DM asserts in paragraph 57 of his witness statement dated 2 August 2018 that other medical practitioners engaged by MHC objected to not having contracts of employment, it is noticeable that DM does not assert he made such an objection on behalf of himself. In my judgment Dr Wilson's submission at paragraph 159 of his closing submissions that the 2nd Consultancy Agreement was "*... forced on [DM] and other doctors against their will ...*" lacks any substance at any rate so far as DM is concerned, being unsupported by anything other than assertion made for the first time after the termination of the relationship between the parties.

71. Secondly, it is clear that at the time when DM was asked to approve the terms of what became the 2nd Consultancy Agreement and then to sign it, he was fully aware of the distinction between an employment contract and a services agreement and that the former may be more suitable for some– see (i) the draft minutes prepared by Mr Adey contained in his email of 14 March 2014 which refer to contracts for senior clinicians as something to be managed by Mr John Prior who was to liaise with DM"*... to ensure that contracts of employment or contracts for service[s] are in place for all senior clinicians ...*" sent to DM by Mr Adey on 15 March to which DM replied "*The minutes of the meeting are agreed"* and (ii) DM's email on 4 June 2014, where he suggests that *"... professionals on the SLA should be offered the opportunity to apply for new roles as direct employees ...*". The reference to *"... the SLA ...*" is to MHC's standard services agreement. DM executed the 2nd Consultancy Agreement in July 2014 – see Ms Quinn's email to DM dated 1 July 2014 – with its commencement date being backdated to 18 July 2011.

72. Dr Wilson's primary submission is that once the terms of the 2nd Consultancy Agreement are considered as a whole, the only appropriate conclusion is that its terms applied in reality to a relationship between MHC and DM not MHC and ELHL and that the effect of these provisions are consistent only with that relationship being one of employer and employee not client or customer and service provider. In support of the first of these submissions, Dr Wilson submits that the 2nd Consultancy Agreement provided in substance for the services referred to in the definitions section to be provided by DM alone. There are two points that are particularly significant – first "*Services"* is defined as meaning:

> "… medical consultancy services … to hold the post of Responsible Officer in accordance with revalidation requirements for provide Consultant Psychiatry services to the hospital for the period of the contract"

This provision does not make literal sense. Whilst I conclude that both medical consultancy services and consultant psychiatry services could be provided by a limited liability company under a services agreement (as might be the case with a locum services provider and as was the case with the 1st Consultancy Agreement) it is more difficult to see how a limited liability company could hold the post of Responsible Officer, not least because regulatory approval for such an office holder is required. Moreover, Dr Wilson submits that this provision must be read with clause 2.1, which provides:

> "[MHC] shall engage [ELHL] and [ELHL] shall provide the Services (which shall be carried out on behalf of [MHC] by [DM]) on the terms of this agreement …"

Dr Wilson submits that these provisions when read together point strongly towards the relationship in substance and reality being between DM and MHC not ELHL and MHC because the Responsible Officer role can be performed only by an individual and all the services are required to be provided by DM. Dr Wilson further submits that there is no contractual right of substitution and that absence reinforces both the submission that the relationship is in substance between DM and MHC and that the relationship is one of employer and employee. Aside from Clause 3.6, which provides that:

> "[ELHL] may use another person, firm, company or organisation to perform any administrative clerical or secretarial functions which are reasonably incidental to the provision of the Services provided that [MHC] will not be liable to bear the cost of such functions"

there is no provision within the 2nd Consultancy Agreement that permits even limited substitution. Clause 3.3 provides that if DM is unable to provide the Services due to illness or injury, ELHL is required to advise MHC of that fact and provide evidence of ill health. It does not make any provision for the supply of a substitute for DM. This is a significant difference from the 1st Consultancy Agreement, clause 3.3 of which permitted qualified substitution.

73. Dr Wilson relies also on clause 3.1, which requires that ELHL provide *"… the Services for at least 19 days in each calendar month together with such additional time, if any, as may be necessary for their proper performance"*. This provision is functionally similar to clause 3.1.2 of the 1st Consultancy Agreement, which required DM to devote 5 days a week to the carrying out of the services the subject of that agreement. Whilst it is not possible to reject this as a relevant factor, it is not one of any great weight in the overall assessment because control in this context is primarily concerned with whether it can be shown that performance of the service is subject to the beneficiary's control to make the beneficiary an employee – see Ready Mixed Concrete (ante). Thus, the issue is primarily about how services or a service is

provided not when. The only express provision that affects the "how" question is clause 2.2, which requires ELHL to procure DM to comply with MHC's reasonable requests. It is not suggested that this clause impacts in any meaningful way on whether the obligation is an employment contract or a services agreement.

74. That said, I accept that a contract that requires the service provider to use all or most of his or her working time in fulfilling one contract can support a finding that the true relationship is an employment relationship. However it is not decisive and the materiality of the point is fact sensitive – a services agreement with a locum filling a maternity or paternity leave vacancy for example is likely to require the locum to work for up to the whole of the time worked by the leave taker. Similar considerations apply to the obligation to provide the service or services at a particular location. If a hospital has a requirement for a locum for example, a requirement that the locum provide services at a particular hospital is unsurprising since the purpose of engaging a locum is to fill a particular temporary vacancy.

75. In relation to the obligation to provide evidence of illness, that is as appropriate a provision within a services agreement of this sort as in an employment contract. The beneficiary under a services agreement is entitled to know if a service provider will be likely to return in the short term in order that it can arrange cover and is entitled to be satisfied that the claim of unfitness is genuine.

76. As against the provisions relied on by Dr Wilson, there are others within the 2nd Consultancy Agreement that are plainly consistent both with the agreement being between the parties it purports to be between and is a services agreement or are as consistent with that being the true arrangement as it being in reality an employment contract between DM and MHC. These include (i) clause 2.5, which entitles either party to terminate the agreement on 3 months' notice without cause, (ii) clause 4.1, which imposes an obligation to pay fees only to ELHL, and to do so only 14 days after receipt of an invoice from ELHL, (iii) the provision within clauses 4.1 and 4.7 that the fees payable shall be inclusive of any VAT arising from the provision of the Services, (iv) clause 4.2, which required ELHL to render invoices, (v) clause 4.3. which provided that ELHL "*… agrees that it is responsible for all tax liabilities arising in connection with any payments made under this Agreement"*, (vi) clause 4.4, which entitled MHC to make deductions equivalent to the cost of making good defective performance of the services from fees otherwise due under the 2nd Consultancy Agreement to ELHL, (vii) clause 7.1 that permitted ELHL and DM to be involved in other business interests subject to the qualifications noted earlier, (viii) clause 10.1, which required ELHL to indemnify MHC in respect of all losses resulting from any act or omission of either ELHL or DM, (ix) clause 10.3, which imposed on ELHL the obligation to maintain at its own cost insurance cover in respect of the provision of the Services, (x) clause 13.2, which made ELHL "*… fully responsible for and shall indemnify …"* MHC in respect of all income tax, National Insurance and Social Security contributions arising from or in connection with the provision of the Services and (xi) clause 21.1, which recorded, as was the fact (see above) that the 2nd Consultancy Agreement had been freely negotiated between the parties and was a

contract for services not a contract of employment. I accept that this last point is largely labelling and thus a factor of limited weight. However, in the context of this case, it is a point that has some weight whereas in cases where the context is similar to that considered in Pimlico Plumbers (ante), Ready Mixed Concrete (ante), Autoclenz Limited v. Belcher (ante) and Firthglow Limited v. Miklos Szilagyi (ante) it will be appropriate to attach no weight to this point.

77. As I have noted in the previous paragraph, the parties have made express provision concerning tax and National Insurance. Although Dr Wilson submitted that in effect this was part of the window dressing designed to make what was in fact an employment contract between DM and MHC look like a services agreement between ELHL and MHC, I regard that point as mistaken for two reasons. First, as I have noted already, what is relevant are the legal obligations that bind the parties, not how the contract is actually performed – see Express & Echo Publications Limited v. Tanton (ante) and Autoclenz Limited v. Belcher (ante). Secondly, it is not suggested that the parties did not carry into effect the provisions within the 2nd Consultancy Agreement relating to tax and National Insurance. This suggests that the parties deliberately structured their contract so as to enable each to take advantage of particular fiscal benefits. Whilst that point may not be decisive, it is one of significant weight when arising in the context of a freely negotiated agreement between parties of approximately equal bargaining power. In relation to this last point, there is nothing to suggest that DM was in a take it or leave it position when he was first sent and then signed the 2nd Consultancy Agreement. As I have explained, the contemporaneous material suggests that he willingly entered into these arrangements, while recognising that it might not be appropriate for everyone.

78. Dr Wilson relied on a number of discrete points as supporting his submission that the true contract was one of employment between DM and MHC and not a services agreement between ELHL and MHC. Each of these features postdate the date when the 2nd Consultancy Agreement was signed. English law does not usually permit reference to facts and matters occurring after a contract has been entered into for the purpose of deciding its true meaning and effect. In Autoclenz Limited v. Belcher (ante) at paragraph 32, Lord Clarke (with whom the other JSCs agreed) noted Smith LJ's summary of the ultimate test to be applied as being that:

> "… the court or tribunal must consider whether the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them."

before noting that Aikens LJ agreed with this summary and had added:

> "... ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept,

> of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."

Lord Clarke then said, "*I agree"*. All this leads me to think that facts and matters occurring after the time when the contract has been entered into are not material to the issue I am now considering unless that conduct shows that the parties have expressly or impliedly varied the terms of their agreement.

79. Dr Wilson relies on what he called in his closing submissions the fact that DM was provided with a company car. I agree that the provision of a company car would be consistent with a contract of employment that either provided for the provision of a car as part of the remuneration package or was varied so to provide. In fact (as Dr Wilson acknowledged) what Mr Adey agreed to was that the amount "*... paid to[DM] under his contract of service would be increased by the amount necessary to lease an appropriate car ..."*. Aside from the reference to DM rather than ELHL and to a contract of service rather than services, as I read it this email is consistent with an increase in the sums payable under what was then the 1st Consultancy Agreement (the 2nd Consultancy Agreement not being signed until July 2014). Mr Adey is wrong to call the 1st Consultancy Agreement a contract of service for the reasons explained above. The email exchange does not help in construing the 2nd Consultancy Agreement because there is no mention of MHC leasing a car in the 2nd Consultancy Agreement and the email itself is consistent with the car being leased by ELHL being the only entity that was receiving remuneration from MHC at the time and which received remuneration thereafter. Although DM said in an email to MHC's solicitors dated 24 June 2016, sent after the relationship between MHC, ELHL and DM had come to an end, that he was in receipt of a car allowance no other documentation had been drawn to my attention that shows that assertion to be true. The only contemporaneous material that has been drawn to my attention is that I have referred to above. In those circumstances I derive no assistance from this point.

80. I reject as irrelevant, descriptive terms used in internal correspondence for the reasons already explained. DM asserts that he was provided with sick pay, compassionate leave, paid annual leave, study leave and secretarial support. He maintains in paragraph 55 of his 2 August statement that these events were "*... inconsistent with the purport of ...*" the 2nd Consultancy Agreement. An agreement by MHC to depart from the strict terms of the 2nd Consultancy Agreement in respect of compassionate leave does not justify the inference either that the contract was not to the effect set out in the document relied on by MHC or that it was subsequently varied or, if it was, that the effect of such a variation was to convert a services agreement into an employment contract. I do not see how the provision of junior staff to assist DM impacts on the issue I am now considering either. It is something that in my judgment is equally consistent with the true arrangement being either a services agreement or an employment contract. In any event the document that Dr Wilson submitted supported the proposition that DM was to be provided with junior staff (an email of 7 December 2012) does not support that proposition. In addition, it antedates the agreement on which MHC relies by a number of years.

81. All this leads me to reject the submission made on behalf of ELHL and DM that the 2nd Consultancy Agreement is a sham. It follows that ELHL (but not DM) will in principle be liable in damages for any proved breach of the 2nd Consultancy Agreement.

The De Facto Director Issue

82. A *de facto* director is a person who acts as the director of a company when not appointed as such. In order to establish that a person is a *de facto* director, "*... it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level"* – see Re Hydrodam (Corby) Limited [1994] 2 BCLC 180 *per* Millett J as he then was at 183, cited without criticism in Holland v. HMRC [2010] UKSC 51 by Lord Hope at paragraph 29 and Lord Collins at paragraph 54 with whom Lord Saville agreed at paragraph 100. Although dissenting in the result, Lord Walker adopted a similar approach in relation to Millett J's formulation at paragraph 106 and 111. Lord Clarke agreed with Lord Walker at paragraph 127.

83. This is ultimately a question of fact and degree, although several indicators have been identified in subsequent cases which assist in deciding whether this test has been satisfied. So in Re Richborough Furniture Limited [1996] 1 BCLC 507 at 524 it was held that for an individual to be a *de facto* director, where there was a *de jure* director or directors, there had to be clear evidence that the individual alleged to be a *de facto* director was acting on an equal footing with the *de jure* director or directors and further that "*... if it is unclear whether the acts of the person in question were referable to an assumed directorship, or to some other capacity such as shareholder or ... consultant, the person in question must be entitled to the benefit of the doubt"*. This is particularly important in this case since Mr Adey was a *de jure* director of MHC for the whole of the time relevant to these proceedings and Mr Pino was such a director for most of that period. As I have noted already, neither gave evidence in these proceedings. In SSTI v. Tjolle [1998] 1 BCLC 333, Jacob J as he then was, identified some other relevant factors. The list included (i) whether there was a holding out by the company of the individual as a director, (ii) whether the individual used the title of director, (iii) whether the individual had proper information (e.g. management accounts) on which to base decisions and (iv) whether the individual had to make major decisions.

84. None of these elements is decisive – see Re Kaytech International Plc [1999] 2 BCLC 351 per Robert Walker LJ as he then was at 423. The question in a case in which it is alleged that an individual owed fiduciary duties to a company of which he is alleged to be a *de facto* director is whether the cumulative effect of the activities relied on is such that the individual has assumed the status and functions of a company director so as to make himself responsible as if he were a *de jure* director – see Smithton Limited v. Naggar [2014] EWCA Civ939 [2015] 1 WLR 189 *per* Arden LJ as she then was at

paragraph 40-41. It necessarily follows that the subjective belief of the parties or either of them as to the true position is immaterial. The question is determined objectively in the manner I have explained - see Smithton Limited v. Naggar (ante) *per* Arden LJ at paragraphs 39-40 but subject to the points made in paragraph 42.

85. DM's case is that throughout his activities were or were predominantly those relevant to his duties as Medical Director, Responsible Officer and Caldicott Guardian, that he did not at any stage undertake work that could only be carried on by a director and at no stage did he act on an equal footing with MHC's *de jure* director or directors. MHC's case is that it is obvious that DM was a *de facto* director at all material times because he participated in or led projects that fell outside the scope of his defined roles and because he was a full member of the only board within MHC for which records have been produced. I remind myself that resolving the question whether an individual is a *de facto* director involves assessing the cumulative effect of all the evidence in the round - see Smithton Limited v. Naggar (ante) *per* Arden LJ at paragraph 40.

86. The parties draw a distinction between the period prior to and the period after April 2014. I start with the Consultancy Agreements. There is nothing within the 1st Consultancy Agreement that impacts directly on the issue I am now considering. The 2nd Consultancy Agreement contains provisions which are inconsistent with MHC intending at the time that agreement was entered into that DM would be acting as a director in the sense identified in the authorities I have referred to. In particular clause 3.4(e) provides that ELHL would procure that DM would not hold himself out as being "*... an agent, member or employee of ...*" MHC. MHC's requirement that DM would not hold himself out to be its agent is incompatible with DM being regarded as a *de facto* director at the date when that agreement was entered into. This is not in any sense decisive but in my judgment is a factor that has to be considered for the reasons identified by Arden LJ in Smithton Limited v. Naggar (ante) at paragraph 42(i). It is also relevant that MHC did not at any time hold DM out to be one of its directors. He was at all times retained as its Medical Director but that is different. That was and was well understood by all in the medical and allied services sector to be a senior managerial and professional role. Whilst some Medical Directors might also be either *de jure* or *de facto* directors of the companies by which they are employed, it does not follow that all Medical Directors are *de facto* directors of the companies that employ them.

87. MHC's case that DM was a *de facto* director is also inconsistent with the evidence given on its behalf in other proceedings. Ms Nicola Johnson commenced Employment Tribunal proceedings against MHC. In its Grounds of Resistance to those proceedings, MHC described the role of DM in paragraphs 30 -31 in these terms:

> "…The claimant refers to Dr Moodley. By way of background, the respondent utilised the services of … ELHL under the terms of a consultancy agreement ("the CA"). As the director, shareholder and nominee of that company, Dr Moodley was nominated by ELHL, as agent responsible for the day-to-day operational delivery of the role of Medical

> Director and Responsible Officer. This afforded him … primary responsibility for … upholding maintenance [of] clinical standards in respect of the respondent's undertaking until the termination of the CA on 4 April 2016.
>
> During the current owner's absence during the period from … 2012 and … 2015 the undertaking had been run by the then finance director Roberto Pino … with clinical input and leadership from Dr Moodley … pursuant to the services the respondent had commissioned to be delivered by ELHL under the CA."

This factual summary of DM's role and activities is not consistent with him being a *de* facto director of MHC. Although Mr Adey was absent from everyday involvement in the business between November or December 2014 and the following April, due to serious ill health, he did not sever ties with the business during this period. The position adopted by MHC in the Employment Tribunal proceedings is inconsistent with its case in these proceedings. No explanation has been offered as to why Mr Adey has not been able to give evidence. As things stand he ought to have been able to give evidence that both explained the position adopted in the Employment Tribunal proceedings and supported MHC's case that DM was a *de facto* director. Given this obvious and stark inconsistency, coupled with the absence of any explanation as to the absence of Mr Adey as a witness, I infer that his evidence would not assist MHC on either of the issues I have mentioned.

88. On any view Mr Pino could have provided very substantial assistance on each of these issues but again his evidence was not adduced by MHC and no explanation has been offered for his absence. Had it been the case it would have been entirely straightforward for MHC to have said (if it had been the case) that Mr Adey was either unable to recall events because of his ill health for example and that Mr Pino had declined to assist MHC because of the circumstances surrounding his departure from MHC. Neither of these suggestions has been made. MHC had sufficient notice that this point would be taken in order to address it. It was set out most clearly in Dr Wilson's written closing submissions at paragraph 152. As I explained at the start of this judgment, there was a gap between the delivery of those submissions and the date when the parties made their oral submissions. That was on any view sufficient time to address this issue.

89. One of the witnesses from whom evidence was adduced by MHC was Mr Kevin Shields. He was employed at MHC's Head of Regulation and Compliance from November 2011, prior to the acquisition of MHC by Mr Adey in November 2012 and was, from September 2014, a statutory director of MHC's subsidiary companies though not of MHC itself. Mr Shields' credibility is not challenged by ELHL and DM although the accuracy of some of his evidence is.

90. His evidence was that from November 2012 MHC's Finance Director was Mr Pino. As I have said already, Mr Pino was appointed a *de jure* director in February 2013. Mr Shields says – and there is no reason for thinking this is wrong – that prior to November 2012 there was a "*Company Board"* and an "*Executive Team"*. He says,

and I accept, that he was part of the Executive Team. Its function was to deal with "*… operational matters (for example staffing levels, serious untoward incident reports) …"* His written evidence was that DM was also a member or at least an attendee at Executive Team meetings. There is nothing in this material that supports the proposition that DM was a *de facto* director down to the date in November 2012, when Mr Adey acquired MHC.

91. Mr Shield's evidence was that in the period between November 2012 and April 2014, the board of MHC had two members – Mr Adey and Mr Pino – see T2/243-246 *passim*. He did not suggest that DM was or acted as if he was a director of MHC during this period. Mr Shields referred to a Policy Review Group ("PRG") in his written evidence. This group would appear to have been a senior management group. Mr Shields said in paragraph 13 of his statement that DM had "*… unfettered ability to contribute to or comment on the creation and enhancement of policies being considered by the Policy Review Group …"* However, in the course of his cross examination, Mr Shields accepted that he could not recall DM attending a PRG meeting (T2/244/18-22), although he suggested that DM's contributions were sent in by email, he accepted that he had not attached any such emails to his evidence and could not recall if there were any such emails (T2/245/3-19) and the PRG ceased to function sometime in 2014 or 2015 on the instructions of Mr Adey and without any input from DM (T3/250/11-251/2).

92. It is common ground that in May 2014 an executive board was formed. MHC assert that this was the board of MHC from that date and it places significant weight on an email of 2 May 2014 from DM to "*All staff within MHC"* by which the addressees were informed of the formation of the Board. In so far as is material the email said:

> "In order to ensure we continue to improve on our high standards of care, and to meet the needs of our growing organisation, a decision has been made to form an Executive Board of Directors.
>
> The board will consist of three members, David Beattie as director of operations, Roberto Pino as Director of Finance and myself as Group Medical Director. The aim of this new structure is to provide the business with clearer operational, clinical and financial vision to aid growth and realise greater benefits for all our staff and service users.
>
> …
>
> David will be starting his new role at the end of May 2014. In the interim, I shall be taking overall operational responsibility for MHC …"

A number of points arise from this. The first is that this was clearly a grouping of senior managers. Mr Beattie had not at that stage re-joined MHC and in fact in the end he did not do so. Mr Pino was a *de jure* director of MHC by this stage, but he was not joining the Executive Board in that capacity but in his capacity as "*Director of Finance"*. Neither Mr Beattie nor DM were *de jure* directors and it is clear from the description that they were joining this new grouping because of the senior managerial

roles they each had (DM) or were intended to have (Mr Beattie) within MHC. Although their respective job descriptions included the word "*Director"* that is irrelevant. An operations director may be a *de jure* or *de facto* director of a company but is not inevitably so simply because his or her job title is Operations Director rather than Operations Manager.

93. The role that this grouping played is apparent from the Minutes of its meetings to which I refer in a moment. It is not apparent who decided that it should be formed. I infer however that that decision was taken by Mr Adey and Mr Pino, at that time the only de jure directors of the company. It was not that body that invited Mr Shield to become a director of the 14 subsidiary companies – that invitation came from Mr Adey via Mr Pino – see T3/255/14-16. Had the new "*Executive Board*" been a Board of Directors in the conventional corporate governance sense, then the invitation would have come from that board or would at least have been discussed and sanctioned by it. There are no minutes recording such a discussion.

94. The decision that Mr Beattie would not re-join MHC was taken by Mr Adey not the Executive Board – see Mr Shields' oral evidence at T3/256/5-7. Indeed, there is no evidence that its members (other, obviously, than Mr Beattie) were ever consulted about that decision, nor did it or anyone on it communicate that decision to MHC's staff. Although Mr Shields' evidence was in some respects confused, he appeared to accept that there were only two directors of MHC – Mr Adey and Mr Pino - and that it was they who ran MHC – see T3/256-257. They were as he put it at T3/257/16-16 "*listed directors and board members"*.

95. There is a danger in looking at the labels the parties used for entities such as the Executive Board. It is the substance of what that entity did that matters. That said, in my judgment it is relevant to note that the entity was called from the outset an "*Executive Board*". Had it been the board of directors in a conventional sense there would have been no need to establish it, it would not have been appropriate to form it of individuals who were not statutory directors or which at least did not include all the statutory directors and it would not have been necessary to describe it as an "*Executive Board"*. The reality is plain from its membership – it did not include Mr Adey and the people included were included by reason of their senior managerial roles (who happened to have job titles that included the word "*Director*"). The decision making of the entity was exactly what was to be expected of an executive board of senior managers. Its decision-making powers did not include capital investment but rather the implementation of or recommendations for such investment – the emails to and from Mr Adey concerning Contract 2 dated 16 December 2014 plainly shows this to be so. It is worth noting that Mr Adey is described in those emails as being the "*Chairman"*. That could only mean the chairman of the board of directors of MHC. He was not chairman of the Executive Board. This string of emails started with a request from Ms Smith to Mr Pino for authorisation to pay £30,000 to SCL. Mr Pino's instruction to Ms Smith was not to pay it "*… for the sake of ensuring that we get the Chairman to approve all capital expenditure as he has requested …"*. Mr Pino then sought authorisation from Mr Adey. That this was the reality is also

demonstrated by the email from Mr Adey concerning an attempt by DM to add a contractor controlled by Dr Charles' father to a list of tenderers referred to below.

96. The Executive Board was not involved in the decisions to appoint senior managers or even the statutory directors of subsidiary companies. Again, too much can be made of the fact that the meetings of the Executive Board came in time to be called "*operations meetings*". I accept as in substance correct what DM said about this in cross examination – the change did not alter the substance of the meetings. That said, in my judgment that change reflected the reality – this group was the forum at which the senior management of the company reached major operational decisions or discussed making such decisions. It was not and was never intended to be the Board of Directors of the company and by participating in its activities DM was not assuming the status and functions of a company director nor was he acting on an equal footing with the *de jure* directors of MHC (Messrs Adey and Pino) in their capacity as *de jure* directors of MHC. Mr Shields accepted this reality when he said that he called the meetings operations meetings. His evidence was that they should not be called board meetings – see his answers in cross examination when he replied "*I am not saying that, no. I am not saying that."* – see T3/259/10-19 and 260/23-261/3.

97. That is the context in which the various documents on which MHC relies have to be viewed. MHC relies on an email dated 13 May 2014 from DM, which is concerned with a request from him that more information be added to "*… the board pack"*. It is clear that this is a reference to the Executive Board and thus begs rather than helps to answer the question I am considering. Similar considerations apply to his email of 5 June 2014 to Ms Yvonne Cox. Although MHC relies on an email from DM to Messrs Adey and Pino dated 10 June 2014, in my judgment it supports DM's case on the issue I am now considering not MHC's. Ms Anderson describes the email in her closing submissions as DM "*… briefs the Board"* – see paragraph 152. I agree with that analysis. The board consisted of MHC's statutory directors Messrs Adey and Pino, not the members of the Executive Board. It is convenient at this point to note that Messrs Adey and Pino operated a separate email account – known as the "*mingsdomain.com"*. This email was sent by DM to Messrs Adey and Pino at their respective mings domain email addresses.

98. I referred earlier to the minutes of the meetings of the Executive Board. It will unnecessarily lengthen this judgment to refer to them all in detail. However, in summary the minutes of 9 June 2014 (attended by Messrs Adey and Pino, DM and Ms Bessal) was attended by Mr Shields to report on specific matters. The only contribution recorded from DM was a report concerning the implementation of a recent acquisition and his only task was to make contact with a member of staff who had been signed off work as a result of stress to ensure the proper level of support was provided. There is nothing within the meeting notes other than reports relevant to the everyday conduct of the business. Similar considerations apply to the minutes of 25 June, which again consists of reports on rather mundane issues. Whilst DM was involved in a number of the tasks identified and at least some were not directly related to his role as Medical Director, none of these tasks could be described as being ones

that could properly be discharged only by a director and were obviously tasks that could properly be performed by a senior manager below board level.

99. The minutes for the meeting of 30 June follow a similar pattern. Although there is a reference to a report concerning two acquisitions then being considered, it was Mr Pino who was providing the information. It is not suggested that the decision whether to proceed would be taken by the Executive Board. All the tasks with which DM is shown to be concerned relate to the management of MHC's various medical facilities. It is noticeable that it is Mr Pino who is recorded as giving instructions concerning the signing of contracts by consultants including DM.

100. The minutes for the meeting on 14 July point to the reality. The meeting was attended by DM and Mr Pino as well as Ms Bessal but not Mr Adey. The first item concerned the potential acquisition of Care at Home (Wales) Limited. The report was by Mr Pino who is recorded as saying that he was "*awaiting numbers to assess acquisition price. Figures to be put to [Mr Adey] when received"*. Two points arise from this. First it is not suggested that the decision to acquire was one that would be taken by the Executive Board, which was merely being updated on what was happening and secondly it is clear that the ultimate decision would be taken by Mr Adey in consultation with Mr Pino. This reflects reality – that the sole shareholder was Mr Adey and the only statutory directors were Mr Adey and Mr Pino. There is nothing in the documentation that suggests any involvement in this by DM.

101. The minutes for the meetings of 28 July 2014, 16 September 2014 (erroneously described as being for 16 October), 23 September 2014, 14 October 2014, 28 October 2014, 20 January 2015 (where this and each following meeting is described as an Operations Meeting), 3 February 2015, 24 February 2015, 10 March 2015, 17 March 2015, 31 March 2015, 2 April 2015, 8 April 2015, 14 April 2015, 21 April 2015, 23 April 2015, 28 April 2015, 27 May 2015, 16 June 2015, 21 July 2015, 11 August 2015, 8 September 2015, 17 September 2015, 30 September 2015 and 15 October 2015 follow a similar pattern to those of 9 and 30 June. It is not necessary that I comment on them in detail beyond noting that any big decision - see for example item 2 concerning recruitment and salary increases - was not taken by the Executive Board, which merely resolved that it be submitted to Mr Adey for approval. None of the issues with which DM is identified as being concerned with were ones that could properly be discharged only by a director and were obviously tasks that could properly be performed by a manager below board level.

102. The minutes of 2 September 2014 are significant to the issue I am now considering. They are different from the usual run of minutes because they are contained in an email from Mr Adey and record decisions that he appears to have taken. The first three all concern directorships. None of them involve decisions by the Executive Board. Indeed, most of what is contained in the document reads like a report to the Executive Board rather than a record of the business transacted by it. It includes at item 3 that:

> "Kevin Shilds is to be appointed as a director for all subsidiary companies of the group except MHC (Hoylake) Ltd"

As I have recorded already, Mr Shield's evidence on this was that the decision was taken by Mr Adey and communicated to him via Mr Pino. The document records that Mrs Adey is to become "… *A Company Director of all companies in the group."*. This is a report to the Executive Board of what is happening. It does not record a decision, or approval, by the Executive Board. It does not demonstrate that DM had any involvement in the decision. It does demonstrate that where Mr Adey wanted to appoint someone within the MHC organisation as a Company Director (in this case Mr Shields) then that was done formally. This point is emphasised by item 4 which was that:

> "We are still considering whether Ryan Sandick is the most appropriate person to take on the Director post for MHC (Hoylake) Ltd".

The "*We"* in this context was either Mr Adey and/or his wife and/or Mr Pino – the statutory directors of MHC – and not the Executive Board. Where it was intended that the Executive Board would approve something then that was expressly identified as being the intention – see for example Item 6 concerning risk registers. Aside from these matters, the minutes follow a similar pattern to those noted earlier and none of the issues expressly concerning DM were ones that could properly be discharged only by a director and were obviously tasks that could properly be performed by a manager below board level. In the Minutes of 14 November 2014, Item 4, it is recorded as having been agreed that Mr Shields should attend all future executive Board meetings "*… given his role as RI/Subsidiary Company Director"*.

103. The minutes for the 30 September 2014 meeting follow the same pattern to those of 9 and 30 June and are significant for present purpose only for the description of what the Executive Board did and should be doing contained in paragraph 2, which includes the statement that:

> "… currently, the Board is a digesting machine for <u>all</u> issues when in fact it should be a more strategic beast …"

This is not consistent with it being a decision-making body but rather a collegiate senior management meeting designed to ensure that MHC's senior management maintained control over day to day and week to week management issues. It is a statement that in my judgment accurately reflects its role.

104. Finally, MHC relies on some descriptions that DM applied to himself as relevant to the issue I am now considering. This is of little or no assistance in the circumstances. The question whether someone is a *de facto* director is determined objectively not on the alleged director's personal belief however genuinely subjectively held that belief might be - see <u>Smithton Limited v. Naggar</u> (ante) *per* Arden LJ at paragraphs 39.

105. Factually, MHC places particular emphasis on how DM described himself in a draft cv as being "*… the Main Board Director of …*" MHC. This was plainly inaccurate.

Given that it was a draft cv (and plainly it was, given the various gaps that appear within it) I am not prepared to conclude that it was dishonest and it certainly was not submitted to anyone in this form so no question of anyone being misled by it arises. I conclude that the statement was plainly incorrect. It does not demonstrate that DM was a *de facto* director of MHC. It demonstrates that DM had mis-described himself as being a director in a draft cv. MHC also relies on a job description issued with the knowledge and consent of DM by MHC which describes a consultant psychiatrist role within MHC and describes the appointee as being "*Accountable to: Board Director Devan Moodley"*. I regard this material as ambiguous given DM's membership of the Executive Board. In my judgment it does not demonstrate that DM was a *de facto* director when this evidence is weighed in the round with the other material that I have considered above.

106. Aside from the material so far considered, there are some clear indicators that DM was not acting on an equal footing with MHC's *de jure* directors. This is apparent for example from the email correspondence between 4 and 8 April 2014 concerning amongst other things the clinical director role within MHC. This correspondence is consistent with the picture that emerges from the material so far considered. Mr Adey started the process with a request for specific consideration of the issue at a meeting to be attended by Mr Pino and DM. That request was sent by Mr Adey to Mr Pino with a request that Mr Pino minute the meeting and email it back to Mr Adey. The meeting then took place and Mr Pino then reports back to Mr Adey by email. There is nothing in the material that suggests DM was acting on an equal footing with MHC's *de jure* directors.

107. That this is in truth the position is also very clearly shown by the correspondence in June 2014 concerning some development work at a facility that had been acquired by MHC located in Blackpool. DM had a personal connection with Dr Charles' late father who controlled a building contractor called Barba Beatus. DM attempted to influence matters so that this company was engaged by MHC to carry out the development work. MHC's official directly responsible for managing this work emailed Mr Adey with his concerns, which in summary were that Barba Beatus were charging more than the other contractors interested, had only been established for a year and had a poor financial record. This produced the following response from Mr Adey copied to Mr Pino but not DM:

> "They can pressure all they like, but it will have no effect. I decide which contractor will be used, for this and all other projects.
>
> You draw up the tender list. You put Barba Beatus on the list but ensure that this is with a note that they are on the list purely because of Devan/Jo Ward apparent preference for this contractor.
>
> You can then make observations about the contractors and put forward your recommendation as to which contractor should be selected, and why.

> This list will then come to the board, when you will be present. A discussion will ensue, and I will make the decision based on the evidence in front of me.
>
> Cheer up! This is normal. People often seek to interfere in areas where they have little or no competence. You should try advising Devan on patient care for a bit of fun."

This email is significant for two reasons. First it is clear that Mr Adey considered there was a board other than the Executive Board where the decision would be taken as to what was to happen. Even if that is wrong, it was not the board that would be the decision maker but Mr Adey. This is hardly surprising given he was MHC's sole shareholder. Secondly and more fundamentally, it is entirely inconsistent with the notion that DM was acting on an equal footing with MHC's *de jure* directors.

108. The onus rested on MHC to prove that DM was a *de facto* director. It has failed to discharge that burden for the reasons that I have summarised above.

The Alternative Bases

109. I have so far concluded that (a) the 2nd Consultancy was a valid and binding agreement as between ELHL and MHC and (b) DM was neither (i) an employee of MHC nor (ii) a *de facto* director of MHC.

110. In the alternative, MHC alleges that DM owed it relevant fiduciary duties by reason of DM's role as Medical Director, Responsible Officer and Caldicott Guardian. Ms Anderson's case on these issues is set out at Paragraph 211 of her written opening submissions and paragraphs 156 to 164 of her written closing submissions.

111. In my judgment this alternative formulation is unarguable. MHC's case is that each of the roles taken on by DM were taken on by him in his capacity as the Individual within the meaning of the 2nd Consultancy Agreement – see MHC's case as pleaded in paragraphs 20 and 21 of the RRAPC, where it is pleaded that DM discharged each of the roles of Medical Director, Responsible Officer and Caldicott Guardian under or following the variation and/or extension by conduct of the 2nd Consultancy Agreement. Although it is difficult to see how an agreement in fact entered into in 2014 (albeit backdated in its effect) could be varied or extended by reference to events that took place earlier, MHC's case is that its relationship with ELHL and DM was governed exclusively by the 1st then the 2nd Consultancy Agreement. On the parties pleaded cases either DM was employed (a suggestion I have rejected) or his services were provided under the consultancy agreements. No other suggestion has been advanced.

112. Since the relationship between MHC, ELHL and DM was governed exclusively by the 1st then the 2nd Consultancy Agreement, it follows that MHC's alternative case by which it is alleged that DM came to owe fiduciary duties to MHC by reason of him becoming Medical Director, Responsible Officer and Caldicott Guardian is unarguable - see Kelly v. Cooper [1993] AC 205 at 215, where the Privy Council

approved the statement of principle in Hospital Products Limited v. United States Surgical Corporation (1984) 156 CLR 41 that where a contractual relationship is the foundation for a fiduciary relationship "*... it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conform to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.*" This principle has been followed consistently ever since – see Hilton v. Barker Booth & Eastwood [2005] UKHL 8; [2005] 1 WLR 567 at Para 30 (Lord Walker) and Benedetti v. Saweris [2009] EWHC 1330, unaffected on this point by the subsequent decision of the Court of Appeal and Supreme Court.

113. This outcome would have been the same even if I had concluded that there was a contract of employment between DM and MHC because MHC has not pleaded an alternative case based on the existence of such an agreement, much less on fiduciary duties owing to it from DM by reason of him being an employee.

Fiduciary Duties Owed by ELHL

114. As explained already the relationship between ELHL and MHC was contractual. However, that does not mean that ELHL could not also owe fiduciary duties to MHC subject to the principles set out above by operation of the express or implied terms of the 2nd Consultancy Agreement. I do not accept Dr Wilson's submission that merely because the relationship is essentially commercial it follows that fiduciary duties cannot arise. Such duties will only not normally arise in a commercial context because in such a context it will not be usual to expect one party to subordinate his own interest to those of his counter party. However, that expectation can be adjusted by the parties contractually either expressly or by terms implied applying the usual principles.

115. Although there is no agreement as to the test to be applied to decide when fiduciary duties outside the settled categories of fiduciary relationships might arise, one that has been followed consistently is that identified in Bristol & West BS v. Mothew [1998] Ch 1 by Millett LJ 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."

This formulation was followed most recently in FHR European Ventures LLP v. Cedar Capital Partners LLC [2014] UKSC 45 [2015] AC 250 by Lord Neuberger SCJ at paragraph 15. The issue is acutely fact specific and arises where there is a "*... legitimate expectation, which equity will recognise, that a fiduciary will not utilise his or her position in such a way as is adverse to the interest of the principal"* – see Arklow Investments Limited v. Maclean [2000] 1 WLR 594 at 598.

116. The facts material to the issue I am now considering have all been set out. In my judgment it is not necessary to go further than the terms of the 2nd Consultancy Agreement to answer the question I am now concerned with. The parties to the agreement have chosen to regulate their relationship exclusively by the 2nd Consultancy Agreement and to regulate expressly the degree to which ELHL and DM can have other business interests during the currency of the 2nd Consultancy Agreement. The fiduciary duty most likely to be relevant for present purposes is a fiduciary's duty not to put himself in a position where his duty to his principal may conflict with his interest without the informed consent of his principal. However, clause 7.1 of the 2nd Consultancy Agreement (the full text of which is set out earlier in this judgment) permits ELHL and DM to be "… *engaged, concerned or [have] any financial interest in any Capacity in any other business, trade, profession or occupation during the Engagement …"* ("other business activity") subject to the express qualifications that follow in the clause. This approach is not consistent with there being an implied duty which prohibits either ELHL from placing itself in a position where its duties to MHC conflict with its own interests without informed consent. The parties agreed that ELHL could do that as long as it did not breach the provisos in clause 7.1.

117. The first proviso to clause 7.1 is that contained in sub-paragraph (a) and prohibited ELHL from other business activity that caused a breach of any of ELHL's obligations under the 2nd Consultancy Agreement. The parties having agreed this formulation, there is in my judgment no proper basis for imposing by operation of law a term that imposes any wider qualification on the permission to participate in other business activity. In my judgment similar considerations apply to the impact of clause 7.1(b) on the issue I am now considering.

Other Duties Owed by DM

118. For MHC to establish a breach of a duty of confidence against DM it must establish that information belonging to MHC that it is alleged was communicated by DM to a third party was confidential, secondly that it was supplied to DM in circumstances that justify the imposition of a duty of confidence and finally that DM used or disclosed the information without the permission of MHC and to its detriment. This duty of confidence arises independently of any contract between the parties and arises wherever information that is confidential is received in circumstances which justify the imposition of the duty. However, where damages for breach are sought the loss claimed must be proved to have been caused by the alleged breach applying conventional principles. None of this is in dispute between the parties.

119. I also accept that DM owed a duty of care in tort by which he was obliged to perform his various duties using the care and skill to be expected of a person claiming to have the skills that DM apparently had. Again that is not in dispute. As with the alleged breach of the duty of confidence, where damages for breach are sought the loss claimed must be proved to have been caused by the breach applying conventional principles.

Summary Of Conclusions Concerning Duties Owed to MHC by ELHL and DM

120. In summary, for the reasons set out at length above I conclude that:

i) ELHL was bound by the terms of the 2nd Consultancy Agreement and owed the contractual duties set out in that agreement to MHC;

ii) ELHL did not owe any duties to MHC in relation to any other business activity other than those imposed expressly by the 2nd Consultancy Agreement;

iii) Since ELHL was not in a fiduciary relationship with MHC, DM cannot be liable as an accessory;

iv) DM is not liable to MHC as if he were a party to the 2nd Consultancy Agreement or otherwise jointly liable with ELHL for any breach of the 2nd Consultancy Agreement;

v) DM was neither an employee nor a *de facto* director of MHC; but

vi) DM owed a duty of care in tort to MHC which required him to perform his duties using the skill and care to be expected of a reasonably competent practitioner and he owed MHC a duty of confidence in relation to confidential information received by him from MHC which he knew or ought to have known was confidential but in each case it will be for MHC to prove breach and that the breaches proved caused the loss claimed.

Alleged Breaches of Duty

121. *Effect of the 2nd Consultancy Agreement*

There is an issue of principle that arises that it is necessary to resolve before turning to the facts relevant to the breach allegations. Dr Wilson submits that "*by no stretch of the imagination can the start-up software business of SCL or the start-up business of WIT be considered remotely similar to or competitive with the multi-million pound residential and hospital health care business of users and patients with autism, learning disabilities and mental health issues operated by …"* MHC. This submission focuses attention on clause 7.1(b) of the 2nd Consultancy Agreement. Ms Anderson's submits that this is wrong because MHC was involved in a similar or competitive business since it was involved in doctor or nurse revalidation and the implementation of systems and products to support that activity. I reject Ms Anderson's submission and accept that of Dr Wilson. Whilst all that Ms Anderson says is correct as far as it goes it is not to the point. At all times MHC was a consumer not a supplier of such systems and products. SCL and WIT were suppliers of such systems and products. In those circumstances SCL and WIT were neither similar to or competitive with MHC.

122. Sub paragraphs (a) and (b) of clause 7.1 are disjunctive provisions. Sub-paragraph (a) prohibits other business activity which causes a breach of "*any of …"* ELHL's

obligations under the 2nd Consultancy Agreement. The obligation that MHC alleges ELHL was in breach of is clause 3.2(a) – see paragraph 57 of the RRAPC. This obliges ELHL to provide and to procure DM to provide "*… the Services with all due care, skill and ability and use its or his best endeavours to promote the interests of …"* MHC. In my judgment the obligation to provide "*… the Services with all due care, skill and ability …"* was not intended to be and is no wider in scope and effect than the tort standard imposed at common law discussed above.

123. The obligation to "*…use its or his best endeavours to promote the interests of …"* MHC means in effect that ELHL was obliged and was obliged to procure DM to promote ELH's interests. Dr Wilson submitted, and I accept, that this is a different obligation from the fiduciary duties imposed by law on fiduciaries. In the present context, MHC relies on a failure by ELHL to disclose the nature of DM's relationship with SCL and WIT. Had ELHL owed MHC a fiduciary duty not to place itself in a position where its duty and interest (or the interest of a third party with whom it is involved) may conflict, whether in fact the contracts entered into between SCL and WIT on the one side and MHC on the other were actually contrary to MHC's interests or in its best interests would be irrelevant – see Snell's Equity 33rd Ed., paragraph 7-018 *passim*.

124. However, Dr Wilson submits that in deciding whether there has been a breach of clause 3.2(a) it is necessary to decide whether the agreements entered into by MHC with WIT and SCL were in its best interests. I agree with that but even if that is wrong and the failure to inform MHC of DM's alleged involvement with SCL and WIT was in and of itself a breach of clause 3.2(a), it would still be necessary for MHC to prove loss caused to it by the breach. It is difficult to see how that could be done without proving that the agreements it entered into were not in its best interests and would not have been entered into had DM's links with WIT and SCL been disclosed. Indeed, this would have been so even if I had concluded that ELHL owed a fiduciary duty to MHC not to place itself in a position where its duty and interest (or the interest of a third party with whom it was involved) may conflict – see Gwembe Valley Development Company Limited v. Koshy [2003] EWCA Civ 1478 [2004] 1 BCLC 131 at paragraphs 135 and 159. The onus of proving that loss was caused by the breach rests on MHC irrespective of whether the duty is fiduciary or not – see Swindle v. Harrison [1997] 4 All ER 705.

125. *Contract 1*

Contract 1 was made between MHC and Symbio Scientific on or about 3 December 2012, that is prior to the date when in fact the parties agreed the 2nd Consultancy Agreement. Although clauses 3.1.1 and 6.1 of the 1st Consultancy Agreement are in similar terms to clauses 3.2 and 7.1 of the 2nd Consultancy Agreement, MHC has not pleaded its claim by reference to the 1st Consultancy Agreement. Unless MHC is able to rely on the 2nd Consultancy Agreement in relation to Contract 1, its contractual claim in relation to Contract 1 must fail. MHC maintains that the 2nd Consultancy Agreement applied by reason of its agreed commencement date being 18 July 2011. It

was not suggested by Dr Wilson that this provision was of no effect if otherwise his case that the 2nd Consultancy Agreement is a sham should fail. I proceed on that basis.

126. It is common ground that DM was neither a shareholder in, nor director of, Symbio Scientific – see paragraph 171 of Ms Anderson's closing submissions. ELHL and DM's case is that he had no other interest of any sort in Symbio Scientific and, therefore, there was nothing to disclose. MHC's case is that DM had a close relationship with Dr Charles and her father by the date when Contract 1 was negotiated and signed and it was this that ought to have been disclosed to MHC. Ms Anderson spent a considerable amount of time at trial in relation to a scheme by which DM and Dr Charles' brother and father planned to develop a site in Wrexham into a registered residential and hospital facility. I accept that DM was involved in this project to the extent set out by Ms Anderson in paragraphs 173 to 188 of her closing submissions. I also accept that DM was involved with Dr Charles' brother and father in an abortive attempt to acquire MHC in 2012, when in the end Mr Adey was successful. Neither of these projects proceeded.

127. Ms Anderson relies on the failure by ELHL and DM to disclose these dealings in either his pleadings or witness statement in these proceedings as relevant to DM's credibility as a witness. When DM was asked about this in cross examination, his response was that he did not consider the issues relevant because they were not referred to by MHC in is pleaded case. Ms Anderson maintains that is not correct by reference to two paragraphs in the RRAPC – paragraphs 9 and 93. Paragraph 9 refers to Symbio Scientific and its shareholders but not any other earlier dealings between DM and the McGuinness family. Likewise paragraph 93 does not assist Ms Anderson – in so far as it alleges DM had a beneficial interest in Symbio Scientific, that was addressed by him by denying it and although it refers to various of his associates having an interest in Symbio Scientific, that would not naturally be the trigger for a lengthy narrative on who DM knew and when, not least because he did not dispute that the shareholders in Symbio Scientific were those who were beneficially interested in it. If and to the extent that MHC invites me to find that this was a deliberate attempt by DM to mislead me, I reject that submission. Substantively, the allegations concerning DM's involvement in the Wrexham project and the proposed MHC acquisition scheme are irrelevant because they are not pleaded allegations and could not be in a claim for damages or equitable compensation because they did not proceed.

128. Turning now to Contract 1, the allegations made are those pleaded in paragraphs 61-67 of the RRAPC. The facts pleaded in those paragraphs are alleged to constitute or evidence a breach of clause 7.1 and/or clause 3.2(a) of the 2nd Consultancy Agreement. However, no attempt has been made to plead how the facts and matters alleged constitute a breach of any of the disjunctive elements of either of these clauses. MHC appears to allege that DM was engaged or concerned or had a financial interest in Symbio Scientific and/or that by causing or permitting MHC to enter into Contract 1, ELHL by DM failed to promote MHC's interests. Whilst that appears to

be the allegation, I am bound to observe that if that was the intended allegation it could and should have been pleaded in a much more focussed way than it has been. I am prepared to deal with the merits of the allegation only because Dr Wilson did not take any pleading point.

129. Dr Charles first met DM in September 2012. DM was not at any stage either a statutory or *de facto* or shadow director of Symbio Scientific nor was he either one of its registered shareholders or otherwise beneficially interested in any of its shares nor was he an investor in it whether by loan or otherwise. This is the effect of paragraph 6 of Dr Charles' witness statement and her oral evidence at T5/517/10 to 21. If and to the extent that MHC allege that DM had a financial interest in Symbio Scientific, I reject that allegation on the basis of this evidence. I find that Symbio Scientific was formed by Dr Charles and was funded by a loan from her brother of approximately £250,000 – see the evidence of Dr Charles at T2/522/4-9.

130. It is not alleged that it was not in MHC's best interests to acquire a revalidation software package to support its clinical consultants through the revalidation process imposed by the Revalidation Regs. Thus, there is no proper basis for criticising DM for asking Ms O'Malley "*... to devote time and attention to developing a system for doctor revalidation ...".* Nor can there be any criticism that Ms O'Malley spent a considerable amount of her time on that issue thereafter or of her undertaking research in connection with the development of such a system or preparing templates in connection with the system. The real criticism appears to be that Ms O'Malley spent time on the project with Symbio Scientific, its employees and Dr Charles.

131. As part of its case of improper conduct by DM in relation to Contract 1, MHC alleges that he sent a proposal provided to MHC by a competitor of Symbio Scientific to Dr Charles. It is not in dispute that he did so. DM accepted that he might not have removed the pricing information from the proposal before it was sent on. There is no evidence that he did so. What evidence there is suggests that he did not do so. The attachment to his email to Dr Charles of 19 November 2012 is entitled "*Evenlogic_Proposal_for-MHC.PDF*. That is precisely the same document that had been sent by Evenlogic to MHC – see the email of 24 October 2012. I doubt this would have been so if the PDF had been edited before it was sent to Dr Charles by DM. If DM's positive case is that the pricing information was removed, the evidential burden of proving that to be so rested on him. He did not discharge that burden. I conclude therefore that the proposal was sent in its entirety to Dr Charles. I also accept that DM knew that this document ought not to have been sent to Dr Charles with that information included. Indeed, it is questionable whether it should have been shared with another third-party bidder at all given the terms of the non-disclosure statement contained in the document. I infer that DM knew that was so from the fact that he forwarded it to Dr Charles from his private email account rather than his MHC account.

132. Although DM suggested in cross examination that his reason for sending the material to Dr Charles was "*to see if she could provide us with a better price and a better*

system" – see T9/1244/6-7, I do not accept that explanation in so far as it relates to pricing information. First, if that is what had been intended, then it would have been neither appropriate nor necessary to send the pricing information only the technical specification. Secondly, there is no reason why a requirements specification could not have been sent to all potential bidders so as to give all an equal chance of supplying what was required at the lowest price. Thirdly, there is no evidence of DM sending Symbio Scientific material to its trade rivals for similar purposes. Finally, if this was the purpose it does not explain why the material was sent from a private as opposed to an MHC email account. The reality is that if the pricing information of one rival bidder is supplied to a competitor, that enables the competitor to supply an undercutting price which is higher than might otherwise have been obtained in a competitive situation. DM accepted that this was so – see T9/1248/5-22. This is all the more unsatisfactory given that DM accepted that his function was to obtain the cheapest price that could be obtained for the specification required – see T9/1247/20-24. Competitive bidding is a mechanism that is likely to achieve best price for the party inviting the bids only if all bidders pricing and specifications are kept confidential to the party inviting the bids.

133. I conclude that DM wanted Symbio Scientific to succeed in supplying the system for use by MHC. I am satisfied that he did not want to compromise on the quality and functionality of the system that was to be provided and did not do so. I am also satisfied that the Evenlogic pricing information was supplied in order to enable Dr Charles to structure a price that was less than Evenlogic's price. DM was aware that Mr Pino considered that the price payable should be no more than £40,000 and that Mr Pino was likely to approve the offer as long as the price was less than that and he was assured that the system being purchased offered the required functionality.

134. It follows that I accept that DM can be criticised for the manner in which the negotiations were carried on so far as pricing is concerned. They were not conducted in the conventional manner of commercial negotiations between service supplier and a customer. It is not necessary that I go through every email that passed between the parties leading to Contract 1. There is a clear contrast been the formal communications between DM acting on behalf of MHC on the one hand and Dr Charles on the one hand and DM and Dr Charles using the private email accounts on the other. All that said there were two issues that mattered – functionality and price. Whilst I accept that by acting in this manner, DM potentially compromised MHC's negotiating position on price, there is no evidence that he did so on functionality. There is no evidence that in 2012 anyone other than Symbio Scientific could supply a system that provided the functionality that MHC required and there is no evidence either that any other supplier could have provided what was required at a price that in the end Symbio Scientific offered and Mr Pino agreed to. Nonetheless DM did not act in the best interests of MHC in the manner in which the price negotiations were handled and to that extent ELHL breached the 2nd Consultancy Agreement by failing to provide, and to procure that DM provided "*... the Services with all due care, skill and ability and use its or his best endeavours to promote the interests of ...*" MHC. It does not follow that ELHL was in breach of clause 7.1 however since neither it nor

DM were *engaged, concerned or [had] any financial interest in any Capacity in …"* Symbio Scientific.

135. *Damages*

MHC claims (i) the whole of the sums paid by MHC to Symbio Scientific and (ii) the "*… costs incurred by …"* MHC in its "*… employees being utilised in development of the revalidation … products for the benefit of … Symbio …"* and (iii) a "*… proportion of the payments made to [ELHL] … in respect of the time that [DM] spent leading, directing and being involved in development of …"* the revalidation products the subject of Contracts 1 to 4 – see paragraph 107 of the RRAPC. No attempt has been made in the RRAPC to break down the sums claimed in relation to the various contracts. However, in the Schedule of loss the sum claimed in respect of Contract 1 is the total sum paid by MHC to Symbio Scientific being £52,800. In relation to the sum paid by MHC to ELHL, the court is invited to assess damages by arriving at a percentage of the total sum paid to ELHL between November 2012 and 23 May 2016 that is the "*… extent of the derived benefit to the claimant"*. In relation to sums paid to MHC's employees, MHC claims in respect of Ms O'Malley £4,768.54 in respect of "*Dr Revalidation"*

136. The only submission made about relief by Ms Anderson in her closing submissions was that MHC was entitled to recover the sums claimed because "*MHC's schedule on quantum was not challenged"*. That approach is mistaken. At best that would mean that the figures were not challenged as figures. Accepting that to be the case, it is still for MHC to prove its loss and damage applying conventional principles. Given the lack of any meaningful submissions on remedies in the parties' closing submissions, I sought and received some additional written submissions addressing the lost time issue. My conclusions on the remedies issues take account of those submissions in addition to the limited assistance provided by the closing submissions.

137. This being a breach of contract claim, the sum that MHC is entitled to recover is the sum that would place it in the position it would have been in had the 2nd Consultancy Agreement been performed in accordance with its terms. The only breach that I have found proved is a failure by ELHL to act in the best interests of MHC by DM supplying the competitor bid containing pricing information to Dr Charles.

138. MHC maintain that ELHL was in breach of contract by failing to inform it of DM's links to Symbio Scientific. I have rejected that claim for the reasons set out above. Even if that is wrong and ELHL was in breach as alleged, MHC has failed to prove the loss claimed to have been caused by the alleged breach. MHC maintains that had it known of the closeness of the relationship between DM and Dr Charles, it would not have entered into Contract 1. I reject that submission. Even if that conclusion too is wrong, it does not follow, and I reject MHC's case, that it is entitled to recover all of the sums it has paid to Symbio Scientific as damages for breach of contract. My reasons for reaching those conclusions are as follows.

139. Firstly, as I have said already, it is not contended that it was not in MHC's best interests to acquire a revalidation software package to support its clinical consultants through the revalidation process imposed by the Revalidation Regs. Had it not purchased such a package from Symbio Scientific, it would have obtained one from another service provider. I reject Ms Anderson's submission that revalidation was the practitioners' responsibility not MHC's - and thus (impliedly) that MHC would have simply not provided any assistance to its practitioners - because it flies in the face of what in fact MHC had decided to do in negotiation with various regulators. This is described above by reference to the early email traffic that led to DM becoming involved in the process. There is no evidence that this decision was influenced by DM, whether for the purpose of benefitting Dr Charles or otherwise. The early email traffic suggests that the decision had been taken prior to DM becoming involved in the process.

140. Secondly, it is not alleged and there is no evidence that revalidation assistance could have been provided by MHC more cheaply without an IT package. What evidence there is suggests that both Mr Adey and Mr Pino at least implicitly accepted that to be so – see for example Mr Pino's recommendation in relation to Contract 2 contained in his email to Mr Adey of 16 December 2014 where Mr Pino asked for approval for the e-learning programme in these terms:

> "Michael: the Board is requesting that we spend £30K … to design a blended e-learning platform which will ensure that more of the mandatory training courses are done in situ and also assist with the future requirements for nurse revalidation. We expect cost savings (of staff not travelling to the training department and requiring extra cover whilst away) to more than justify the expenditure".

Mr Adey approved the expenditure "*reluctantly"* but he was not reluctant because he did not think IT was the appropriate solution but only because he wondered whether an off the shelf package that was cheaper could be acquired. There is no evidence of the availability of such a package with all the functionality that was required being available.

141. Thirdly, it is not suggested that there was a total failure of consideration for the sums paid by MHC under Contract 1. It is not alleged, nor is there any evidence, that the service provided by Symbio Scientific was in excess of, or did not meet, MHC's requirements or that a service that did meet its requirements could have been provided by an alternative service provider at no cost to MHC.

142. Assuming without deciding that it would be open to MHC to claim some lesser sum under this head notwithstanding the way that it has been pleaded, no sum is recoverable because no evidence has been adduced that supports the award of a lesser sum. Whilst I accept that ELHL was in breach of contract by reason of the supply by DM to Dr Charles of the competitor bid, there is no evidence of any loss being caused thereby. Dr Charles did not suggest that she would have quoted a lower price but for the receipt of the competitor bid and as I have said there is no evidence that an IT

package with the same functionality could have been supplied more cheaply by a rival supplier.

143. A similar conclusion would have followed had I concluded that ELHL owed MHC a fiduciary duty of the sort discussed at length earlier in this judgment. As I have explained, in a claim for equitable compensation for breach of fiduciary duty it would still have been necessary for MHC to plead and prove the loss caused by the breach and the head of loss I am now considering would have failed as a claim for equitable compensation for breach of fiduciary duty in just the same way as it has as a claim for breach of contract.

144. I turn now to the claim to recover part of the salary costs incurred by MHC in respect of Ms O'Malley. Given my findings as to breach this head of loss is not recoverable because the breach I have found proved did not cause the loss claimed. However, even if, as MHC maintain, ELHL was in breach of contract by failing to inform it of DM's links to Symbio Scientific, and even if, contrary to my findings, MHC would not have proceeded with Contract 1 or the provision of a similar system supplied by another supplier, the claim to recover salary costs is one that I would have rejected. My reasons for reaching that conclusion are as follows.

145. The sum claimed is £4,768.54. This sum was not challenged as a sum during the trial. Ms Anderson submits and I accept that it is too late to do so in supplemental submissions supplied after the trial. It remains for MHC to prove that this sum is recoverable as damages for breach of contract on the assumption that it had established that (i) ELHL was in breach of contract by failing to inform it of DM's links to Symbio Scientific, and (ii) had it been so informed, MHC would not have proceeded with Contract 1 or the provision of a similar system supplied by another supplier. Had it been its case that it would have proceeded with another supplier, then there would have been an additional issue to decide as to whether the time for which damages are claimed would have been spent on the provision of a system by another supplier in any event. It is probable that at least some of it would have been given that the functionality required by MHC was not available elsewhere.

146. The relevant principles are those set out by Wilson LJ as he then was in Aerospace Publishing Limited v. Thames Water Utilities Limited [2007] EWCA Civ 3 in these terms:

> "I consider that the authorities establish the following propositions:
>
> (a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established
>
> (b) The claimant also has to establish that the diversion caused significant disruption to its business.

> (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time."

In arriving at that conclusion, Wilson LJ examined a number of earlier first instance authorities including Tate and Lyle Food and Distribution Limited v. GLC [1982] 1 WLR 149, of which he said this at paragraph 80 of his judgment:

> First, Tate and Lyle Food and Distribution Ltd v. Greater London Council [1982] 1 WLR 149. The defendants were liable to the claimants for having failed to dredge silt which they had caused to be accumulated when constructing new piers for the Woolwich ferry and which had obstructed the claimants' use of their barge moorings. The result had been that the claimants themselves had had to dredge the silt and, as part of their claim, they claimed managerial and supervisory expenses referable to that operation. In rejecting this part of the claim Forbes J. said at 152 E – G:
>
> > "I have no doubt that the expenditure of managerial time in remedying an actionable wrong done to a trading concern can properly form the subject matter of a head of special damage. In a case such as this it would be wholly unrealistic to assume that no such additional managerial time was in fact expended. I would also accept that it must be extremely difficult to quantify. But modern office arrangements permit of the recording of the time spent by managerial staff on particular projects. I do not believe that it would have been impossible for the plaintiffs in this case to have kept some record to show the extent to which their trading routine was disturbed by the necessity for continual dredging sessions."
>
> It is thus important to note that the claim was rejected not because of a failure specifically to establish that, had it not been diverted to the remedial measures, the managerial time would have been productive of revenue for the claimants but only because they had not properly demonstrated the amount of time thus diverted and, more generally, the extent to which their trading routine had been disturbed by it.

147. In my judgment it is sub-paragraph (b) of Wilson LJ's summary of the applicable principles and the last factor mentioned in the final sentence of Wilson LJ's analysis of the effect of Tate and Lyle Food and Distribution Ltd v. Greater London Council (ante) that are material to the claim to recover part of Ms O'Malley's salary. Although Dr Wilson submits that MHC's claim is unprincipled because it focussed on salary and allied cost rather than loss of revenue, I think this is mistaken in light of Wilson LJ's conclusion that " … *it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.*" However, if no disruption is established, then there is nothing on which to found the inference. There is no evidence of any disruption whatsoever to MHC's usual trading routine or

its business more generally caused by Ms O'Malley's activities in relation to Contract 1 and Symbio Scientific and for that reason the sum claimed in respect of Ms O'Malley's activities is not recoverable as damages for the assumed breach of contract.

148. It is unclear what element of the salaries of other MHC employees are claimed in respect of Contract 1. However, the common feature of the claims for alleged loss of use of the other employees time is that the court is invited to select almost at random a proportion of any relevant employee's salary. In my judgment damages are not recoverable on that basis because not only has MHC failed to establish that diversion caused significant disruption but also because MHC has failed to prove the extent of the diversion. In my judgment this element of the claim (if relied on in relation to Contract 1) fails for those reasons as well as for the reasons set out in the previous paragraph of this judgment.

149. Finally, I turn to the suggestion that I ought to award by way of damages a percentage of the fee paid to ELHL between September and December 2012 in order to reflect the time "… *[DM] spent leading, directing and being involved in development of …"* the product the subject of Contract 1 – that is the doctor revalidation system. In my judgment that claim ought to fail for the following reasons. First, as explained above, ELHL's contractual obligation was to provide DM's services for the minimum period identified in the 2nd Consultancy Agreement. It is not alleged that DM's services were not provided for that period and there is no evidence that it was not.

150. Secondly, since the claim is not advanced on the basis that DM was not provided for the minimum contractual period, the claim could only be made on the same basis as the claim made in respect of Ms O'Malley. In principle MHC would be entitled to recover the sums paid to ELHL for DM's time that should have been but was not devoted to providing services to MHC – see the Australian case of Zomojo Pty Limited v. Hurd (No.4) [2014] FCR 441 *per* Jessup J at [15] affirmed on appeal to the full court cited in Kramer, Law of Contract Damages, 2nd Ed., at [2-20]. That said, there is no reason why the principles identified by Wilson LJ in Aerospace Publishing (ante) should not apply to such a claim as they do in respect of lost employee claims. The claim in respect of DM advanced on that basis suffers from the same difficulty that led me to reject the claim in respect of Ms O'Malley.

151. Thirdly, since the claim is advanced on the basis that the court should select a proportion of the sum paid to ELHL it suffers from the same defects noted in paragraph 148 of this judgment. Finally, any loss of time attributable to the breach I have found proved was no more than *de minimis.*

152. In summary, whilst I accept that ELHL breached the 2nd Consultancy Agreement in the way referred to above, no loss has been proved to have been caused thereby. My conclusions would have been the same had I concluded that either ELHL or DM owed a fiduciary duty to MHC to inform it of DM's connections to Dr Charles for the

reasons I give above in respect of the claim to recover the whole of the sum paid to Symbio Scientific.

153. *DM's Involvement with SCL and Contract 2*

Contract 2 was made between MHC and SCL on or about 11 December 2014 under which SCL was to develop for and supply to MHC on a pilot basis an e-learning platform product called "*Achieve Connect*". At paragraphs 233 and 234 of his closing submissions, Dr Wilson refers to a governing law and exclusive jurisdiction clause. Quite why he should do so is not made apparent. In short however (a) if and to the extent that DM and ELHL contend that Northern Irish law is different from English law in any material respect it was for them to prove it and they have not attempted to do so; (b) if and to the extent they wished to rely on the exclusive jurisdiction clause to challenge the jurisdiction of the English court, the time for doing so ended when each submitted to the English jurisdiction and (c) in any event it is not open to either to rely on either of these provisions since they are contained in a contract to which they are not party.

154. MHC's case is that (unknown to MHC's statutory directors or shareholder) in or about June 2014, DM and Dr Charles agreed to form a business relationship and that SCL was incorporated in order to carry that partnership into effect. Although Ms Anderson for understandable reasons advances this point in great detail in her closing submissions, it is not necessary that I reproduce all of the detail in this judgment because Dr Wilson has not sought to challenge it – see paragraphs 235 to 239 of his written closing submissions. Nonetheless I should make clear that I accept Ms Anderson's submission that DM was interested or at the very least strongly supportive of SCL and its business activities. I reach that conclusion for the following reasons.

155. SCL was incorporated on 10 June 2014. On 9 June 2014, Dr Charles sent an email to DM in which she set out seven company names that were "*… free in Companies House"*. In relation to Symbio Connect she said "*… this would create a strong brand for RW* [Revalidation Wizard] *sister products such as Nursing Connect. We could re brand RW to Revalidation Connect"*. She closed the email by asking DM to "*text me a number between 1 and 7"* by which she meant that DM was to choose one of the seven names she set out in the email. There was then a text exchange between DM and Dr Charles. As with most of the text messages I was shown in the course of the trial it was attended by a high level of colloquialism and familiarity that is unusual in business communications. However, On 9 June 2014 at 2138, Dr Charles chased DM for a response. He then replied "*6&7"* which after some obscure further exchanges he altered to "*5"*. Dr Charles then asked DM "*So shall we go with that then?"*. DM relied "*Yup"*. Following incorporation of SCL, Dr Charles forwarded a copy of the email confirmation from Companies House to DM at his private email address at 12 18 on 10 June 2014, saying "*It looks like we are in business!"*. In my judgment these exchanges when read together make it abundantly apparent that whatever the formal governance arrangements were intended to be, this was the inception of a joint venture between DM and Dr Charles.

156. What happened thereafter was entirely consistent with that being the case. As explained already, Ms Smith was and is DM's wife. She became involved in organising and orchestrating SCL's internal business structure arrangements. She did so at the request and in accordance with directions given to her by DM. This is apparent both in relation to the arrangements concerning SCL's banking and also its shareholding. In relation to banking, Dr Charles opened a bank account for SCL and sent the details to DM by email to DM's private email account on 7 July 2014. On 23 September 2014, Dr Charles arranged for Ms Smith to be identified as an account user – see her email to Ms Smith of 23 September 2014 at 1702. On 24 September Ms Smith confirmed that she had obtained access to the account and in her response, Dr Charles said to Ms Smith "*[DM] said you gave him a rollicking about being overdrawn. I did tell him. I'm glad you keep him in line, he is a slippery one"*. Although much later in the chronology, the email from DM to Dr Charles and others dated 8 February 2015 in relation to his relationship with SCL's bankers is significant. In that email, he informs Dr Charles that he has requested a meeting with the bank but that nothing was needed from any of the addressees in order to prepare for the meeting.

157. In relation to shareholdings, the arrangements suggest that DM was beneficially interested in SCL and that the shareholdings were arranged in a manner designed to disguise that fact. The first relevant email is that of 23 September 2014 from Ms Smith to Dr Charles in which Ms Smith asks whether Dr Charles needs help in organising share allotment. Dr Charles responded saying that nothing had been done but she would sent though the information. The significant point is that Dr Charles was expecting Ms Smith to sort out the allotments. Ms Smith responded by email saying that all she needed was a Companies House authentication code because DM "*… has given me the amounts you have agreed"*. On 25 September, Ms Smith instructed the accountants who acted for her and DM to allot 1,850,000 shares to Summit Healthcare Limited (a company controlled by a friend of DM called Dr Nair) and 150,000 to Dr Charles. The significant point about this is not who ultimately was allotted what but rather how the allotment process was being handled. That process, in combination with the way in which banking facilities were handled, strongly supports the conclusion that DM was beneficially interested in SCL. It also supports the conclusion that Ms Smith was performing a lot of the administrative tasks in effect as directed by DM.

158. In addition to this activity, Ms Smith was involved in setting up pay roll for SCL – see her emails to Dr Charles of 11 and 18 September 2014. DM was heavily involved in assisting in the design of SCL's product and approving critical elements of its marketing – see by way of example DM's email to Dr Charles of 13 September 2014, DM'e email to Dr Rankin of 22 September 2014 and the other emails referred to by Ms Anderson in paragraphs 280 and 281 of her closing submissions. This level of involvement led to him being asked by Dr Charles to approve SCL's standard terms and conditions – see her email to DM of 6 February 2015. This was after Contract 2 had been entered into but nonetheless in the course of his cross-examination DM accepted that these terms would be those that SCL would seek to rely on in its

dealings with MHC, where DM would, ostensibly, be representing the interests of MHC. DM agreed that this was, as Ms Anderson put it, "*a bit dodgy"* – see T8/1074/14-1075/3.

159. Not merely was DM involved at this level of everyday detail, but he was driving the strategy of SCL from an early stage – see in particular his email to DR Charles of 6 October 2014 which he opened by saying "*... there is a need for us to define a strategy and structure to allow us to progress the company in the most effective manner ...".* The email went on to identify the role of Dr Charles and DM as being that "*[Dr Charles] and myself work on the forum technology which will be utilised for ..."* both medical and nursing revalidation before adding that " *... the uptake for the nursing system may be the key to providers also switching their doctors to us."*. He concluded by saying that "*I will also be leasing an office close to Manchester Airport for the marketing team to work out of"*. In my judgment this is plainly a communication from one joint venture partner to another.

160. DM was heavily involved in the day to day administration of SCL's affairs – see by way of example (i) Dr Charles's email of 15 September informing DM about the transfer of a server contract from one third party supplier to another and seeking DM's approval of the expenditure involved, (ii) her email of 18 November 2014 notifying Ms Smith about use of the company credit or debit card, (iii) her email to Ms Smith of 6 January 2015 recording DM's agreement that Dr Charles could purchase some additional office furniture and (iv) Ms Smith's email response agreeing to the amount required to be expended. In my judgment these communications (when taken in the round with the other material I consider in this part of the judgment and in particular the financial contributions referred to below) are consistent only with DM being beneficially interested in SCL.

161. It is clear that substantial amounts of cash were provided by DM and ELHL to SCL. Between the end of August 2014 and 10 August 2016, DM and ELHL paid £137,252.32 into SCL's bank account. DM procured the payment of a further £106,000 by third parties to SCL. It was on this basis that DM was prepared to accept albeit reluctantly that he was a substantial debt investor.

162. It is now necessary that I take a step back from this detail in order to assess its impact on the credibility of DM as a witness. Ms Anderson sets out in detail in her closing submissions the way in which DM and those who have acted on his behalf have represented the degree of his involvement with SCL – see paragraphs 11-50. It is not necessary that I go through each of the statements that Ms Anderson relies on. In my judgment DM is articulate, shrewd and intelligent. When he said paragraph 29 of his 4th witness statement that "*I categorically deny that I have ever had any involvement with; beneficial interest in or derived any benefit from ..."* SCL he fully understood what he was saying and the impression that was being conveyed by what he was saying. I reject as inherently implausible the suggestion that DM misread or misunderstood what had been drafted for him, not least because it was apparently consistent with what had been said on his behalf prior to the service of this statement.

Likewise, his explanation of the 6 October email given in his oral evidence is one that I reject. When Ms Anderson put to DM that this was one partner telling another what he thought as to how their business should be organised and developed, DM responded first that "*I really did not see it that way"* (D8/1039/3) and a little later "*That was not my understanding"* (D8/1040/5). When asked why, if that was not the case, he would be renting an office in Manchester, he said:

> "Well, I was going to get an office, because it was closer to Wales and they could have worked out of there. It was not specifically for that and it never happened. I never got an office in the end. But yes they could have used it"

This was an answer that was carefully crafted in order to avoid the obvious inference to be drawn from the email that he was being asked about. He did not say he was leasing an office for his own purposes that the marketing team could use as well. He was plainly saying that he would be renting an office for the marketing team. When that was suggested to him he accepted that the documents came across in the way that was being put to him and a little later that "*I am not disagreeing with you about the contents of the documents"*(T8/1041/13-14). In the end, when Ms Anderson put to DM that the document showed that his case that he had no involvement in SCL was unsustainable, DM relied "*… I have said to you that my understanding … was that I did not derive a financial benefit …"*. This was beside the point that Ms Anderson had been putting to DM, was not an answer to the question that he had been asked and was plainly an attempt to deflect the real point being made by Ms Anderson. .

163. In my judgment on the basis of the material set out above (which is some but not all of the material relied on by the claimant within the documentation that has been disclosed) I reject the suggestion by DM that he neither had any involvement with or beneficial interest in SCL. I accept that he did not derive any financial benefit from his involvement in SCL. However, that is only because SCL did not make a distributable profit or pay any dividends at any stage. Given the volumes of material demonstrating the level of DM's involvement in the affairs of SCL, this error cannot credibly be regarded as innocent mis-recollection. I regard DM's concession that he was a loan investor as his explanation for the sums that he advanced to SCL as an example of DM conceding the bare minimum that he considered was required by the material then being put to him rather a full and frank description of the position. Having considered DM's evidence in the round concerning his involvement with SCL, regrettably I conclude that his evidence on this issue is untrue. I turn below to the impact this has in relation to Contract 2. This conclusion leads me to the further conclusion that I should not accept DM's evidence save where it is corroborated, against his interest or is admitted or at any rate should be very cautious before so doing.

164. Against that background I turn to Contract 2. MHC's case is that it would not have entered into Contract 2 had it known of DM's involvement in SCL. This involves looking further than merely the level of DM's involvement in SCL but at whether entering into Contract 2 was contrary to MHC's best interests. My reasons for

concluding that this is a relevant consideration are set out in relation to Contract 1 above.

165. First, I find that MHC did not know of DM's interest in and involvement with SCL or of the degree to which he had been involved with the genesis of the product to be supplied under Contract 2 at any time down to the date when Contract 2 was signed – see the concession by DM at T8/1103/18-21. In light of that concession (and the absence of any challenge to the point in Dr Wilson's closing submissions) it is not necessary for me to set out in great detail why that was an inevitable concession. However, the detail is all set out in paragraphs 313-341 of Ms Anderson's closing submissions, which I accept.

166. It is at this stage that the real issue between the parties becomes apparent. Dr Wilson submits that (a) none of MHC's staff contributed to the development of the software package, (b) the only contribution made by MHC's staff was course content that would have been undertaken whether or not SCL had provided the platform and (c) there is no evidence that MHC would not have entered into Contract 2 with SCL if they had known of DM's connection with SCL. Dr Wilson submits that the sole test applied by Mr Adey was whether the scheme would save MHC money and, he submits, there is no evidence that the service could have been provided cheaper either in house or by using an alternative third-party provider.

167. DM asserts in his witness statement that "*... in late 2015 ...*" he had been told by Graham Hallows that Mr Adey and Mr Pino had told him that DM was the owner of SCL and WIT. If such a conversation took place before the date when Contract 4 was signed and took effect, then it would provide significant support for the proposition that DM's involvement with SCL would have made no difference in relation to Contract 2. For reasons that I explain below when considering Contract 4, I reject DM's evidence on that issue.

168. The result of all this is notwithstanding the vast amount of time and effort that has been expended by MHC is demonstrating that DM had an interest in SCL (which as I have said I accept) the only real question I have to determine is whether MHC has demonstrated a breach of contract as alleged. In the absence of any evidence that supports the proposition that MHC would not have entered into Contract 2 with SCL had it known of DM's interest in that company, it is difficult to see how that allegation could be made good other than by inference. There are two people who could have provided this evidence – Mr Adey and Mr Pino. However, MHC chose not to call either of them. In those circumstances, I infer that if they had been called that would not have been their evidence. This conclusion is consistent with the mail exchanges between Mr Adey and Mr Pino on 16 December 2014. No one was suggesting that MHC should not acquire an e-learning support package. The only dispute was whether one could have been acquired more cheaply off the shelf that provided the functionality required. In those circumstances, had DM disclosed his links to SCL, it is probable that an assessment of the merits of what was proposed would have been tested by another or others in the senior management of MHC.

However, there is no evidence that an off the shelf package was available, much less that it was available with all the required functionality at a cheaper price than was paid to SCL.

169. Whilst I am invited by Ms Anderson to infer that that MHC would not have entered into Contract 2 with SCL from the facts that I have found proved – that is that DM was heavily involved and financially interested in SCL but did not disclose that fact to MHC – in my judgment it would be wrong to draw that inference without some evidence that suggested Contract 2 was in some way disadvantageous in terms of the service provided or cost when compared to other providers of a service of a similar standard. There is no material available that enables such a conclusion to be reached. Indeed, by the time the parties commenced negotiations leading to Contract 4, there is significant evidence that the products were of high quality and of significant value and benefit to MHC. I develop that point further below. In those circumstances I conclude that breach has not been proved. Although Ms Anderson submitted that there was an obvious conflict between DM's role as the person responsible for appraising medical practitioners working for MHC and his interest in the provider of the software used for that purpose, in my judgment that takes matters no further in the absence of evidence that Contract 2 was in some way disadvantageous in terms of the service provided or cost when compared to other providers of a service of a similar standard.

170. *Contract 2 – Damages*

In light of the conclusions that I have reached on the breach issue, no issue concerning damages arises. Had it arisen, I would have concluded that the claim to recover the whole of the sum of £30,000 paid to SCL would have failed essentially for the same reasons that I rejected such a claim in respect of the Contract 1 claim. As I have said earlier by reference to the email exchanges between Mr Adey and Mr Pino on 16 December 2014, no one was suggesting that MHC should not acquire an e-learning support package. The only dispute was whether one could have been acquired more cheaply off the shelf that provided the functionality required. There is no evidence that an off the shelf package was available that provided the functionality required, much less that it was available at a cheaper price than was paid to SCL. There is no argument available to MHC that the consideration for which the payment was made has wholly failed. On the contrary, the software was supplied and used and it has not been suggested that it was in any way not fit for purpose either wholly or in part. It was used by MHC without complaint in the course of its business. There is no alternative claim advanced in relation to the sums paid to SCL. The staff time costs claim raises the same issues as those in relation to Contracts 1. In my judgment these claims ought to fail for the reasons that I set out above in relation to the Contract 1 claim.

171. *Contract 4*

It is appropriate to address the claim made by reference to contract 4 at this stage because although made on 28 October 2015 (after Contract 3) it was a contract under which SCL was to provide the services initially provided under Contract 1 and Contract 2 to MHC at a price of £95,000 (inc VAT) and £1,000 per month for a 12-month period.

172. The issues that arise in relation to Contract 4 are very similar to those that arise in relation to Contract 2. MHC alleges but DM denies that he was heavily involved in assisting SCL in its negotiations with MHC, DM relies on the fact that he had no or no significant involvement in the negotiations on behalf of MHC whereas MHC maintain that to be beside the point given the assistance he was providing to Dr Charles in connection with her negotiations with MHC and finally there is a dispute as to whether MHC would have adopted any different course had it known of DM's interest in SCL given the quality of and benefits derived by MHC from use of the products the subject of Contract 4.

173. Contract 4 was negotiated initially by Mr Williams on behalf of MHC. These negotiations led to the provision of a draft contract on 11 September 2015 by email from Dr Charles to Mr Williams. However, this was forwarded to DM by Mr Williams by email the following day, in which Mr Williams said "*Please see attached copy of Therese's contract – can you please advise next step. Is this to go to Roberto for comment etc"*. DM's response in an email of 12 September 2015 was that the contract seemed fine to him but it "…*Needs to go to Roberto for sign off please"*. Mr Williams then sent the draft contract to Mr Pino by an email of 12 September (16.02) to which Mr Pino responds saying:

> "Can you please set up a meeting with them so I can go over this contract.
>
> We are using them I think for the RO product and the nurse revalidation product.
>
> I could do with squaring the circle for all these contracts"

174. As mentioned above, DM maintains that there was a conversation between him and Mr Graham Hallows of MHC "*… in late 2015 …"* during which he alleges he was told by Graham Hallows that Mr Adey and Mr Pino had told Mr Hallows that DM was the owner of SCL and WIT. As I have said already, I reject that evidence. My reasons for reaching that conclusion are as follows.

175. DM's evidence as to the conversation with Mr Hallows is entirely uncorroborated. Dr Wilson submits that it is corroborated by an email that Mr Pino sent to Mr Adey alone on 18 September 2015 but I reject that submission. The context in which that email came to be sent was that set out above – the receipt by Mr Pino of the draft of Contract 4 and his instruction to Mr Williams to set up a meeting with SCL as set out

in the email of 12 September quoted above. In his email of 18 September, Mr Pino informs Mr Adey:

> "Michael
>
> I am meeting Dr Therese Charles at New Hall today regarding the email software contract.
>
> It would appear that we are using them for
>
> 1.E-Learning.
>
> 2 Nurse revalidation.
>
> 3 RO Software to monitor doctor training
>
> I have only just realised that they are all connected to the same person."

Dr Wilson submits that the person being referred to is DM. Dr Wilson invites me to draw an adverse inference from the fact that Mr Adey and Mr Pino have not been called to give evidence by MHC. Had they been, they would have been asked about this issue. Equally, Mr Hallows has not been called and so could not be asked about the conversation that DM relies on.

176. I reject Dr Wilson's suggestion that Mr Pino is referring to DM in the final line of his email to Mr Adey. In its context that sentence is much more naturally read as being a reference to Dr Charles rather than DM. I say that because up until that stage three separate companies were involved – SCL for e-learning, Symbio Scientific for medical revalidation and WIT for nursing revalidation. That Mr Pino had only recently realised this is apparent from the email he sent to Mr Williams on 15 September quoted above. This makes it more likely that he is referring to Dr Charles in the email he sent to Mr Adey. If the person being referred to was DM (who is not mentioned anywhere by name in the email) rather than Dr Charles (who is mentioned) I do not see any reason why Mr Pino would be coy about mentioning DM by name. Finally, DM's case on this issue is close to inconsistent with some answers that he gave in cross examination. Ms Anderson cross examined DM about the forwarding of the draft agreement to Mr Pino. Ms Anderson suggested that it was apparent from his email to Mr Williams of 15 September (which had been copied to DM) that Mr Pino had "*... no idea that you are involved with Symbio Connect does he?"*. DM accepted that he had not informed Mr Pino of his involvement. The point for present purposes is that if DM had not told Mr Pino of his involvement by 15 September, it is highly unlikely that he would have discovered that fact sometime between then and 18 September. No plausible basis for this information coming to Mr Pino in the period between 15 and 18 September is suggested. If it had, it is inherently implausible that Mr Pino would have reported that fact to Mr Adey in the terms he uses in his email of 18 September. He would have said in terms (presumably, given the nature of MHC's case, with some sense of outrage) that DM was interested in the supplier of each of the programmes. If he had reported the position to Mr Adey before the email was sent

then he would have referred to that fact in the email if it was DM's involvement that he was alluding to. The notion that Mr Pino knew of DM's involvement is entirely inconsistent with Mr Pino's email to DM of 21 September 2015, referred to below. Thus while I accept that there is a theoretical distinction between Mr Pino knowing of DM's involvement and him being told of that involvement by DM, it is a distinction of no relevance in the circumstances.

177. In my judgment these factors outweigh the absence of any evidence from Messrs Adey and Pino in relation to the issue I am now considering. In my judgment the attempt to rely on the email is opportunistic, particularly since DM does not commit himself in his statement to any even approximate date as to when the conversation is alleged to have taken place and does not refer to the email in his statement as supporting his case. Finally, although DM relies on the fact that MHC does not allege in paragraph 93 of the RRAPC that it did not have any knowledge of DM's involvement in the Symbio companies or WIT but only that DM "*... did not declare or disclose his beneficial interest ...*" I think this semantic, legalistic and opportunistic unless there is evidence that demonstrates MHC knew of DM's involvement with SCL even though he had not disclosed it himself. There is no such evidence apart from DM's uncorroborated and self-serving evidence of his conversation with Mr Hallows, which I reject. This conclusion fortifies my earlier conclusion that I ought to be cautious before accepting DM's evidence save where it is corroborated, against his interest or admitted by MHC.

178. What then followed were some detailed negotiations between Mr Pino on behalf of MHC and Dr Charles. This led to Dr Charles sending a revised draft contract to Mr Pino under cover of an email of 20 September 2015. On 21 September 2015, Mr Pino forwarded it to DM commenting that "*... I have had a good chat with Dr Therese and I do not think that she is up for much movement on these numbers. She said she would have another look at them but it would be useful if we met to discuss them. When are you free?"* As I have said above, I consider the terms of this email to be entirely inconsistent with Mr Pino being aware of DM's connection with SCL.

179. Unbeknown to Mr Pino, DM was supplying behind the scenes support to Dr Charles during the course of those negotiations. Although Ms Anderson submitted that this was significant for understandable forensic reasons, in my view its importance has been exaggerated. On 27 September 2015, Dr Charles sent a further revised draft contract to Mr Pino. It was not suggested that DM had any substantive input into any of the draft contracts sent by Dr Charles to Mr Pino down to this point. Mr Pino responded to Dr Charles by email on 28 September 2015. In his response (copied to DM), Mr Pino said:

> "I have read through the contract and it would be useful for us to go over some of the finer points when you have a minute:
>
> 1. VAT
>
> 2. Delivery dates for the YF modules.

> 3. Delivery dates for the Autism Course/Care Certificate/First Aid/Medicine Competency course.
>
> 4 We require an ability to develop our own specialist training platform, partly because we may well want to licence this out to third parties. We accept that this will never be possible with your platform. Nothing in the contract should prevent us from doing this though.
>
> 5. Clause 2.7 'these terms and conditions may be amended from time to time without notice'. This clause feels like the contract can be unilaterally varied without notice. Can we have greater clarity on this point.
>
> Please let me know when you are free to talk these points through, this is more about getting the contract right so we can sign"

DM supplied to Dr Charles some comments on Mr Pino's email annotated on Mr Pino's email to Dr Charles that Dr Charles had sent to him. I set out DM's comments in italics below:

> "I have read through the contract and it would be useful for us to go over some of the finer points when you have a minute:
>
> 1. VAT
>
> *As discussed*
>
> 2. Delivery dates for the YF modules.
>
> *Depends on what YF's requirements are*
>
> 3. Delivery dates for the Autism Course/Care Certificate/First Aid/Medicine Competency course.
>
> *In what order is this required? Once this is established with the Training Department, the schedule can be drawn up.*
>
> 4 We require an ability to develop our own specialist training platform, partly because we may well want to licence this out to third parties. We accept that this will never be possible with your platform. Nothing in the contract should prevent us from doing this though.
>
> *Fine. Good luck to your morons doing that*
>
> 5 Clause 2.7 'these terms and conditions may be amended from time to time without notice'. This clause feels like the contract can be unilaterally varied without notice. Can we have greater clarity on this point.
>
> *Delete clause*"

Ms Anderson cross examined DM on his supply of comments to Dr Charles on Mr Pino's letter. Ms Anderson asked DM of the annotated document set out above:

> "Q: This is another extraordinary document of deception, is it not, because you wearing your Symbio hat, annotate for Dr Charles the responses to Roberto Pino.
>
> A: Yes. As I have said, and I will repeat this, I went way beyond what I should have done … I accept that in terms of my responses they were unconditionally not the right thing … I am not trying to excuse anything. I accept that I compromised myself …
>
> Q: Well it was dishonest. You see if you want to do a clean breast and if you are planting this mitigation for the purpose of the transcript that you are saying you are going to have to send to the Regulator, then I think you might have to be a bit more candid and fess up properly to what has gone on?
>
> A: I am not making these statements for – yes. I have said to you that I was going to, the transcripts were going to be passed on and |I am not saying this in terms of trying to get something on the transcript as you suggest. I am answering your questions as honestly as I can and I an accepting responsibility and I am agreeing with you …
>
> Q: Are you accepting that it was dishonest?
>
> A: I agree with you that I should have told them and you know this is a matter that I will be discussing with the regulators
>
> Q: But you see Dr Moodley, the concern that MHC has about this is that you are still delusional about it … I … would put this to you, that you are a clinician still. As I understand it, you have clinical duties to patients who are vulnerable …
>
> A: I do not have clinical responsibilities at the moment, no.
>
> Q But you supervise others who do?
>
> A: Yes I do". "

DM clearly accepted in this exchange that he should not have supplied the comments he supplied to Dr Charles. He was correct to do so. I find that as a result ELHL was in breach of its contractual obligations contained in Clause 7.1(a) by failing to procure that DM promoted the interests of MHC. I record that no issue arises in this case concerning DM's fitness to practice as a medical practitioner, other that in relation to Patient X. In relation to Patient X issue, MHC reported DM to the GMC and the GMC decided that there was nothing for it to investigate. In those circumstances, I do not consider it appropriate that DM's fitness to practice, much less MHC's views on that issue should have been introduced into the cross examination. I have left that part of this exchange out of account for all purposes in connection with this trial.

180. There is no evidence of the systems supplied by SCL being anything other than fit for MHC's purposes. By an email of 1 July 2015, Mr Williams reported to DM in relation to the e-learning platform that:

> "… the Blended learning on the whole is going very well the general feedback is excellent .."

This view appears to have been shared by the relevant sector regulators – see Ms O'Malley's note dated 4 April 2016. This view of the quality of the system was shared by MHC's staff – see by way of example Mr William's email to DM and Ms O'Malley dated 26 August 2015 in which he described the e-learning format as "*spectacular"* and that the revised format being developed and which was to become the subject of Contract 4 as one that would "*... revolutionise the way staff carry out training and take what we have now to the next level and also to be the first of its kind that is used in this way …"* and the email from Ms Mandy Reeves to Mr Williams dated 12 November 2015. Mr Williams was sufficiently impressed by Ms Reeves comments to pass them on to DM and Ms O'Malley by email on the same date in which he said of Ms Reeves' remarks that "*... I thought it was important to share"*.

181. Following completion of the negotiations between Mr Pino and Dr Charles, Mr Pino reported to Mr Adey with his recommendations as to what should be done by an email dated 24 September 2015, copied to Mr Hallows, Ms Bessal and DM. In it Mr Pino states:

> "Michael:
>
> There are three pieces of software which we wish to use which will add value to the Group:
>
> 1. Medical revalidation software: This ensures that all our Doctors are GMC compliant.
>
> 2. Mandatory training. This is a legislative requirement.
>
> 3. Nurse revalidation. This is now a legislative requirement
>
> The costs of 1 & 2 are £8k per month and the relevant points for why this cost is beneficial is contained in [an attached document]
>
> The 1 year contract for 1 and 2 is attached.
>
> The costs and 1 year contract for 3 is £648/ month.
>
> Looking forward we should certainly be developing our own platforms for future administrative and legislative requirements namely care certificates and specialist training which we will develop. The argument then follows that some of the items above could also be incorporated into our platforms. I am talking to a software developer about this and will report back shortly.
>
> The platforms above do not include YF as their needs are slightly different and this too needs to be considered going forward.
>
> I am also hoping to reduce the prices of these contract a little more but we really need to run with 1 to 3 above as they provide significant benefits to the Group:

a. The training of our staff is done mostly in their own time (so we are not paying for their time) and they do not have to travel to a central location.

b. The quality of the modules they complete is high and ensures excellence. The packages are updated automatically to reflect legislative changes and are care home/hospital specific.

c. The training package allows for staff to be inducted immediately they start work at the home and not wait weeks for the relevant course to be run.

d. The cost savings made as a result of signing up to these contracts will certainly negate the cost of all software packages.

Can you please support these initiatives?"

Mr Adey responded later the same day by email saying "*Approved"*. Thereafter following a review of the contract by solicitors instructed by MHC, Contract 4 was signed and took effect.

182. Three points emerge from this email. First, it further negates the suggestion made on behalf of MHC that if MHC had been aware of the connection between DM and SCL it would never have provided the medical and nursing re validation platforms or not proceeded to contract for the provision of systems judged to be the best available for MHC's business. Secondly it further undermines the suggestion made on behalf of MHC that SCL and/or WIT were competitors of MHC. Not merely did MHC not at any stage trade in the provision of revalidation or e training platforms but this email makes clear it was not intended they should do so. It suggests only that at some time in the future MHC might want to take the process in house. Finally, this email reflects the other documentary material relevant to the quality of the products being provided.

183. Much time was taken up in attempting to demonstrate that some of the money paid by MHC to SCL under Contract 4 ended up in another company or other companies controlled by DM. This issue is explored in great detail in MHC's closing submissions at paragraphs 357 to 395. I intend to address it much more shortly than does Ms Anderson because much of the material relied on by Ms Anderson is not in dispute.

184. I find that Achieve Connect Limited, which was incorporated on 13 April 2015, was beneficially controlled by DM for the reasons identified by Ms Anderson in paragraph 369 and 380 of her closing submissions. Dr Kumar was a 5% shareholder. I accept also that DM was beneficially interested in or controlled Symbio Corp Limited for the reasons summarised by Ms Anderson at paragraph 365 of her closing submissions. This is immaterial to the substantive issues that arise other than as necessary background however, because it is not alleged that Achieve Connect Limited received any of the money paid by MHC to SCL.

185. Achieve E-Learning Academy Limited was incorporated on 26 October 2015. Dr Kumar was its director and shareholder. As Ms Anderson puts it at paragraph 387 of her closing submissions, "*the only reason this company was formed is because of the failure to set up a bank account for Achieve Connect"*. The bank account for Achieve E-Learning Academy Limited was set up by Dr Kumar at the instigation of DM – see the material referred to by Ms Anderson in paragraphs 388 to 391 of her closing submissions. That DM is in control is apparent from the fact that Ms Smith took control of the bank account – see the material referred to by Ms Anderson at paragraphs 393 and 394 of her closing submissions. I infer from these facts and matters and find that DM was either beneficially interested in or controlled Achieve E-Learning Academy Limited. I find that at least some of the money due under Contract 4 to SCL was invoiced by and paid to Achieve E-Learning Academy Limited – see the invoices of 21 December 2015 (£7,917.00), 29 February 2016 (£7,917.00) and 29 March 2016 (£7,917.00). These payments were made by agreement between Dr Charles and DM – see the email of 18 December 2015 from Dr Charles to Ms Smith and Dr Charles' email to the accounts department of MHC of 22 December 2015. I accept, indeed it is not in dispute, that DM did not disclose to MHC his interest in or dealing with or on behalf of Achieve E-Learning Academy Limited or Achieve Connect Limited.

186. The ostensibly substantive relevance of all this is identified in paragraph 395 of Ms Anderson's written closing submissions as being that "*… some of the monies which MHC pays under Contract 4 get paid to …"* Achieve E-Learning Academy Limited. My detailed findings in relation to that allegation are set out above. There is no claim made in these proceedings based on the receipt of a secret commission by DM nor is there a claim for an account of profits.

187. None of this activity demonstrates DM or ELHL to be engaged, concerned or to have a financial interest in a business that was similar to or competitive with that of MHC. I do not accept that it demonstrates either a failure by ELHL to procure that DM use his best endeavours to promote the interest of MHC other than in relation to the limited assistance to Dr Charles referred to earlier. I do not accept that by failing to disclose his interest in, or connection with, Achieve E-Learning Academy Limited, Achieve Connect Limited and/or SCL, DM failed to use his best endeavours to promote the interests of MHC. I accept that DM's believed that it was in MHC's best interests to use the SCL systems the subject of Contract 4 for the reasons summarised in Mr Pino's email to Mr Adey set out above. That belief was a reasonably held one as is apparent from the views expressed by MHC's regulators and its senior managers. The only people who could give evidence demonstrating that MHC would not have proceeded at all either with an IT solution to training needs or with a system other than that provided under Contract 4 are Mr Adey or, possibly, Mr Pino but neither were called to give evidence. In the absence of any evidence that the systems were unfit for purpose or overpriced or that there were other IT solutions available that provided the same or sufficient functionality at the same or a lower cost, I am unable to infer that Mr Adey would have decided not to proceed with Contract 4.

188. *Contract 4 - Damages*

The material set out above leads me to conclude that MHC has failed to make good its case that it would not have entered into Contract 4 had it known of the connections between DM and Achieve E-Learning Academy Limited, Achieve Connect Limited and/or SCL. Although ELHL was in breach of contract by reason of the assistance that DM provided to Dr Charles, because it was potentially helpful to her in her negotiations with Mr Pino, there is no evidence that any of the points made by DM made any difference to the terms of the Contract 4. The only person who could have given such evidence was Mr Pino. In any event damages are not claimed on that basis. Even if I am wrong to conclude that mere non-disclosure was not a breach of contract, or if I am wrong to conclude that neither ELHL or DM owed fiduciary duties to disclose DM connection with SCL, the claim to recover the whole of the sum paid to SCL as damages or equitable compensation for breach of that duty is unsustainable essentially for the same reasons that such a claim would have been recoverable in relation to Contract 1. The claim to recover the whole sum paid to SCL is premised on the proposition that but for the breach MHC would never have entered into Contract 4 or incurred any costs in relation to the activity for which SCL supplied programmes. That is not sustainable in light of the material referred to above.

189. The staff time costs claim raises the same issues as those made in relation to Contract 1. In my judgment these claims ought to fail for the reasons that I set out when considering the damages claim in relation to Contract 1.

Contract 3

190. Contract 3 was made between MHC and WIT on 8 October 2015 ('Contract 3') pursuant to which WIT was to supply '*Nurse Connect*', which was described in the contract as being a *"... a complete Nurse Revalidation Solution using our Nurse Connect Platform ...*at a price of £648 per month for 100 licensees. The issues between the parties are similar to those I have considered in relation to Contracts 1, 2 and 4. Ms Anderson's submissions focus on the degree of involvement DM had with WIT which she maintains (and for the reasons I give below I accept) demonstrate that he had either an interest in or control of WIT at all times material to this dispute. Dr Wilson's submissions did not engage with any of this material but focussed on the negotiation of Contract 3, which he maintains was carried on without any material involvement from DM and on the quality of the product supplied, which he argues was cheaper than any other available product and more or at least as satisfactory as any other available product. As with all the other contracts the subject of these proceedings, MHC seek to recover all the sums paid to WIT and the recovery of part of the salary paid to a number of different employees and part of what was paid to ELHL.

191. Ms Anderson submits that DM "*... is all over WIT – as founder, investor, director, fund-raiser in precisely the same way as with ..."* SCL, Achieve E-Learning Academy Limited and Achieve Connect Limited. DM's case was that WIT was Ms

O'Malley's company – see for example T10/1318/20-22. I reject that but it is relevant to note this exchange between DM and Ms Anderson:

> "Q … just assume for the purpose of the question that you are right. If you knew that Gemma O'Malley was intending to set up a business and to contract with MHC without herself disclosing her interest in that company, you would have been obliged to bring that to the board's attention would you not that you knew she was on the other side of the contract?
>
> A: ... yes …"

Ms Anderson took up a significant amount of time in her closing submission with drawing out the genesis of WIT. Most of it is not material to the issues that rise in this case other than as background. I accept however that the initial understanding between Ms O'Malley ("GOM") and DM was that the WIT project (whatever form in the end it undertook) was a joint venture in the sense that it was something they worked on closely together. I reject the notion that WIT was a business venture devised by GOM for her benefit to which DM provided advice as a friend. Although there is a great deal of material that supports this as a matter of inference, I do not intend to lengthen still further this already over lengthy judgment by referring to it all. However, some of the more important documentation that supports this inference are the following. Virtually at the outset GOM obtained a domain name for WIT. The invoice for this was addressed to GOM but forwarded to by her to DM by email using their respective private email addresses – see GOM's email using her Yahoo account dated 11 July 2013 addressed to DM at his AOL account. If WIT was GOM's project there is no reason why she would be sending the invoice to DM. Equally consistent with this is that (i) GOM attempted to incorporate a company to be the vehicle for the project at DM's request – see GOM's email of 23 July 2013, (ii) DM's instruction to use only personal email – see DM's email to GOM of Sunday 8 September 2013, (iii) DM's request to GOM to carry out a "*... comprehensive competitive analysis ...*" of various appraisal systems to which GOM responded:

> "… I know you are going to be extremely disappointed in me but I haven't had time to do any further work. Unfortunately, MHC has taken precedence … "

and (iv) DM's email to GOM of 5 March 2015 sending her an action list. This is all consistent with DM being the driving force behind WIT, as are his emails commenting on detail in relation to the WIT offer – see DM's email of 12 February 2015 to Mr Bromfield concerning web content, his email of 26 February 2015 confirming that he had finalised most of the content for the website and the email exchange on 15 April 2015 between DM and Dr Charles concerning plagiarising by Mr Bromfield of material for use of the WIT website.

192. DM's involvement in the commercial aspects of WIP's operations are wholly inconsistent with his representation of the business as being GOM's not his. On 10 April 2015, he texted GOM asking her to open a bank account. Although the email exchange is not entirely clear, it would appear that was attended to by GOM, who

reported that an account had been opened to DM by email of 17 April 2015. Most telling of all is the money that was paid into WIT's account by DM or ELHL. £34,445 was paid into WIT's account between 12 August 2015 and 18 April 2016. In a text exchange between DM and GOM in December 2015, DM claimed to have spent over £250,000 on WIT. In the same exchange, DM encouraged GOM to purchase shares in WIT. If the company was hers (as was DM's case at trial) then this would not have arisen. Similarly, DM would not have been demanding the bank cards for the WIT account as was apparently the case in a text to GOM on 10 January 2016. On 28 January 2016, DM was asking GOM how much he had to credit to the account to meet wages. All this, when taken together, clearly establishes that DM was at least beneficially interested in WIT and probably its controller.

193. Having reached that conclusion, I now turn to the formation of Contract 3. MHC submits that the negotiation was controlled from behand the scenes by DM on behalf of WIT, although ostensibly they were conducted by Ms Katherine Dixon on its behalf. That this is so is plain from the fact that Ms Dixon sent a copy of WIT's proposal to DM under cover on an email dated 12 August 2015. It is also plain from the email from Ms Dixon to Dr Charles on 21 August 2015, where she says that DM had "*... instructed me to offer [MHC] the price of £7.20 including VAT ...*" She said he had justified that to MHC by saying that there would then be no need to add VAT. The difficulty about that was that WIT was not registered for VAT. Dr Charles so informed Ms Dixon by her response. Ms Dixon's response to this was to inform Dr Charles that she was "*... not sure why he* [DM] *gave a price that included VAT for MHC then ...*" and added that DM had "*... said to offer a 10% discount if she goes with 100"*.

194. Ms Nicola Johnson handled the negotiations on behalf of MHC – but she reported to DM – see the exchange of emails between them on 19 and 20 August 2015. The contract was signed by Mr Pino following approval from Mr Adey in the correspondence referred to above concerning Contract 4. The presentation leading to approval was given by Ms Johnson. DM was not present when the presentation was made – see the email exchange between Ms Johnson and DM on 11 August 2015. There is no evidence that DM had any input into the presentation other than supplying information concerning other suppliers he considered when considering suppliers of the medical revalidation products to Ms Johnson when requested. There is no evidence that any system available from other suppliers offered better functionality and there is some evidence that all other systems considered were more expensive and did not offer the compatibility with the e-learning system. That MHC was entirely satisfied with the system it was provided with is apparent from the fact that clause 2.1 of Contract 3 entitled MHC to a full refund down to April 2016 if MHC was not reasonably satisfied with the product or it did not provide the service promised. No such claim was made.

195. All of this leads me to conclude that MHC's allegation that DM failed to use his best endeavours to promote MHC's interest has not been made out. He was undoubtedly intimately involved in the work of WIT from the outset and he was clearly and

obviously beneficially interested in or was the beneficial controller of WIT throughout. There is no doubt either that he was fully aware of the terms of WIT's proposal to MHC and provided some advice on price structure. I have considered with some care whether he was the cause of a misleading presentation of price by requiring Ms Dixon to describe the price as VAT inclusive. However, there is no evidence that MHC was misled by this. Its damages claim has not been pleaded on the basis that it was misled by this representation and there is no evidence that VAT Invoices were requested, as would have been the case if MHC had thought it was entitled to pay only a price net of VAT and either recover the VAT from HMRC or demand a reduced price from WIT to reflect the fact it was not registered for VAT. Even if I am wrong to conclude that no breach of contract is established by the facts I have found proved, I reject the suggestion that had MHC been informed of the true position it would not have proceeded either at all or with WIT. For the reasons I have explained the product was cheaper than the others considered, had functionality that equalled or exceeded that offered by other providers and had the advantage that it was fully compatible with SCL's e-learning platform which provided the continuing training that assisted with re-validation. The only financial decision maker was Mr Adey. It would have been his decision whether to proceed or not and his absence means that there is no direct evidence on the issue I am now considering. On my findings it is impossible for me to infer that MHC would not have proceeded either with acquiring a IT revalidation platform at all or would have proceeded with another and cheaper supplier.

196. *Contract 3 - Damages*

This issue does not arise in light of the findings I have made concerning breach. The issue arises only if I am wrong to conclude that mere non-disclosure was not a breach of contract, or if I am wrong to conclude that neither ELHL or DM owed fiduciary duties to disclose DM connection with WIT.

197. The claimant first seeks to recover the whole sum paid under Contract 3, which MHC qualifies at £3,888. In light of the findings made above, I reject that claim. On the counter factual assumptions identified above, I would have held that MHC was not entitled to recover that sum as either damages or equitable compensation for the same reasons that I have rejected the claims to recover the whole sum paid under Contracts 1. That sum would have been recoverable only if MHC would not have entered into Contract 3 or incurred any costs with other providers in respect of the services provided by WIT had MHC been informed of the position.

198. As with the claims in respect of Contracts 1,2 and 4, MHC seeks to recover by way of damages or equitable compensation parts of the sums paid to various employees and to ELHL. This is relevant only if I am wrong to conclude that mere non-disclosure was not a breach of contract, or if I am wrong to conclude that neither ELHL or DM owed fiduciary duties to disclose DM connection with WIT and that MHC would not have entered into Contract 3 or incurred any costs with other providers in respect of the services provided by WIT had MHC been informed of the position.

199. The principles are those that I have set out above when considering the damages claimed by reference to Contract 1. There is no doubt that GOM and Mr Bromfield were involved in working on behalf of WIT. In respect of GOM, the sum claimed is £5,228.23. The figures were not challenged in the course of the trial. I agree with Ms Anderson that it is too late now to challenge figures that could and should have been challenged, if they were to be challenged, in the course of the trial. It remains the case however that applying the principles set out earlier in this judgment it is for MHC to prove that the diversion of resource caused significant disruption to its business. There is no evidence that is so. The obvious person to have supplied such evidence would have been GOM. She would be in the best position to judge whether what she did for WIT caused significant or any disruption to MHC's business. She provides no such evidence. That there was such disruption is not consistent with GOM's response to DM's request that she carry out a "*… comprehensive competitive analysis …"*, which was: "*… I know you are going to be extremely disappointed in me but I haven't had time to do any further work. Unfortunately, MHC has taken precedence …*" In the absence of any evidence of the extent to which MHC's trading routine was disturbed by GOM's activities this element of the claim fails. Although it has been said that the value of an employee's services cannot be less than the sum paid to the employee, that does not lead to the conclusion that earnings are recoverable without evidence of disruption. The contrary argument is not consistent with the law as stated in paragraph (b) of Wilson LJ's formulation in Aerospace Publishing (ante).

200. The next claim is in respect of Mr Bromfield. This claim is even more difficult from MHC's perspective because it does not purport to quantify a claim based on a genuine estimate of time expended but invites the court to arrive at a figure based on a percentage of Mr Bromfield's gross earnings in effect plucked from the air. In my judgment damages are not recoverable on that basis because not only has MHC failed to establish that diversion caused significant disruption but also because MHC has failed to prove the extent of the diversion of Mr Bromfield. Similar considerations apply to the claim in respect of Ms Nicola Johnson and all other staff for whom a claim is advanced on this basis. In addition, MHC claim the whole of sums paid by way of bonus to Ms Johnson. No allegation is made that suggests this bonus was improperly sanctioned by DL. Those claims fail.

201. In relation to bonuses paid to GOM and Mr Bromfield, it is alleged that £1500 of the bonus paid to GOM was then paid by her to DM. Similarly, in relation to Mr Bromfield, it is alleged that £1,000 of that was paid by Mr Bromfield to DM. It would appear that this claim is made on the basis that DM wrongly induced MHC to pay each of these bonuses because, improperly, he had been promised the benefit of part of any sum received by GOM and Mr Bromfield. These are potentially serious allegations which have not been pleaded. They are not mentioned in the RRAPC as far as I can see. The bonuses are not mentioned anywhere within Ms Anderson's supplemental submissions concerning damages.

202. The only mention of GOM's bonus in Ms Anderson's main closing submissions, where at paragraph 440, she says simply that in October 2014 GOM was paid a bonus

of £3,000 by MHC. It is not recoverable as part of the loss of time claim because it has not been proved to have been paid in whole (or for that matter in part) for activity undertaken on behalf of WIT.

203. Finally, there is the claim in respect of the sums paid by MHC to ELHL for the services provided by DM. That claim would have failed for the same reasons that the similar claim made in respect of Contract 1 failed.

204. *The Approved Clinician Reviews*

No claim is included in respect of this head of loss in the Schedule of loss relied on by MHC on the basis set out by Ms Anderson in paragraphs 550 to 555 of her closing submissions – that is a claim for loss of use of GOM's time. That claim is not what is pleaded in the RRAPC – see paragraph 96.6. There is no evidence that demonstrates the extent of the diversion of GOM's time to approved clinician reviews and no evidence of any, much less significant, disruption to MHC's business caused thereby. This claim fails on that basis.

205. *Confidential Information*

This allegation was relevant at the outset of these proceedings to the interim relief sought by MHC at the outset of this litigation – see paragraphs 100.4 and 107 of the RRAPC. Although a financial claim was pleaded in respect of Ms Chenda-Joseph – see paragraph 108.5 of the RRAPC – it was not included within the Schedule of Loss - see Item 8 - and has not been proved. It is alleged in Item 8 of the Schedule of Loss that MHL "*… incurred the costs of a third party to assist with the data review of [DM]'s professional email address at a cost of £6,000 (plus VAT)*" the invoice said to prove this claim (from CY4OR Legal Limited) describes the work for which payment is claimed as being for "*…Ingestion of 50GB; project management on line review platform for up to 4 users and hosting for 2 months as authorised by Mark Selwyn"*. Following delivery of this judgment in draft, I directed that there be oral submissions concerning this element of the claim at the hand down of this judgment. I will deliver a supplemental judgment dealing with this element of the claim following the completion of those submissions.[1]

206. *Insurance*

ELHL and DM do not dispute that there has been a technical breach of contract. Following circulation of this judgment in draft Ms Anderson asked me to further consider this element of the claim. I directed that there be oral submissions concerning this element of the claim at the hand down of this judgment. I will deliver

[1] Post judgment Note: Following completion of the supplemental submissions, I delivered an oral judgment dismissing this element of the claim.

a supplemental judgment dealing with this element of the claim following the completion of those submissions.[2]

207. *Patient X*

This claim shows at its most extreme how disproportionate this litigation has become. It is quantified at £250. In summary, it is alleged that Patient X was transferred to one of MHC's facilities in a manner that meant his continued detention was unlawful. It is alleged that DM sought legal advice as to how to proceed and then chose to proceed otherwise than in accordance with the advice received. It is alleged that this resulted in the continued unlawful detention of Patient X and that MHC made an *ex gratia* payment to Patient X of £250 in full and final settlement of Patient's X's claim for unlawful detention. The issues that arise were reported by MHC to the GMC. The GMC took no action in respect of the complaint. If this claim was to be made good then it would have to be demonstrated by evidence that the decision by DM as to how to proceed was one that no responsible body of consultant psychiatrists would have made. There is no such evidence. The claim fails on that basis.

208. *Accessory Liability and Unlawful Means Conspiracy*

Accessory liability does not arise because I have concluded that ELHL's duties to MHC were solely contractual. However, even if I am wrong in concluding that ELHL did not owe MHC a fiduciary duty to report DM's connections with Symbio Scientific, SCL or WIT, the equitable compensation claims by MHC against ELHL would have failed for the reasons set out above. DM could have no greater liability for dishonest assistance than ELHL could have for breach of fiduciary duty.

209. Finally, I turn to the alleged unlawful means conspiracy. A conspiracy to injure by unlawful means is actionable where the claimant proves that (a) he has been caused loss or damage (b) as a result of unlawful action (c) taken pursuant to an express or tacit agreement or understanding between the defendant and another or others (d) to injure him by unlawful means (e) whether or not the intention to injure is the predominant purpose or not – see Lonrho Plc v. Fayed [1992] 1 AC 448 and Kuwait Oil Tanker Co SAC v. Al Bader [2000] 2 All E.R.271 *per* Nourse LJ at [108]. Knowledge of the facts that make the transaction unlawful is sufficient; it is not necessary for the conspirators to know that the transaction is unlawful – see Belmont Finance Corp. v Williams Furniture Ltd (No2) [1980] 1 All ER 393 per Buckley LJ at 404.

[2] Following completion of the supplemental submissions, I delivered I delivered an oral judgment determining that the claimant was entitled to an indemnity in respect of any future losses resulting from the breach of contract relied on.

210. The allegation pleaded in paragraph 106 of the RRAPC is limited to an allegation that ELHL and DM conspired together with WIT to cause loss and damage to MHC. However, the loss and damage relied on has not been proved for the reasons that I have identified. Further or alternatively, the evidence does not establish an intention to injure even to the limited level of being a contributing cause of ELHL and DM's conduct.

Conclusions

211. In summary:

(a) ELHL owed MHC the contractual duties stated expressly in the 2nd Consultancy Agreement;

(b) ELHL did not owe any duties to MHC other than those set out in the 2nd Consultancy Agreement;

(c) DM was not a party to the 2nd Consultancy Agreement and was not liable for any breach of it by ELHL;

(d) DM was not a *de facto* director of MHC nor its employee;

(e) DM did not owe MHC fiduciary duties as alleged either by reason of him being MHC's Medical Director or Responsible Officer or Caldicott Guardian;

(f) ELHL was in breach of:

(i) clause 3.2(a) of the 2nd Consultancy Agreement in relation to Contract 1 by DM sending the pricing information to Symbio Scientific that had been sent to MHC by a competitor of Symbio Scientific (in which however neither defendant was a shareholder or otherwise interested) ; and

(ii) clause 7(1)(a) and clause 3.2(a) of the 2nd Consultancy Agreement in relation to Contract 4 by providing comments on Mr Pino's email commenting on Dr Charles's commercial proposals;

(g) MHC has failed to prove it was caused the claimed losses by reason of either of the proved breaches of contract;

(h) If, contrary to my conclusions, ELHL or DM had owed either a contractual fiduciary or tortious duty to disclose the nature and extent of DM's involvement with Symbio Scientific, SCL or WIT, MHC would nevertheless have failed to prove it was caused the claimed losses by reason of the failure to disclose the nature and extent of DM's involvement with Symbio Scientific, SCL or WIT;

(i) The claim for damages for breach of confidence fails because no loss has been pleaded or proved to have been caused by the breach alleged;

(j) The claim for damages for failure to arrange insurance in accordance with the terms of the 2nd Consultancy Agreement fails because no loss or damage has been proved to have been caused by the alleged breach;

(k) The patient X claim fails because it has not been proved that the claimed or any loss was caused by any breach of duty by DM;

(l) The conspiracy claim fails because MHC has failed to prove either loss or damage caused by the alleged conspiracy or the requisite intention to injure.