SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2024] SC GLA 38

GLW-CA82-23

JUDGMENT OF SHERIFF S REID

in the cause

ZLX LTD

Pursuer

against

JAMES MACKIE WHOLESALE LTD

Defender

GLASGOW, 23 AUGUST 2024

The sheriff, having resumed consideration of the cause,

MAKES the following FINDINGS-IN-FACT:

(1) The pursuer provides tax advisory services to businesses, advising them on their eligibility for research and development ("R&D") tax relief from His Majesty's Revenue & Customs ("HMRC"), and assisting clients in the preparation and submission of such claims to HMRC.

(2) The defender is a fruit and vegetable wholesaler.

(3) In August 2021, the pursuer's chief executive officer, Stephen McCallion, contacted the defender's director, Robert Paterson, to arrange a time to meet in order to offer the pursuer's services to the defender.

(4) The parties had had no prior dealings or contact.

(5) The pursuer had obtained the defender's contact details from a third party, Tommy McConnell.

(6) Mr McConnell acts as an "introducer" for the pursuer, whereby he receives payment from the pursuer to introduce new clients to the pursuer.

(7) On 27 August 2021, the pursuer's Mr McCallion met with the defender's Mr Paterson for about one hour at the defender's premises.

(8) At the meeting, Mr McCallion advised Mr Paterson of the services provided by the pursuer; Mr McCallion advised Mr Paterson that the defender was eligible to make a claim to HMRC for R&D tax relief in relation to the installation by the defender of a new refrigeration unit in the defender's premises; and Mr McCallion sought to persuade Mr Paterson to engage the pursuer to prepare and submit a claim (on behalf of the defender) to HMRC for R&D tax relief in relation to the installation of the refrigeration unit.

(9) At the meeting, Mr Paterson informed Mr McCallion that the unit had merely been purchased by the defender "off the shelf" from a specialist contractor (called ISD Solutions), from whom the defender had in the past purchased other refrigeration units; that the unit was of a type commonly used by other wholesalers of fruit and vegetables; and that the defender had spent no more than about 15 minutes in selecting, purchasing and arranging the installation of the refrigeration unit.

(10) Despite having been provided with the foregoing information, Mr McCallion insisted that the defender was eligible to apply for R&D tax relief in relation to the installation of the refrigeration unit; Mr McCallion offered to prepare and submit to HMRC, on behalf of the defender, an R&D tax credit claim (in relation to the installation of the refrigeration unit) on a "no recovery, no fee" basis, whereby the pursuer would only charge a fee to the defender if the R&D tax relief claim was successful, the fee being 30% of the value of any R&D credit so obtained for the

defender; and, on that basis, the defender's Mr Paterson accepted the pursuer's offer, and appointed the pursuer to so act.

(11) The pursuer's *pro forma* Terms and Conditions (now comprising the document forming item 5/1/5/1 – 5/1/5/4 of process), specifically clauses 3, 10 & 11 thereof, were not disclosed, or discussed, or referred to at the parties' meeting on 27 August 2021.

(12) No further meeting or discussion took place thereafter between Mr McCallion and Mr Paterson (or any of the defender's employees).

(13) The pursuer's documents entitled "Storyboard" (forming item 5/1/1-19 of process) and "Innovation Report" (forming item 5/1/9/1-10) were never shown to or discussed with Mr Paterson or any of the defender's employees prior to commencement of these proceedings.

(14) In November 2021 the pursuer sent an email to Mr Paterson bearing to attach a hyperlink to a document called a "Client Pack"; the hyperlink on the email was inoperative; Mr Paterson was unable to access the Client Pack; and so, by email dated 24 November 2021 (of which item 6/1/1 of process is a true copy), the defender's Mr Paterson emailed the pursuer advising that the Client Pack was inaccessible.

(15) On 2 December 2021, the pursuer sent a further email to the defender's Mr Paterson bearing to attach a "Client Pack" comprising the following three documents: (i) a Client Authorisation Form; (ii) an HMRC Form entitled "Authorising your Agent"; and (iii) a "Project Letter" dated 25 November 2021 from the pursuer to the defender; and, in the email, the pursuer requested that the defender complete, electronically sign and authenticate, and return the documents to the pursuer via the "DocuSign" facility.

(16) The Project Letter bears to attach an "appendix" which purportedly sets out the pursuer's "general terms and conditions", but in fact no such appendix was attached to the Project Letter.

(17) The Project Letter also bears to attach (on the second page thereof) a hyperlink to a document described as the pursuer's "Terms & Conditions", but again the hyperlink was not attached; the defender was unable to access the pursuer's "Terms & Conditions" through the purported hyperlink; and, as a result, the pursuer's said "Terms & Conditions" were never seen by, or notified to, the defender.

(18) On 2 December 2021, having considered the three documents within the Client Pack (namely, the Client Authorisation Form, the HMRC Form and the Project Letter), the defender's Mr Paterson appended his digital signature to each the three documents and returned the signed versions to the pursuer via the DocuSign facility, together with a copy of his driving licence (as requested in the Client Authorisation Form).

(19) Item 6/2 of process is a true copy of the pursuer's email dated 2 December 2021; items 6/2/4, 6/2/5-6 and 6/2/7-8 of process are true copies of the Client Authorisation Form, the HMRC Form and the Project Letter, respectively, as digitally signed by Mr Paterson on behalf of the defender; and item 6/2/9 of process is a true copy of Mr Paterson's driving licence as authenticated as returned to the pursuer via the DocuSign facility.

(20) The facility to allow digital signatures to be appended to the documents was provided by means of a software device known as "DocuSign", which records the digital signing or authentication of documentation; the "DocuSign" device electronically records the authentication of such documents; it produces a separate document referred to as a "Certificate of Completion" to identify the documents so

authenticated, together with the date and time of authentication; and it reproduces the documents so authenticated, with each page thereof bearing the same unique DocuSign identification number.

(21) Item 5/1/6/1 is a true copy of a DocuSign Certificate of Completion recording *inter alia* the digital authentication by Mr Paterson of the Client Authorisation Form, the HMRC "Authorising your Agent" Form, and the Project Letter dated 25 November 2021, together with a copy of Mr Paterson's driving licence, bearing to comprise 6 pages in total, all pertaining to a unique DocuSign identification number (namely, ID 9B2997F7-F1D1-48A1-8BF6-9086E1E8B118); and items 6/2/4, 6/2/5-6 and 6/2/7-8 of process are true copies of the foregoing documents (also comprising 6 pages in total), each page of which bears the same unique DocuSign identification number.

(22) None of the documents so signed or authenticated by the defender's Mr Paterson bears to comprise the pursuer's "general terms and conditions" as referred to in the Project Letter.

(23) None of the documents so authenticated by the defender's Mr Paterson bears to include the pursuer's *pro forma* Terms and Conditions (being the four page document now forming item 5/1/5/1–5/1/5/4 of process).

(24) The pursuer's *pro forma* Terms and Conditions (item 5/1/5/1–5/1/5/4 of process), specifically, clauses 3.2, 10.2 & 11 thereof, did not form part of the Client Pack sent by the pursuer to the defender by email dated 2 December 2021; they were not included among the documents viewed or digitally signed by Mr Paterson on behalf of the defender on 2 December 2021; and neither the existence nor import of clauses 3.2, 10.2 or 11 of the pursuer's *pro forma* Terms and Conditions was narrated or disclosed

in the body of the Project Letter, or otherwise within any of the documents within the Client Pack.

(25) In the event, the defender was induced to enter into the agreement to appoint the pursuer by virtue of an express representation by Mr McCallion to Mr Paterson at the meeting on 27 August 2021 that the defender was eligible for R&D tax relief in relation to the installation of the refrigeration unit ("the First Representation"); the First Representation was erroneous; in fact, the defender was not eligible for R&D tax relief in relation to the installation of the refrigeration unit; and, having regard to the absence of factual foundation or financial or accounting vouching therefor, there was no reasonable basis on which the pursuer's Mr McCallion could reasonably have made such a representation.

(26) *Separatim* the defender was induced to enter into the agreement to appoint the pursuer by virtue of a further express representation by the pursuer's Mr McCallion that the engagement was on a "no recovery, no fee" basis only, whereby the only financial liability undertaken by the pursuer to the defender would be the payment of a fee equating to 30% of any R&D tax relief successfully obtained in relation to the installation of the refrigeration unit ("the Second Representation").

(27) In contrast, clauses 3.2 & 10.2 of the pursuer's *pro forma* Terms and Conditions purport to define the duration of the pursuer's appointment as being for a minimum period of 5 years, terminable by the defender only upon 12 months' written notice given after expiry of the first year; and (ii) clause 11 purports to impose liability upon the defender for significant cancellation fees, calculable by reference either to hourly rates or as a fixed sum of £8,000 plus VAT, and payable upon the occurrence of various events, including early termination within the minimum 5 year term, or

the defender choosing not to proceed with an R&D claim after being told by the pursuer that it was eligible to do so.

(28) If, prior to conclusion of the parties' oral agreement on 27 August 2021 (*et separatim* prior to the defender signing and returning to the pursuer the three documents within the Client Pack on 2 December 2021), the defender's Mr Paterson had been made aware of the existence, import and content of clauses 3.2, 10.2 & 11 of the pursuer's *pro forma* Terms and Conditions, the defender would not have agreed to the pursuer's appointment, entered into an agreement with the pursuer, or signed any of the three documents within the Client Pack.

(29) If, prior to conclusion of the parties' oral agreement on 27 August 2021 (*et separatim* prior to the defender signing and returning to the pursuer the three documents within the Client Pack on 2 December 2021), the defender's Mr Paterson had been made aware that the First Representation was erroneous, the defender would not have agreed to the pursuer's appointment, entered into an agreement with the pursuer, or signed any of the three documents within the Client Pack.

(30) Later in December 2021, Mr Paterson discussed the pursuer's appointment (and the proposed R&D tax relief claim) with the defender's accountant, Craig Butler of Milne Craig, Chartered Accountants, Glasgow.

(31) From that discussion, Mr Paterson became aware of the following facts: (i) the defender was categorically not eligible for any R&D tax relief in relation to the installation of the refrigeration unit at its premises; (ii) such a claim could have no proper accounting legitimacy because, incontrovertibly, the refrigeration unit had merely been purchased by the defender "off the shelf" from a third party specialist contractor; the unit itself was not innovative in any sense; it was of a type

commonly supplied to other wholesalers of fresh produce; its acquisition and installation involved no research or development activity by any of the defender's employees, and incurred negligible time and labour by the defender; (iii) the veracity of such a claim was likely to be challenged by HMRC; and (iv) the submission of such a claim was likely to be substantially prejudicial to the defender as it was likely to result in the defender incurring a liability to repay to HMRC any wrongfully-obtained R&D tax credit or payment, together with a statutory penalty and interest thereon, as well as causing reputational damage to the defender.

(32) Upon attaining this knowledge, the defender's Mr Paterson decided not to proceed with the proposed R&D tax relief claim, and he instructed its accountants not to release to the pursuer any information about the defender in relation thereto.

(33) In the event, between December 2021 and June 2022, no further communication was received from the pursuer by the defender or its accountants about the proposed R&D tax relief claim.

(34) By email dated 15 June 2022 (item 5/1/12/1), the pursuer attempted to send to the defender a letter dated 15 June 2022 entitled "Polite Notice" (item 5/1/11/7 of process); but, in the event, the email failed to transmit to the defender.

(35) By a further email dated 17 June 2022 (item 5/1/12/1), the pursuer sent to the defender the letter dated 15 June 2022 entitled "Polite Notice" (item 5/1/11/7 of process); the letter attached a copy of the pursuer's *pro forma* Terms and Conditions; the letter requested financial information from the defender with a view to seeking to vouch the proposed R&D tax credit claim; and the letter and its attachment were received by the defender on 17 June 2022.

(36) By email dated 17 June 2022 (item 5/1/13/1 of process), the defender notified the pursuer that the defender did not wish to proceed with the proposed R&D tax credit claim, and requested that the pursuer delete the defender's details from its records.

(37) By letter dated 13 July 2022 (item 5/1/14/2 of process), the pursuer advised the defender of its "potential breach of contract" by reason of its failure to engage with the pursuer.

(38) By letter dated 30 August 2022 (item 5/11/15/3 of process), the pursuer notified the defender of its decision to terminate the parties' contract, purportedly on the basis of the defender's breach thereof.

(39) The pursuer's letter dated 30 August 2022 narrated the full content and import of clause 11.2 of the pursuer's *pro forma* Terms and Conditions; and the letter attached an invoice dated 30 August 2022 demanding payment from the defender of a "cancellation fee" of £8,000 plus VAT, being the sum now craved, purportedly pursuant to clause 11.2.

(40) The existence and import of clause 11 of the pursuer's *pro forma* Terms and Conditions was not brought to the defender's attention until 30 August 2022.

MAKES the following FINDINGS-IN-FACT AND IN-LAW:

(1) On 27 August 2021, the parties concluded an oral agreement for the appointment of the pursuer to prepare, and submit to HMRC, on behalf of the defender, a claim for R&D tax relief in respect of the installation of the refrigeration unit.

(2) In terms of the parties' oral agreement, the pursuer agreed to act on a "no recovery, no fee" basis, whereby the only monetary obligation undertaken by the pursuer to

the defender would be the payment of a fee representing 30% of any R&D tax relief successfully obtained for the defender.

(3) The pursuer has failed to prove that its *pro forma* Terms and Conditions (forming item 5/1/5/1– 5/1/5/4 of process), specifically clauses 3.2, 10.2 & 11 thereof, were in existence as at 25 November 2021 or 2 December 2021; and, if they were, that they were the same as the "general terms and conditions" referred to in the Project Letter.

(4) The parties' oral agreement, concluded on 27 August 2021, did not refer to, or otherwise incorporate, the pursuer's *pro forma* Terms and Conditions (including clauses 3.2, 10.2 or 11 thereof).

(5) The parties' written agreement, concluded on 2 December 2021, did not incorporate clauses 3.2, 10.2 or 11 of the pursuer's *pro forma* Terms and Conditions.

(6) Clauses 3.2, 10.2 & 11 of the pursuer's *pro forma* Terms and Conditions are onerous and unusual in nature.

(7) Due to the onerous and unusual nature of clauses 3.2, 10.2 & 11 of the pursuer's *pro forma* Terms and Conditions, it was the duty of the pursuer to take sufficient steps fairly and reasonably to bring to the defender's attention the existence and import of those particular terms, prior to conclusion of the contract.

(8) In the event, the pursuer failed to discharge the duty upon it to take sufficient steps fairly and reasonably to bring to the defender's attention the existence and import of clauses 3.2, 10.2 & 11, prior to conclusion of the parties' agreement.

(9) As a result, clauses 3.2, 10.2 & 11 of the pursuer's *pro forma* Terms and Conditions were not incorporated into the parties' oral or written agreement.

(10) Absent incorporation of clauses 3.2, 10.2 & 11 of the pursuer's *pro forma* Terms and Conditions, the pursuer's appointment was terminable by the defender without notice, and without incurring any liability for a "cancellation fee".

(11) *Separatim* to the pursuer's knowledge, as at 25 November 2021 and 2 December 2021, clauses 3.2, 10.2 & 11 of the pursuer's *pro forma* Terms and Conditions sought to impose upon the defender a new, significantly different, and more onerous contractual and financial liability than that set out in the Second Representation.

(12) By virtue of the material change in circumstances described in the preceding finding, it was the duty of the pursuer to bring that change in circumstances (that is, the existence and import of clauses 3.2, 10.2 & 11, and their purported incorporation) to the defender's attention, prior to conclusion of the contract.

(13) In the event, the pursuer failed to discharge the duty upon it to bring that change in circumstances to the defender's attention, prior to conclusion of the contract.

(14) As a result, *esto* the pursuer's *pro forma* Terms and Conditions (specifically, clauses 3.2, 10.2 & 11 thereof) were incorporated into the parties' agreement, the agreement is vitiated by essential error on the part of the defender, such error having been induced by the Second Representation (being the pursuer's misrepresentation as to the restricted scope of the contractual and financial liability undertaken by the defender to the pursuer) and the pursuer's non-disclosure of the foregoing change in circumstances;

(15) By email dated 17 June 2022 (item 5/1/13/1 of process), the defender validly terminated the pursuer's appointment and the parties' agreement.

(16) In any event, the parties' agreement is vitiated by essential error on the part of the defender, such essential error having been induced by the pursuer's

misrepresentation (specifically, the First Representation) as to the defender's eligibility to claim R&D tax relief in respect of the installation of the refrigeration unit.

MAKES the following FINDINGS-IN-LAW:

(1) The parties' agreement not having incorporated the pursuer's *pro forma* Terms and Conditions (specifically clauses 3.2, 10.2 & 11 thereof), the pursuer is not entitled to payment of the sum craved.

(2) In any event, the defender having been induced to enter into the contract under essential error induced by the pursuer's misrepresentation (namely, the First Representation), the contract should be reduced *ope exceptionis*.

(3) *Esto* the parties' agreement incorporated the pursuer's *pro forma* Terms and Conditions (including clauses 3.2, 10.2 & 11 thereof), the defender having been induced to enter into the contract by reason of essential error induced by the pursuer's misrepresentation (namely, the Second Representation), the contract should be reduced *ope exceptionis*.

(4) The defender not being liable in contract to the pursuer for the sum sued for, the defender should be assoilzied;

ACCORDINGLY, Repels the pleas-in-law for the pursuer; Repels pleas-in-law numbered 1, 5, 7, 9 & 10 for the defender; Sustains pleas-in-law numbered 2, 3, 4, 6 & 8 for the defender, whereby Assoilzies the defender from the craves of the writ; *ope exceptionis* Reduces the parties' agreement; meantime, Reserves the issue of expenses; Appoints the sheriff clerk forthwith to assign a case management conference to determine the issue of expenses, to proceed remotely, by way of telephone conference call, before Sheriff S Reid.

NOTE

Summary

[1] The pursuer provides tax advisory services. The defender is a fruit and vegetable wholesaler.

[2] The defender appointed the pursuer to prepare and submit to HMRC, on behalf of the defender, a claim for a research and development ("R&D") tax credit. The pursuer had expressly advised the defender that it would act on a "no recovery, no fee" basis, specifically that it would only charge a fee representing 30% of the amount of any R&D tax credit or payment successfully obtained from HMRC as a result of the claim.

[3] A few months later, the pursuer emailed a "Client Pack" to the defender, including a "Project Letter", bearing to record the parties' agreement. The Project Letter referred to the pursuer's "general terms and conditions", which were said to apply. The Project Letter purported to append a copy of, and attach a hyperlink to, those terms. In fact, no such document was appended and the hyperlink was inoperative. The defender signed the Project Letter electronically, and returned it to the pursuer.

[4] The defender subsequently terminated the pursuer's appointment.

[5] The pursuer now sues the defender for payment of a "cancellation fee" of £9,600.

[6] The key issue in dispute is whether clause 11 of the pursuer's *pro forma* conditions, which creates the fixed cancellation fee, was effectually incorporated into the parties' agreement. In my judgment, it was not. First, the pursuer, on whom the onus lies, has failed to prove that its *pro forma* conditions were in existence at the date of conclusion of the contract. Second, clauses 3.2, 10.2 & 11 of the *pro forma* conditions, upon which the claim is founded, are properly characterised as being onerous and unusual. Therefore, it is

incumbent upon the pursuer to show that it took sufficient steps to bring the existence and import of those *particular* terms fairly and reasonably to the defender's attention (*Montgomery Litho Ltd* v *Maxwell* 2000 SC 56; *Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd* [1989] 1 QB 433). It failed to do so. Third, in any event, the parties' agreement is vitiated by essential error induced by the pursuer's express misrepresentation that the defender was eligible for R&D tax relief. Fourth, *esto* clauses 3.2, 10.2 & 11 of the pursuer's *pro forma* conditions are not onerous or unusual, to the pursuer's knowledge they nevertheless sought to impose a new contractual and financial liability upon the defender that was materially different from, and more onerous than, that which had previously been expressly represented by the pursuer to the defender in pre-contract communications. Therefore, it was the pursuer's duty to bring that change in circumstances to the defender's attention (that is, the existence and import of clauses 3.2, 10.2 & 11, and their purported incorporation) *(Shankland & Co* v *John Robinson & Co* 1920 SC (HL) 103, 111; McBryde, *The Law of Contract in Scotland*, 15-70). It failed to do so. Accordingly, in that scenario, the parties' contract is vitiated by essential error induced by the pursuer's misrepresentation (by non-disclosure). Fifth, I conclude that clause 11 constitutes an unenforceable penalty clause, and is unenforceable. For each of these reasons, the pursuer's claim fails.

The evidence

[7] The action called before me at a diet of proof on 14, 15 & 16 May 2024. For the pursuer I heard testimony from Stephen McCallion, Murray Young and Shari Martin. For the defender I heard evidence from Robert John Paterson and Craig Butler. Signed witness statements for the pursuer's witnesses and affidavits of the defender's three witnesses were also lodged in process in advance of the proof. Each of the parties' witnesses adopted the

terms of their related statement/affidavit as their evidence-in-chief, supplemented by oral testimony. In addition, parties tendered a joint minute of admissions agreeing certain facts and evidence.

Stephen McCallion

[8] Mr McCallion (67), the founder and chief executive officer of the pursuer, testified that he started completing research and development ("R&D") tax relief claims for his former employer in around 2015; he continued this work until around 2018; and in February 2019 he left his former employer to set up the pursuer. Throughout his testimony, he was dismissive of the ability of accountants to advise on such claims: accountants were said to be "more focused on numbers", whereas the pursuer provides "technical expertise" to submit successful R&D claims. He testified that the defender was introduced to the pursuer through a third party (Mr McConnell) who had "mentioned" that the defender "might qualify" for an R&D claim. Mr McCallion arranged to meet the defender's director, Mr Paterson, on 27 August 2021. The parties met for about one hour and 15 minutes. Mr Paterson was not able to answer all of Mr McCallion's questions. Nevertheless, Mr McCallion reached the view – and expressly advised the defender's Mr Paterson at that meeting – that the defender was eligible for R&D tax credit in respect of the installation of a refrigeration unit at the defender's premises. Mr McCallion spoke of the criteria necessary to make such a claim.

[9] He testified that he then had a second meeting with Mr Paterson and two other individuals at the defender's offices. At that second meeting, he claimed to have gone through a "Storyboard" prepared by him from his notes of the previous meeting and internet research (item 5/1/1 of process). This second meeting also lasted for about an hour.

[10] Following the second meeting, the pursuer's customer service department sent contractual documents to the defender. The documents were duly signed and returned electronically by Mr Paterson. Mr McCallion insisted that the defender must have accessed the pursuer's terms and conditions via a hyperlink on the Project Letter because the documents could not have been electronically signed without that link having first been accessed.

[11] Mr McCallion then gave his "Storyboard" to the pursuer's "technical department". The technical department did not need any further information because, according to Mr McCallion, he was so experienced in writing such reports. The notes were then converted into another document called an "Innovation Report", but the pursuer was unable to proceed further because financial information was required from the defender to complete the claim, and the defender (and their accountants) then failed to further engage with the pursuer. Mr McCallion testified that this failure to engage constituted a breach of the pursuer's terms and conditions, triggering an entitlement on the part of the pursuer to charge its cancellation fee of £8,000 plus VAT.

[12] Mr McCallion testified that, in terms of the pursuer's terms and conditions, the contract with the defender was due to subsist for 5 years, terminable only upon giving 12 months' notice thereafter. Mr McCallion spoke to the time alleged invested by him in meeting the defender and preparing the "Storyboard" and the "Innovation Report".

[13] In cross-examination, Mr McCallion acknowledged that he had never disclosed or explained to the defender that there would be a withdrawal or cancellation fee payable by the defender. He confirmed that the pursuer advertised its services on a "no win, no fee" basis. He gave differing accounts as to the time actually spent on the work for the defender. He acknowledged that no-one within the pursuer actually checks the content of the Client

Pack that is sent to clients. Specifically, no one checks the content of the Project Letter or whether hyperlinks on it are operative. However, he insisted that the documents within the Client Pack are not capable of being signed electronically unless the recipient client has first accessed the hyperlink and read through the pursuer's terms and conditions. He admitted that the document bearing to be the pursuer's *pro forma* terms and conditions is undated; that the pursuer's terms and conditions had changed in 2023; and that none of the pages on the document lodged in process (item 5/1/5/1-4 of process) bear the DocuSign unique ID reference number.

[14] He acknowledged (indeed insisted) that he had told Mr Paterson that the defender was eligible for R&D tax relief in respect of the installation of the refrigeration unit. He disagreed with any suggestion to the contrary, from the defender's accountants or otherwise. He acknowledged that he had no financial information from the defender relating to the installation of the refrigeration unit. Mr McCallion acknowledged various errors on the Innovation Report and the Client Authorisation Form.

Murray Young

[15] Mr Young (25), a trainee solicitor, had formerly worked as compliance officer of the pursuer. He adopted his signed witness statement dated 6 May 2024. He identified certain emails sent by him. He was not cross-examined.

Shari Martin

[16] Ms Martin (31), a community care officer now employed by East Ayrshire Council, was formerly employed by the pursuer as a client support manager. She was responsible for "managing" the process of submitting R&D tax relief claims "from start to finish". She

spoke to her usual practices. She also recalled sending the Client Pack email to the defender in this case because "there was an eagerness to complete the claim" as she and her colleagues would then "receive a bonus". She confirmed that the pursuer did not have a good relationship with the defender's accountants, Milne Craig. She acknowledged that "alarm bells" started to ring when it emerged that Milne Craig were the defender's accountants. She had tried to get the claim "over the line". She volunteered that she was under some pressure. She was the only person within the pursuer who was managing the claims at the time because her colleague was off sick. In her oral evidence-in-chief, she conceded that she "wasn't really involved" with the pursuer's terms and conditions. She acknowledged that complaints had been received by the pursuer from other clients that the pursuer' terms and conditions, supposedly hyperlinked in the pursuer's Project Letter template, were inaccessible.

[17] In cross-examination, Ms Martin acknowledged that she populated many of the fields within the template documents in the Client Pack. No one checked the Project Letter. She did not pay much attention to the DocuSign certificate of completion. ("This page isn't something I look at", she said.)

Robert Paterson

[18] Mr Paterson (52) is the director and majority shareholder of the defender. He adopted the terms of his affidavit dated 10 May 2024. In around 2018/19, he had arranged for a new refrigeration unit to be purchased and installed on the defender's premises. It was needed due to the growth of the company's business. It did not replace the existing freezer; it merely added additional storage. It was purchased from and installed by a trusted third party contractor called ISD Solution. They had installed all of the defender's previous and

existing refrigeration units. He had met Mr McCallion just once. There was no second meeting with him or any of his staff. Mr McCallion told him he had an R&D tax relief claim. He offered to prepare and submit it on a "no recovery, no fee" basis. There was to be no hourly charge. It was a success fee only, being 30% of the value of any successful R&D tax credit. After the meeting, there had been no correspondence from the pursuer until he received an email from ZLX in November 2021 bearing to contain a "Client Pack". But the "Client Pack" would not open. He could not view the document. He sent an email to the pursuer on 24 November 2021 advising that the Client Pack was inaccessible. A further email and Client Pack were sent to him on 2 December 2021 containing only three documents (including the Project Letter). The Project Letter repeated the payment terms as previously described by Mr McCallion, namely "no recovery, no fee". There was no mention within the Project Letter of any other fees being payable by the defender.

[19] In cross-examination, he confirmed he had spent minimal time in the purchase and installation of the new fridge, perhaps 15 minutes or so talking to the contractor. He had simply ordered a "like for like" refrigeration unit. The contractor (ISD) knew what it was doing. He trusted it. Mr Paterson remembered trying to click on the words on page 2 of the Project Letter that read: "Click here to view our terms and conditions", but the link did not work, and no copy of any such terms and conditions was attached to the Project Letter. He did not see any such terms and conditions until after the court action had started. He testified that the only reason he had signed the documents was because Mr McCallion had presented a "zero risk", "no recovery, no fee" service, and the Project Letter said nothing about any other charges that could be payable by the defender. Had he been aware of the pursuer's "cancellation" or withdrawal fee, Mr Paterson would not have signed the documents in the Client Pack. He did sign them believing that the payment terms were as

had previously been discussed and agreed with Mr McCallion. At no point did Mr Paterson see the pursuer's "Storyboard" or "Innovation Report". He dismissed the content as generic, having been copied and pasted from the defender's website. In December 2021, having returned the Client Pack to the pursuer, Mr Paterson spoke to Craig Butler of Milne Craig, the defender's accountants, who clarified that the defender was not eligible for any R&D tax relief in respect of the installation of the refrigeration unit and that the submission of a claim was wholly ill-advised. Mr Paterson instructed a colleague to notify the pursuer that the defender did not wish to proceed with the R&D tax relief claim.

Craig Butler

[20] Craig Butler (45), a chartered accountant and director of Milne Craig Chartered Accountants, Paisley, adopted the terms of his affidavit. He spoke to Milne Craig's long-established connection with the defender as their external accountants, and of his knowledge of the defender's business and accounts. In December 2021, he learned that the defender had engaged the pursuer to process an R&D tax relief claim. He was surprised at the pursuer's involvement. He contacted Mr Paterson. He expressed concern to Mr Paterson about making of such an R&D tax relief claim because the defender plainly did not qualify for any such tax relief; he was concerned about the veracity of any such claim; he was aware that the defender had spent no time or money on research and development activities. Mr Butler spoke to the mechanism by which R&D claims are processed by HMRC. He explained that such claims are regularly challenged by HMRC, but often only several years after the claim has been made and initially granted, resulting in a clawback of tax by HMRC, and the imposition of significant interest and penalties on claims incorrectly submitted.

Closing submissions

[21] Helpfully, the parties lodged detailed written submissions in support of their respective positions. For the sake of brevity, I shall not repeat them at length here.

Reasons for decision

[22] On the evidence, I reached the following conclusions.

Oral agreement concluded in August 2021

[23] Firstly, there was no dispute on the evidence that, at the meeting between the parties' principal officers on 27 August 2021, Mr McCallion expressly advised Mr Paterson that (i) the defender was eligible for R&D tax relief on the installation of the refrigeration unit ("the First Representation") and (ii) that the pursuer would prepare and submit a claim to HMRC on a "no recovery, no fee" basis, with the only monetary obligation to be undertaken by the defender to the pursuer being the payment by the defender of a fee representing 30% of any R&D tax relief successfully obtained ("the Second Representation"). No mention was made of any "cancellation" or "withdrawal" fee. No mention was made of any minimum five year appointment of the pursuer.

[24] Not unreasonably, the defender believed that the engagement of the pursuer to provide its services was restricted to a single claim (in respect of the recent installation of the fridge), which was certain to succeed. In addition, the engagement was believed to be "risk-free" (as Mr Paterson put it) in financial terms to the defender because the defender's liability to the pursuer was both restricted and conditional. It was restricted, in the sense that it was limited to a fixed percentage (30%) of the value of any tax credit actually

obtained; and it was conditional, in the sense that it was only payable in the event that the claim was successful.

[25] In his testimony, Mr Paterson fairly conceded that he was initially sceptical. But Mr McCallion was also insistent and persuasive. He made no bones about it. He had indeed told Mr Paterson, clearly and categorically, that the defender was eligible to claim R&B tax relief in respect of the installation of the fridge. Incontrovertibly, he made the First Representation. Likewise, he did not dispute that he made the Second Representation. Neither representation was qualified in any way. As a result of the two Representations, Mr Paterson agreed, at the meeting on 27 August 2021, to appoint the pursuer to prepare and submit a claim for R&D tax relief in respect of the installation of the refrigeration unit. On these points at least, the evidence of Mr Paterson and Mr McCallion is consistent.

[26] That explains why the next communication between the parties is the email from the pursuer's administrative team in November 2021 with a "Client Pack" containing documentation that purports both to formally record the parties' agreement (by means of the Project Letter) and to implement it (by means of the Client Authorisation Form and HMRC "Authorising your Agent" Form). If Mr Paterson had rejected Mr McCallion's sales pitch back in August 2021, the subsequent email in November 2021 from the pursuer (with the Client Pack), and Mr Paterson's unquestioning action in signing and returning it, would have been incongruous. It would have been challenged, or ignored. Instead, the arrival of the Client Pack (and its unchallenged authentication and return by Mr Paterson) is indicative of the fact that Mr Paterson had already agreed to the appointment. The deal had already been concluded in August when the two principal officers of the companies had met. The evident purpose of the Client Pack documents was merely to formalise (and to implement) the agreed appointment.

[27] I did not accept Mr McCallion's evidence that in September 2021 he had a further meeting with Mr Paterson (and two other employees whose names he could not remember). (A discrepancy also arose here: in his written testimony, Mr McCallion states that Mr Paterson attended that meeting; in his oral testimony, he said that Mr Paterson did not attend.) I did not accept Mr McCallion's evidence that he discussed his "Storyboard" with the defender at that supposed second meeting (or indeed at any other time). Regrettably, Mr McCallion was not an impressive witness. His testimony, on these and other disputed issues, was unconvincing.

[28] Throughout his testimony, Mr McCallion tended to make sweeping assertions, general and vague in nature, with no specification. Attention to detail was not his forte. He tended to exaggerate. His "Storyboard" and the grandly-titled "Innovation Report" illustrate the approach. They are unimpressive. The former is little more than a re-hash of the latter. Both are significantly incomplete. Both are formulaic in structure and terminology. As Mr Paterson commented, they appear to have been cobbled together from generic information elicited from Mr Paterson and a trawl of the defender's website. They lack any financial or accounting detail (essential elements for such a claim). They are faintly comical in their implausible attempts to present the simple purchase of a fridge from a third party (taking 15 minutes or so of the defender's time) as a triumph in research and development, shifting "baseline technology" to achieve "technological advances". I was unimpressed by them. They bear the hallmarks of documents concocted to create the appearance of industry.

[29] In cross-examination, he obfuscated when presented with the DocuSign Certificate of Completion, which evidenced that only six pages had been digitally authenticated by Mr Paterson, each bearing (on the top left of the page) the unique DocuSign ID reference

number. He refused to accept (the undeniable truth) that the document now founded upon as the pursuer's "Terms and Conditions" did not bear that unique DocuSign ID number. He initially sought to argue that the "appendix" referred to in paragraph 1 of the Project Letter was a reference to the "Client Authorisation Form", not the pursuer's "general terms and conditions" at all. That interpretation is untenable on a plain reading of the document. Eventually, he conceded that the pursuer's "general terms and conditions" were not attached as a separate "appendix" to that Letter, but insisted (in written and oral testimony) that the purser's terms and conditions must nevertheless have been accessed and read by Mr Paterson because the Project Letter was otherwise incapable of being authenticated electronically through DocuSign. It was all rather unconvincing. There was no other independent or qualified evidence that the DocuSign device operated in that way. Besides, if it did operate in that way, one would still expect that the terms and conditions so accessed would bear the unique DocuSign ID reference number. Otherwise, a principal benefit of the DocuSign authentication process is defeated, namely, that every page of every contractual document is verified by the adhibition of the unique DocuSign ID reference number.

[30] That apart, my confidence in the reliability of Mr McCallion's unvouched assertion was undermined by evidence of the pursuer's repeated botched electronic communications with the defender. Mr McCallion casually sought to dismiss those blunders, but the evidence tends to undermine the reliability of his unvouched testimony that the hyperlink to the pursuer's terms and conditions was operative and accessed. Instead, the more natural inference to be drawn from the pursuer's repeated botched communications is that pursuer's administrative support structure at the time was unpredictable, unreliable, under strain, and driven by the motivation quickly to clinch a deal to secure an employee "bonus". Mr McCallion and Ms Martin both conceded that there was no system in place to quality-

check the content of the pursuer's correspondence to clients. In her written and oral testimony, Ms Martin candidly conceded that she was "really keen" to conclude the deal with the defender because she was tantalisingly close to achieving a sales target that would earn her and her colleagues a "bonus"; she was therefore under considerable pressure to "get this claim over the line" in order to meet the "bonus" deadline, all while she was working from home on her own because her colleague was off sick. None of this filled me with confidence in the reliability and integrity of the pursuer's systems.

[31] More generally, I was troubled by Mr McCallion's penchant for hyberbole and his nonchalant attitude to inconvenient detail. He constantly talked up the pursuer's expertise as if he was presenting a sales pitch to the court, while missing no opportunity to denigrate the abilities of professional accountants to understand or submit R&D tax relief claims to HMRC. He presented the pursuer as a substantial business concern with "15 offices" in Scotland, but ultimately had to concede, with no apparent sense of contrition, that within this calculation he had included boardrooms within shared office space. It was a rather silly gaffe, but it gives a small insight into the nature of his modus operandi. He exaggerated the time spent by him in his dealings with the defender, including most obviously travel time to and from their premises. Overall, my clear impression of this witness was that he was unreliable on material issues. In contrast, Mr Paterson impressed me as candid, careful and plainspoken. I preferred his recollection of events where it conflicted with that of Mr McCallion.

Which pro forma conditions were sought to be incorporated?

[32] Secondly, against the background of the concluded oral agreement in August 2021, it is evident that the pursuer first sought to introduce its "general terms and conditions" in late

November/early December 2021. The first reference to any "terms and conditions" appears in the Project Letter received by the defender on 2 December 2021. The onus lies on the pursuer to prove that the document upon which it now relies (the "Terms and Conditions" forming items 5/1/5/1 – 5/1/5/4 of process), were in existence at the date of conclusion of the parties' contract, and that they were indeed the "general terms and conditions" to which reference was made in the pursuer's Project Letter. In my judgment, the pursuer has failed to discharge that onus.

[33] The document founded upon by the pursuer is undated and unauthenticated. There is no credible or reliable evidence to identify that particular document as the same document to which reference is made in the pursuer's Project Letter. The document was not attached as an "appendix" to the Project Letter, despite wording *in gremio* to that effect. No operative hyperlink to the document was attached to the Project Letter, again despite wording *in gremio* to that effect. The pursuer's original email to the defender purportedly attaching a "Client Pack" also contained no operative hyperlink to any of the documents within the pack. These persistent failures undermine my confidence in the reliability of the pursuer's administrative systems.

[34] In addition, interestingly, both Mr McCallion and Ms Martin candidly conceded in their oral testimony that the version of the pursuer's terms and conditions that was in existence as at November 2021 had, in fact, since been amended. In cross-examination, Mr McCallion conceded that he did not know exactly when the version relied upon was created (he speculated that it was in 2020), but he conceded that the pursuer's general terms and conditions were changed in 2023.

[35] In the context of persistent administrative failures within its business, I am left in genuine doubt as to whether the (undated, unauthenticated) document now produced and

relied upon by the pursuer (item 5/1/5/1-4 of process) was actually the version that was in existence as at November/December 2021, or whether it is a subsequent iteration of the pursuer's "general terms and conditions", revised and amended since that date. None of the pursuer's witnesses reliably addressed that basic issue. The approach of the pursuer's witnesses to the identification of the applicable terms and conditions was casual, sloppy, and unreliable.

[36] The onus falls upon the pursuer on this preliminary issue. I conclude that the pursuer has failed to prove that the *pro forma* Terms and Conditions (item 5/1/5/1-4 of process), on which this action is predicated, were even in existence at the date of conclusion of the parties' agreement, and that they were the "general terms and conditions" referred to in the Project Letter. This conclusion is fatal to the pursuer's claim.

The duty of fair dealing: onerous or unusual terms in pro forma conditions

[37] Second, even if there were a credible and reliable evidential foundation on which to conclude that the lodged Terms and Conditions are indeed the "general terms and conditions" referred to in the Project Letter, I conclude that clauses 3.2, 10.2 & 11 thereof were not validly incorporated into the parties' agreement.

[38] These particular terms, found within a *pro forma* set of standard conditions, are properly characterised as unusual and onerous. (They also substantially innovate upon the terms of the parties' existing oral agreement for the appointment of the pursuer.) They purport to transform the parties' agreement from a common-place, one-off, project-specific appointment, terminable without notice, to one that endures for a minimum five year period, terminable only on lengthy notice, with a substantial financial penalty on the defender for early termination or breach. In those circumstances, the law imposes a duty

upon the pursuer, as the *proferens*, to prove that it took sufficient steps fairly and reasonably to bring to the defender's attention the existence and import of those *particular* onerous and unusual clauses (*Montgomery Litho Ltd* v *Maxwell* 2006 SC 56). On the evidence, it has failed to do so.

[39] It is notorious that people hardly ever trouble to read printed standard conditions. Over the years, *pro forma* conditions have tended to become more and more complicated, and more and more one-sided in favour of the party who is imposing them. The other parties, if they notice the printed conditions at all, generally still tend to assume that such conditions are only concerned with "ancillary matters of form and are not of importance" (*Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd* [1989] QB 433). To address that reality of life, in the so-called ticket cases the courts developed a principle that reasonable steps had to be taken to draw the other parties' attention to *pro forma* standard conditions as a whole, or they would not form part of the contract (*Parker* v *South Eastern Railway Co* (1877) 2 CPD 416; *Hood* v *Anchor Line (Henderson Brothers) Ltd* [1918] AC 846; *McCutcheon* v *David MacBrayne Ltd* 1964 SC (HL) 28; *Thornton* v *Shoe Lane Parking Ltd* [1971] 2 QB 163). It was then said to be a "logical development" of the common law that if a party seeks to enforce a term, found within its *pro forma* standard conditions, that is onerous or unusual in nature, the onus lies on that party to prove that it took sufficient steps fairly and reasonably to bring to the attention of the other party the existence and import of that *particular* term (*Interfoto Picture Library Ltd*, *supra*, 445). If the onus was not discharged, the term would be treated as not having been incorporated into the contract. In Scotland, this principle was approved by the Inner House in *Montgomery Litho Ltd* v *Maxwell*, *supra.*

[40] How much is required will vary from case to case, depending upon the nature of the condition. Where the particular term founded upon is not unusual, it may not be necessary

for the party founding upon it to prove much more than that the intention to attach *some* conditions had been fairly brought to the notice of the other party. However, where the particular term founded upon is unusual in that class of contract, or particularly onerous, the party seeking to rely upon it must show that the intention to incorporate such a term was fairly and reasonably brought to the notice of the other party. As Lord Denning memorably explained, in some cases the term may require to be drawn to the attention of the other party "in the most explicit way", for example, by being "… printed in red ink with a red hand pointing to it, or something equally startling" (*Thornton* v *Shoe Lane Parking Ltd*, *supra*, 169-170).

[41] In the present case, the pursuer argued that the defender was bound by the pursuer's *pro forma* terms and conditions because the defender had ticked a box on the Client Authorisation Form stating that it had received a copy of them; because the Project Letter, signed by the defender, expressly referred to the pursuer's "general terms and conditions"; that the defender must have accessed and viewed those conditions, through the hyperlink, prior to signing the Project Letter; and because the pursuer's digital signature on the Project Letter was preceded by the words: "The terms of this letter are agreed and confirmed". But all that misses the point. As was explained by the Inner House in *Montgomery Litho Ltd* v *Maxwell*, *supra*:

> "The point is not whether the standard terms and conditions which may be voluminous have been read in whole or in part by one of the parties. The question really is whether a particular condition is of such an unusual nature that it should specifically be drawn to the attention of the other party rather than being left simply as part of a large collection of other terms and conditions which are of a fairly standard nature."

Thus, in *Montgomery Litho Ltd*, the defender had signed an application form with the statement: "I have read and accepted the company's standard Terms and Conditions". The

Extra Division held that the addition of those words "adds nothing". The principle involved here has "very little to do with a conventional analysis of offer and acceptance" (*Interfoto Pictures Library Ltd*, *supra*, 443, per Lord Bingham), and more to do with an autonomous (though admittedly curtailed) concept of fair and open dealing in relation to specific onerous or unusual terms.

[42] What then constitutes an onerous or unusual term? In *Langstane Housing Association Ltd* v *Riverside Construction (Aberdeen) Ltd* 2009 SCLR 639, Lord Glennie stated (paragraph [40]):

> "If there is some condition which is of particular importance, in the sense of departing in a material way from the terms usually incorporated into that type of contract, then, by a parity of reasoning, the recipient of the document should not only be made aware that the document contains contractual terms but should have his attention drawn to that condition. This has been described in the cases as applying to unusual, onerous, exorbitant, or draconian conditions, but I do not think that anything turns on the epithet. The important characteristic is that the condition departs in a material way from the terms which would reasonably be expected to apply to that type of contract."

This analysis was adopted by Sheriff Ross in *Difference Corporation Limited* v *Unitel Direct Limited* [2019] SC EDIN 56. Interestingly, the learned sheriff also observed that a distinction may be discernible between those cases where a printed condition seeks to impose an unexpected liability upon the other contracting party (as in *Montgomery Litho Ltd* (personal liability on a director) or *Interfoto Picture Library Ltd* (an extortionate daily financial penalty)), and those cases where the contentious term merely seeks to regulate the liability of the *proferens* as the performing party (at least to a conventional extent only). In the former cases, Sheriff Ross observed that the incorporation of such a term has tended to fail; in the latter, the incorporation of the term might more readily be tolerated.

[43] In the present case, the impugned terms fall squarely into the former category. They seek to impose a significant and unexpected burden upon the non-performing party. They are onerous and unusual. They depart in a material way from the terms which would reasonably be expected to apply to this type of one-off, speculative appointment. Nothing sufficient has been done by the pursuer to bring the defender's attention, fairly and reasonably, to these onerous, unusual and innovative terms. No copy was appended. No working hyperlink was attached. The specific contentious terms were never highlighted to the defender. On the contrary, the Project Letter merely replicates *in gremio* those terms that had previously been expressly disclosed, discussed and agreed concerning the defender's restricted and conditional contractual and financial liability to the pursuer, with not a hint or "heads-up" that the pursuer's general *pro forma* conditions might materially alter the nature or extent of the defender's commitment. For those reasons, the pursuer has failed to discharge the duty incumbent upon it. Accordingly, the pursuer has failed to prove that clauses 3.2, 10.2 & 11 of its *pro forma* conditions were incorporated into the parties' agreement.

Error induced by the First Representation

[44] Third, in any event, even if the pursuer's *pro forma* conditions (including the contentious terms) were validly incorporated into the parties' agreement, on the evidence I am satisfied that the defender was induced to enter into that agreement on the basis of a material express misrepresentation by the pursuer (namely, the First Representation, that the defender was eligible for R&D tax relief).

[45] On the evidence, the defender is not so eligible. I accepted the testimony of Mr Butler on this issue. It was careful, measured, knowledgeable and qualified. I rejected

Mr McCallion's competing evidence on the issue. It was glib, casual, uninformed, and unvouched by any essential financial or accounting data. I acknowledge that an honest expression of opinion, or mere "advertising puff", will not readily be characterised as a misrepresentation. However, Mr McCallion's First Representation went further than that. It was a categoric, unqualified representation of a fact (eligibility for R&D tax relief), which lacked any reasonable evidential or factual foundation standing the manifest absence of any accounting or financial vouching. Accordingly, the parties' contract should be reduced *ope exceptionis*.

Error induced by the Second Representation

[46] Lastly, *esto* the parties' agreement incorporated the pursuer's *pro forma* Terms and Conditions (including clauses 3.2, 10.2 & 11 thereof), to the pursuer's knowledge those terms nevertheless sought to impose a new contractual and financial liability upon the defender that was materially different from, and more onerous than, that which had previously been expressly represented by the pursuer to the defender in pre-contract communications.

[47] Therefore, it was the pursuer's duty positively to bring to the defender's attention the existence and import of those new, materially different, and more onerous terms. Those new terms represented a material change of circumstances *(Shankland & Co* v *John Robinson & Co* 1920 SC (HL) 103; *McBryde,* The Law of Contract in Scotland, 15-70). The pursuer failed discharge that duty. Accordingly, the parties' contract is vitiated by essential error induced by the pursuer's misrepresentation (by non-disclosure).

[48] To explain, misrepresentation can arise from non-disclosure or concealment only in circumstances where there is a positive duty of disclosure. A duty of disclosure can arise where a change of circumstances has taken place, or facts are discovered to be other than

they were believed to be, between the stage of the representation and the stage of completion of the contract (*Blakiston* v *London & Scottish Banking and Discount Corporation Ltd* (1894) 21R 417; *Walker*, The law of contracts, 14.66). Put simply, "[i]f facts alter after a representation, there may be a duty to disclose the new facts" (*McBryde, supra,* 15-67). In *Shankland & Co, supra,* 111, Lord Dunedin stated:

> "Now we are here dealing with a contract of sale, which is a contract made at arm's length, not a contract *uberrimæ fidei* such as insurance. There is, therefore, no general duty of disclosure of all surrounding circumstances. I do not doubt that, once the representation had been made, if anything had happened to alter the pursuers' view of the truth of that representation, they would have been bound to disclose what had happened, for the representation was a continuing representation."

[49] Mr McCallion did not dispute the unqualified terms of his Second Representation. Mr Paterson was equally clear that it was a material factor in inducing him to agree to the pursuer's appointment. The appointment was "risk-free" from the defender's perspective. However, in November/December 2021, when the facts changed – and, to the knowledge of the pursuer, it sought to introduce new contract terms buried within its *pro forma* conditions that were materially different from that Second Representation (in that they sought to *extend* the defender's contractual commitment to a minimum five year term, and to impose a *new* liability on the defender for hefty cancellation and withdrawal fees) – the pursuer came under a positive duty to disclose that change of circumstances to the defender. It failed to do so. That failure resulted in there being a misrepresentation by the pursuer (by non-disclosure to the defender), which induced the defender to conclude the contract. Accordingly, in that alternative scenario, the parties' contract should also be reduced *ope exceptionis.*

Unenforceable penalty clause

[50] Lastly, in any event, I conclude that the "cancellation fee" charged by the pursuer is an unenforceable penalty at common law.

[51] It purports to entitle the pursuer to charge the defender a fee "fixed at £8,000 per year" (clause 11.2(iii)) for the duration of the 5 year minimum term of the agreement.

[52] The correct test for a penalty clause is whether the sum or remedy stipulated as a consequence of the breach of contract is exorbitant and unconscionable when regard is had to the innocent party's legitimate interest in the performance of the contract. Though not always so confined, an innocent party's legitimate interest in the enforcement of the contract will rarely extend beyond compensation for breach (*Parking Eye*, [32]). An extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty, and be unenforceable (*Cavendish Square Holding BV* v *Talal El Makdessi; Parking Eye Ltd* v *Beavis* 2015 UKSC 67).

[53] Here, the stipulated fixed sum of £8,000 (*a fortiori* £8,000 per year, for the five year minimum term of the agreement) bears no relation whatsoever to any *evidenced* genuine pre-estimate of loss (*Dunlop Pneumatic Tyre Co Ltd* v *New Garage & Motor Co Ltd* [1915] AC 79). I rejected, as neither credible nor reliable, Mr McCallion's vague, unvouched and exaggerated testimony of the time invested by him and his staff in the preparation of this claim and others. I rejected, as neither credible nor reliable, his sweeping, unvouched assertions of the vastly differing ranges of tax relief likely to be secured by the pursuer for other clients, and of the related likely percentage returns for the pursuer. As a result, I was left with no evidential foundation to conclude that the stipulated sum of "£8,000 per year" in this agreement was proportionate to the highest level of damages that could possibly arise from

the defender's breach of this contract. Absent such evidence, the stipulated sum is *ex facie* arbitrary, exorbitant and unconscionable.

[54] Moreover, there was no evidence quantify or estimate the R&D tax credit that was likely to be obtained for the defender under this contract in the first tax year in respect of the installation of the fridge. (The pursuer led no financial or accounting data to verify the existence of, still less to quantify, any such R&D claim.) By logical extension, the estimated percentage fee likely to be earned by the pursuer (or lost upon a breach) was also entirely unknown. Likewise, there was no evidence to suggest that any further R&D claims were even remotely anticipated in any of the succeeding years of the minimum 5 year term, or the estimated level of tax credit achievable, or the resulting estimated percentage fee return. The court cannot be expected to speculate in a vacuum. It was for the pursuer to define the extent of its "legitimate interest" in performance of the parties' contract, and the "highest level of damages that could possibly arise" from a breach (*Parking Eye, supra*, [255]). It failed to do so. The pursuer's alternative approach (of seeking to calculate loss based on hourly rates and time invested) also failed, due to the weaknesses of Mr McCallion's testimony. He sought to talk up the amount of time involved in meeting clients, in research, in preparing the "Storyboard" and "Innovation Report", in submitting a claim to HMRC, all without documented evidence of time-recording or reliable time-estimates. I rejected his unreliable testimony on these issues.

[55] Accordingly, *esto* the impugned clauses were incorporated into the parties' contract, and *esto* the contract does not otherwise fall to be reduced *ope exceptionis*, I would have found that the cancellation fee charged by the pursuer under clause 11 was unenforceable at common law as an unlawful penalty.