IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

CASE NOS: 2303023/2014 and 2301446/2015

IN THE MATTER OF A WASTED COSTS APPLICATION AGAINST THE SECOND RESPONDENT'S REPRESENTATIVES, HILL DICKINSON LLP

BETWEEN:

DR C M DAY

Claimant

-and-

LEWISHAM & GREENWICH NHS TRUST

First Respondent

HEALTH EDUCATION ENGLAND

Second Respondent

CLAIMANT'S CLOSING SUBMISSIONS
For wasted costs application to be heard on 23rd – 25th October 2024

Numbers in [ ] are references to the bundle

INTRODUCTION

1. These are the Claimant's Closing Submissions in respect of his wasted costs application against HD. The Claimant also relies on the content of his Opening Note, dated 22 October 2022 insofar as relevant to these submissions.
2. Hereafter, the parties' names are abbreviated as they were in the Opening Note, and the same shorthand is used as in that note.
3. These Closing Submissions are structured as follows:
    a. The Law
    b. Submissions on the issues in the following order:
        i. Issues 1.1 – 1.3:
            1. Enforceability by HD
            2. Construction of the Agreements;
            3. Sharp Practice;
            4. Setting Aside the Agreements
        ii. Issue 1.6: HD's conduct;

iii. Issue 1.5: Should the ET make a wasted costs order?
iv. Issue 1.4: Should the ET make a wasted costs order of its own volition?
v. Issue 1.7: The extra costs C has incurred.

AD HOMINEM ATTACKS

4. C, whose perseverance defeated an attempt by HEE to seek impunity for whistleblowing detriment, is dismayed but sadly not surprised to note that HD have continued, in their skeleton argument, to make further attacks on C's character which are entirely irrelevant to the application. These include (paragraph references immediately below are references to HD's skeleton argument):
    a. Suggesting that C may have abused the indemnity principle in respect of CrowdJustice funding (¶1(viii));
    b. Querying what C has done with the £55,000 he was paid under the May 2018 Agreement, insinuating that he has used it for something he was not entitled to (¶¶55 – 57);
    c. Characterising inaccurate slurs in respect of C's whistleblowing as "*accurate references to the hard truth*", including perpetuating the notion that C resigned from his post at R1, which he emphatically did not do (¶14);
    d. Describing C as having a "regrettable lack of focus and perspective"; (¶10)
    e. Asserting, despite the implications of a lengthy cross-examination on the Gold Guide and the apparently overwhelming level of control R2 exerted over C, that it remains "fanciful" for C to suggest that HEE determined his terms more than the Trust (¶5(ii) fn 9);
    f. Lampooning C's blog posts (¶13(ii) fn 13);
    g. Dedicating all but two pages of an 18-page skeleton argument to attempting to discredit C by repeating unfair and untested statements made about him in a litigation which is under appeal.
5. Despite having made all these attacks on C in the skeleton argument, C was not cross-examined on any of them.
6. The ET is invited to disregard these and any similar assertions in their entirety. The ET is further invited to note that despite having had a series of inaccurate and unwelcome slurs made on his character simply for attempting to assert his rights, C

did his utmost to give helpful and honest evidence in a complex case with a complex history.

THE LAW

Construction of consent orders and settlement agreements

7. Settlement agreements and consent orders are contracts. The starting point for construing such documents is the decision of the House of Lords in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1997] UKHL 28 (and reaffirmed by the House of Lords in **Chartbrook Ltd v Persimmon Homes Ltd & Ors** [2009] UKHL 38). In **ICS,** Lord Hoffman set out the key principles to be applied to the interpretation of a contract (see generally **ICS** at 912H – 913E):

    a. Interpretation of a contract is: "*the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*" (see **ICS** at 912A)

    b. The negotiations between the parties and any declaration of subjective intent by any of them are not admissible background for the purposes of interpretation (except where evidence of facts communicated in the course of without prejudice negotiations and which are part of the factual matrix or surrounding circumstances. Such negotiations are admissible (see the decision of the Supreme Court in **Oceanbulk Shipping & Trading SA v TMT Asia Ltd** [2010] UKSC 44; [2011] 1 AC 662 at ¶¶36 - 48]).

    c. Words should be given their natural and ordinary meaning unless one would nevertheless conclude from the background that something must have gone wrong with the language: the law does not require judges to attribute to the parties an intention which they plainly could not have had;

    d. If a detailed analysis of the words leads to a conclusion that flouts business common sense, it must be made to yield to business common sense.

8. In order to ascertain the meaning of a document, the court asks the objective question: how would the terms of the agreement have been understood by a reasonable person

in all the circumstances surrounding the making of the contract. This is known as the factual matrix.

9. The factual matrix can include "*absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man*" (see **ICS** per Lord Hoffman at 912H – 913A).

10. Where a settlement or consent order is reached during the course of trial, it was held in **Alliance and another v Tishbi and others** [2011] EWHC (Ch) 1015 held that the words in question in the relevant agreement must be read in "a practical context", which involves a consideration of four specific features:

    a. The state of the action at the time when the compromise was reached.

    b. The arguments as they were presented at trial.

    c. The correspondence that immediately preceded the trial.

    d. The material that was available to be deployed at trial.

11. In the employment context, settlement agreements are specifically subject to further statutory requirements in order to be valid by s203 ERA 1996:

> "(a)*the agreement must be in writing;*
>
> (b)*the agreement must relate to the particular complaint;*
>
> (c)*the employee must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and in particular its effect on his ability to pursue his rights before an employment tribunal;*
>
> (d)*there must be in force, when the adviser gives the advice, a policy of insurance or an indemnity provided for members of a profession or professional body covering the risk of a claim by the employee in respect of loss arising in consequence of the advice;*
>
> (e)*the agreement must identify the adviser; and*
>
> (f)*the agreement must state that the conditions regulating settlement agreements under the Act are satisfied."*

12. As set out in **Foskett on Compromise (9th Ed)** at 28-37:

"The intention behind this restriction is to ensure that settlement agreements cannot be used effectively to constitute a blanket 'full and final settlement' of all claims that an employee 'has or might have' against an employer. The involvement of an independent adviser can only render effective settlement agreements which seek to settle the specific dispute or disputes raised between employee and employer. However, if a number of disputes exist between an employee and an employer, each can be settled in the single settlement agreement provided the proper formulation is used in connection with each claim. There is no need for separate agreements in relation to each. The confinement of a "settlement agreement" to the particular complaint or proceedings involved means that such an agreement is more limited in its scope than an agreement effected through an ACAS conciliation officer. It should be emphasised that the specific claims settled must be identified in the agreement."

13. The House of Lords in **BCCI v Ali** [2001] UKHL 8; 1 All ER 961 made clear that any sort of general release requires specific wording. This is reflected in the EAT's decision in **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849 at [6], As Lord Bingham explained in the **BCCI** case:

"[10] … a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware.

[…]

[17] I think these authorities justify the proposition advanced in paragraph 10 above and provide not a rule of law but a cautionary principle which should inform the approach of the court to the construction of an instrument such as this. … the judges I have quoted expressed themselves in terms more general than was necessary for decision of the instant case, and I share their reluctance to infer that a party intended to give up something which neither he, nor the other party, knew or could know that he had."

14. In **BCCI**, neither party knew or could have known about a claim for stigma damages, and therefore they could not possibly have intended to settle those claims.

15. The principles in **ICS** and **BCCI** have been applied numerous times by the EAT. In **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849, the EAT applied those cases and summarised the key issue as follows (emphasis supplied):

> "*In our judgment the law as to contracts for release is pretty straightforward. The law does not decline to allow parties to contract that all and any claims, whether known or not, shall be released. The question in each case is whether, objectively looking at the compromise Agreement, that was the intention of the parties, or whether in order to correspond with their intentions some restriction has to be placed on the scope of the release. <u>If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come in existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for.</u> We can see no reason why as a matter of public policy a party should not contract out of some future cause of action. But we take the view that it would require extremely clear words for such an intention to be found*" (per Judge J R Reid QC at ¶9).

16. It was further accepted in **BCCI** that where a general release would result in unfairness to a party, it would be unconscionable to allow the other party to rely upon it. This is sometimes known as the "sharp practice principle". The example given by Lord Nicholls in BCCI who held there was a difference between the situation where both parties were unaware of a claim which subsequently came to light and the situation where:

> *"the party to whom the release was given knew that the other party had or might have a claim and knew also that the other party was ignorant of this. In some circumstances seeking and taking a general release in such a case, without disclosing the existence of the claim or possible claim, could be unacceptable sharp practice. When this is so, the law would be defective if it did not provide a remedy."* (per Lord Nicholls at ¶32)

Setting aside a settlement agreement

17. The ET's power to look behind a settlement agreement emanates from the power of the ET to consider the validity of the agreement under section 202 Employment Rights Act 1996 itself rather than the common law, see **Glasgow City Council v Dahhan** UKEATS/0024/15/JW at ¶21 and **Horizon Recruitment Ltd v Vincent** [2010] ICR 491 at ¶27, albeit that the common law principles are then applied.

18. An agreement can be set aside on the basis of misrepresentation - **Greenfield v Robinson** EAT/811/95 at pp 2-3; **Horizon** at ¶17; or mistake (**Horizon** at ¶18); or duress (**Horizon** at ¶ 21).

19. Setting aside of compromise agreements and/or consent orders, on the basis of fraud / misrepresentation / mistake was explored in **Hayward v Zurich Insurance Co Plc** [2016] UKSC 48; [2017] AC 142. The fraud / misrepresentation / mistake need not be the sole cause, it need only be a material cause which induced the decision to enter into the settlement agreement - **Hayward** at ¶33. There is a presumption in favour of a causative effect (**Hayward** ¶¶34 and 35): it is very difficult to rebut that presumption **Hayward** at ¶36.

20. Misrepresentation can occur in a variety of ways. Generally, it involves an untrue statement of fact or law made by one party or their representative to another party, and it induces that other party to enter into a contract. For example, a party can induce another party into a contract by misrepresenting the true legal character of a document relevant to the contract. This was the case in **Pankhania and another v London Borough of Hackney** [2002] EWHC 2441 (Ch).

21. Misrepresentations may be implied, whereby the court must consider "*what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context*" (**IFE Fund SA v Goldman Sachs International** [2006] EWHC 2887 (Comm)). In such cases, the context is important, including the characteristics of the representee.

22. The court must view the words or conduct objectively, but it may also take into account the natural assumption of a reasonable representee in determining whether an implied representation has been made. One way the courts have approached this question is to ask: Would a reasonable representee naturally assume that the true

state of facts did not exist and that, if it did, they would necessarily have been informed of it? (see **Property Alliance Group Ltd v The Royal Bank of Scotland plc** [2018] EWCA Civ 355 at ¶¶130 – 132).

23. A party may also make a misrepresentation by silence. What is generally meant by this is that a misrepresentation may arise where a party tells a half-truth, leaving part of a matter unsaid.

The duty of disclosure

24. The EAT dealt with the importance of disclosure in **Birds Eye Walls Ltd. v Harrison** [1985] ICR 278. In that case, Waite J held that even where there is no order for disclosure, duties still apply as follows:

> *"We therefore accept the general proposition that no party is under any obligation, in the absence of an order from the industrial tribunal, to give discovery in the tribunal proceedings. That is subject, however, to the important qualification that any party who chooses to make voluntary discovery of any documents in his possession or power must not be unfairly selective in his disclosure. Once, that is to say, a party has disclosed certain documents (whether they appear to him to support his case or for any other reason) it becomes his duty not to withhold from disclosure any further documents in his possession or power (regardless of whether they support his case or not) if there is any risk that the effect of withholding them might be to convey to his opponent or to the tribunal a false or misleading impression as to the true nature purport or effect of any disclosed document".*

25. Waite J went on to explain that, even where the original disclosure was voluntary and there had been no order for disclosure:

    a. the duty to ensure that neither an opponent or a court is misled is a high duty which the tribunals should interpret broadly and enforce strictly; and,

    b. Tribunals should use their wide and flexible powers as masters of their own procedure to ensure that a party does not suffer any avoidable disadvantage as a result of misleading and partial disclosure.

26. Although the ET process is less formal than the disclosure process in the civil courts, the scope of a solicitor's duties remain the same, since they are duties to the court in the administration of justice: they are not limited by the disclosure rules of a particular court or tribunal.
27. In **Square Global Ltd v Leonard** [2020] EWHC 1008 (QB), it was held that a legally represented party should not be left to decide the relevance of documents for the purpose of disclosure and that legal representatives have a duty to the court to complete that task and carefully ensure that proper and full disclosure is made, and that it was fundamental that the client must not make the selection of which documents were relevant.
28. In that case, the High Court cited with approval the 5th Edition of Matthews and Malek, **Disclosure**, at paragraphs 18-02 and 18-09. The current 6th Edition summarises the relevant principles as follows:

    18-02 - A solicitor's duty is to investigate the position carefully and to ensure so far as is possible that full and proper disclosure of all relevant documents is made. This duty owed to the court, is:

    "one on which the administration of justice very greatly [depends], and there [is] no question on which solicitors, in the exercise of their duty to assist the court, ought to search their consciences more."

    The duty is owed to the court by the solicitor as an officer of the court.

29. In respect of obtaining documents, the ET's attention is drawn to the following commentary from the same text at 18-14:

    A solicitor must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable grounds for suspecting that there are others, then he must investigate the matter further, but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge and if he has decided on reasonable grounds to believe his client, criticism cannot be directed at him.

Wasted Costs

30. The Tribunal may award wasted costs under Rules 80 – 82 of the Tribunal Rules. Rule 80 provides relevantly as follows:

> ***80.— When a wasted costs order may be made***
>
> *(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—*
>
> *(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or*
>
> *(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.*
>
> *Costs so incurred are described as "wasted costs".*

31. The jurisdiction to make a wasted costs order is exercised in line with the Court of Appeal's decision in **Ridehalgh v Horsefield** [1994] Ch 205 (approved in **Medcalf v Mardell** [2002] UKHL 27), which sets out the well-known three stage test:

    a. Did the representative act improperly, unreasonably or negligently?

    b. If so, did that conduct result in the party incurring unnecessary costs?

    c. If so, is it just to order the representative to compensate the party for the whole or part of these costs.

32. In **Ridehalgh**, the Court of Appeal also explained the sort of conduct required for a wasted costs order (by reference to s51(7) Senior Courts Act 1981). The question is not whether the party has acted unreasonably. The test is a more rigorous one. To lay the ground for a wasted costs order, it is vital to establish that a representative assisted proceedings amounting to an abuse of the courts process (thus breaching his or her duty to the court) and that his or her conduct actually caused costs to be wasted.

33. However in **KL Law Ltd v Wincanton Group Ltd and anor** EAT 0043/18, Simler J (then President of the EAT) observed that, where there has been a failure in respect of disclosure, a tribunal cannot simply assume that there was either negligence on the part of the legal representative concerned or that it is a failure by the legal

representative regarding his or her duty to the court. Simler J emphasised that: '*a wasted costs order is an order that should be made only after careful consideration and any decision to proceed to determine whether costs should be awarded on this basis should be dealt with very carefully. A wasted costs order is a serious sanction for a legal professional. Findings of negligent conduct are serious findings to make. Furthermore, even a modest costs order can represent a significant financial obligation for a small firm. Tribunals should proceed with care in this area*.'

SUBMISSIONS

The LDAs

34. The LDA which was relevant to the worker issue is the 2014 LDA. This was never disclosed by HD or disclosed in the litigation by anyone.
35. While there are a number of similarities in the structures of the 2012 and 2014 LDAs, the specific importance of the 2014 LDA to C's case has been repeatedly diminished in HD's submissions. For the avoidance of doubt:
    a. It is the contract which was in place between the R1 and R2 at the material time;
    b. In 2013, R2 took over the work of the Deaneries, which meant that R2 took over entirely the workforce planning and oversight of medical (and dental) education;
    c. By Clause 6 of the 2014 LDA [735], there is an explanation of authorised representatives, as being a suitably qualified and senior employee of the Authority;
    d. By Clause 3 of Schedule F Part D [813], R2 in fact placed a "duly authorised representative" in the figure of the Postgraduate Dean (at the material time, Dr. Frankel) at R1, who oversaw multiple aspects of trainees' development, including any concerns about professional competence or disciplinary matters Clause 15 of Schedule F Part D [816].
36. On the basis of the 2012 LDA, by contrast, there was a distinction between R2, the Deanery, and the Director of Medical and Dental Education (see Schedule 3 Clause 3 at [227]). The Director of Medical and Dental Education was the person responsible for 'postgraduates' (i.e. junior doctors), but they were not a representative of R2 for

this purpose: they were the representative of the Health Service Body. This is the Trust [178]: namely, R1, and not R2.

37. HD also relies on the Gold Guide giving the same information as the LDA. C submits that it is unarguable that the Gold Guide was the same as the LDA.
38. It is telling that in his evidence, Mr. Wright noted that the Gold Guide at ¶¶4.7 – 4.9 [1091] that day-to-day management rested with the Postgraduate Dean. You need the 2014 LDA to understand that what this means is that R2 had day-to-day management of doctors training to be consultants.
39. When it was put to Mr. Wright that there was no equivalent in the LDA to clause 1.6 of the Gold Guide, Mr. Wright took the Tribunal to Clause 33 of the 2014 LDA at [764]. The problem with this clause is that it doesn't refer to doctors in training at all: it refers to those who are training the doctors.
40. It is further unarguable on the basis of the 2014 LDA that R2 did not control the entire commissioning relationship between R1 and C, without any sort of intermediary body. Further, in respect of a postgraduate student such as C, there was a direct employment relationship, in which terms were set and oversight was provided for individual students, between the Postgraduate Dean as the representative of R2 and the student themselves.

Issues 1.1 – 1.3: The Agreements / Orders

41. In summary, C contends that the Agreements:

    a. Are not enforceable by HD as a third party;

    b. When properly construed, none of the Agreements prevent C from bringing a wasted costs application (Issues 1.1 – 1.3);

    c. It would be unconscionable and contrary to the sharp practice principle to find that the agreements preclude C from bringing a wasted costs application in these circumstances (Issues 1.1 – 1.3);

    d. Alternatively, the October 2018 Agreement should be set aside for fraud/misrepresentation (Issue 1.1) as should the May 2018 Agreement.

42. C's unchallenged evidence is that he would not have entered into these agreements if he had known of HD's failure to disclose a document that HD drafted – C WS paras 50, 62 and 65.

Unenforceable by HD under the Contracts (Rights of Third Parties) Act 1999

43. HD submit that they are entitled to rely on the Contracts (Rights of Third Parties Act) 1999 ("**CRTPA 1999**") in benefitting from and attempting to enforce the Agreements as a means of preventing C from bringing a wasted costs application. C disagrees.

44. Under CRTPA 1999, a third party may only enforce a contract term where (see s1 CRTPA 1999):

    1. the contract expressly gives the third party the right to enforce or where the term purports to confer a benefit on it;

    2. If on a proper construction it appears the parties did not intend the term to be enforceable by the third party, then a term which purports to confer a benefit is not enforceable;

    3. The third party must be expressly identified in the contract by name, as a member of a class, or as answering a particular description;

45. C does not understand HD to be suggesting that they can benefit from third party rights to a consent order.

46. C contends that the statutory protections in relation to the settlement of employment claims limits the extent to which a third party can benefit from a settlement. Claims against third parties are not exempt from the rule that the only claims which may be settled validly by a settlement agreement are those in which specific claims are identified.

47. The power of an ET to award wasted costs is found in the 2013 Rules which are contained in a schedule to a statutory instrument SI 2013/1237.[1] As such, their exclusion by way of a settlement agreement would only be valid if they were included in the list of statutory claims which were being settled. The relevant statutes / statutory instruments that give the ET a power to make a wasted costs order are not listed in the October Agreement at Clause 2.1.

[1] Made on the authority of the Health and Safety at Work etc Act 1974, s 24(2); Employment Tribunals Act 1996, ss 1(1), 4(6), (6A), 7(1), (3), (3ZA), (3A), (3AA), (3AB), (3B), (3C), (5), 7A(1), (2), 7B(1), (2), 9(1), (2), 10(2), (5)–(7), 10A(1), 11(1), 12(2), 13, 13A, 19, 41(4); Scotland Act 1998, Sch 6, para 37; Government of Wales Act 2006, Sch 9, para 32

48. Further or alternatively, and as explained below, on a proper construction of the Agreement there are no third party rights of which HD can avail itself.

Proper construction of the Agreements does not preclude a wasted costs application

49. Before determining whether a settlement agreement or consent order precludes a claim, the ET must first construe the document to determine what it means and to understand its scope, in-line with the principles of construction set out in ICS.

50. The circumstances of this wasted costs application could not possibly have been anticipated by C. It must also be right even taking HD's argument at its highest that a wasted costs application *against HD* or the prospect that they might be subject to wasted costs application could not possibly have been anticipated by C at the time of entering into the May 2018 or October 2018 settlement agreements. Both the 2014 LDA and HD's involvement in drafting it were unknown to C at those times.

51. The test in **ICS** asks that the court consider the meaning that the document would convey to the reasonable person having all the background knowledge which had reasonably have been available to the parties at the time of the contract. Negotiations are admissible in construing the factual matrix relevant to the agreement where they communicated in the course of without prejudice communication. The assessment that the tribunal must undertake is an objective one, and one which takes into account all the circumstances.

The CA Consent Order (Issue 1.2)

52. The October 2016 Consent Order in the Court of Appeal relevantly provides [159]:

> *"BY CONSENT IT IS ORDERED THAT:*
>
> *(1) Whatever the outcome of the Appellant's appeal, each of the Appellant and Second Respondent shall bear its own costs"*

53. The Consent Order is a common form of order entered into by parties on an appeal to the Court of Appeal – particularly in cases that have started in the ET. On any objective view, this relates purely to the agreement ahead of the Court of Appeal hearing, such that the unsuccessful party on appeal would not have to bear the other parties' costs.

54. It is simply impossible, and certainly not a permissible construction under the principles in ICS, to give this agreement a meaning on the face of the words used that would provide HD with costs protection in these circumstances. There is no reference to wasted costs, no reference to HD; and there could not have been any contemplation by C at that stage that he may have a wasted costs claim against HD.

55. In any event, HEE did pay C £55,000 upon conceding the worker issue (which was not limited to the costs at any particular stage of the litigation), and also subsequently threatened C with wasted costs in the events that led to the October 2018 Agreement. If it is contended that the CA consent order precludes any application for costs in relation to any stage of the proceedings, those are two clear examples of HD acting in a manner contrary to the position they currently take on construction of the Agreements.. Even if it is only contended that the CA Consent Order only precludes C from seeking his costs of the Court of Appeal stage in 2017 against HD, C cannot be barred from pursuing HD given that wasted costs against HD were not in his contemplation at that time.

The May 2018 Agreement (Issue 1.3)

56. The relevant clause of the May 2018 Agreed Order sets out as follows [335]:

> "*BY CONSENT THE EMPLOYMENT TRIBUNAL ORDERS that in full and [sic] settlement of all the Claimants' claims for costs in respect of the worker issue HEE will pay the Claimant's costs to the Claimant's solicitors in the sum of £55,000 sterling inclusive of VAT within 28 days of today*"

57. At the time of the May Agreement, it cannot sensibly be contended that on any objective view the parties thought that they were settling the prospect of a wasted costs order:

    a. Firstly, the ordinary and natural meaning of the words "claims for costs" do not encompass an application for wasted costs against a party's representative;

    b. A reasonable observer would conclude that this paragraph included the entirety of the parties' agreement, particularly given that it was signed off by an Employment Judge;

c. In all the circumstances at the time the contract was signed, it would be entirely out with the contemplation of C that he could be settling a potential wasted costs order;

d. The issue being settled by way of the May Agreement could only be reasonably understood as relating to costs incurred in respect of 'the "worker" issue' as a result of HEE conceding the point, not as a result of HD failing to disclose the LDAs;

e. The wording of the Agreement cannot be construed as conferring any rights on a party's representatives under this agreement. There is no reference whatsoever to a benefit of any kind being conferred on HD. It would be extraordinary if a consent order between parties to litigation could be construed as conferring a benefit on a party's representative;

f. The wording of the Agreement similarly cannot be construed as barring any future claim. To read that into the simple words of the May Agreement would be to achieve the sort of "extravagant result" that the EAT warned against in **Howard**.

58. Therefore, on a proper construction of the May Agreement, there is nothing in that agreement which precludes C from bringing his wasted costs application.

The October 2018 Agreement (Issue 1.2)

59. In order to properly construe the October Agreement, it is necessary for the ET to look at the whole agreement, as well as the factual matrix, in some detail.

60. The recital to the October Agreement provided (emphasis supplied):

> *WHEREAS*
>
> *(A) The Claimant brought claims against the Employer and HEE in the South London Employment Tribunal for unlawful detriment on grounds of having made protected disclosures in connection with his participation in and departure from a specialist training programme provided by HEE and in connection with his employment with the Employer between August 2013 and August 2014.*

(B) The final hearing of those claims commenced on 1 October 2018 and in the course of that hearing the parties have reached agreement for the withdrawal and settlement of those claims on the terms set out herein.

(C) This Agreement is in full and final settlement of those claims and all or any claims the Claimant has and/or may have against the Employer and/or HEE, their directors, officers, agents and/or employees arising out of or in connection with his employment and/or training and/or their termination.

(D) The parties intend this Agreement to be an effective waiver of any such claims and agree that it constitutes a valid settlement agreement under section 203 of the Employment Rights Act 1996.

61. The recital is not part of the settlement, but it does provide some context for the basis of the parties' discussions. The context given at (C) above demonstrates fully that the parties were not contemplating settling any claims which had not already arisen, and there is none of the specific wording which would support the sort of general release from all future applications for which HD contends.

62. The relevant clause of the October 2018 Agreement sets out as follows [338]:

> *"2.2 This Agreement is also in full and final settlement of all or any claim or application for costs or expenses that any of the Parties may have against any other Party or a Party's representative, whether in relation to the Claims or their conduct or otherwise".*

63. Firstly, the ordinary and natural meaning of the words "*any claim or application for costs or expenses that any of the Parties may have against any other Party or a party's representative, whether in relation to the Claims or their conduct or otherwise*" plainly does not extend to claims which were not within the contemplation of the parties at the time they were signing the October Agreement:

    a. "Have or may have" refers to the basis of an application that existed or which may have existed at the time the Agreement was signed. This does not include, nor could it include, the present application;

    b. As enumerated by the House of Lords in **BCCI**, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights

and claims of which he was unaware and could not have been aware. There is no clear language in the October Agreement which could encompass wasted costs in respect of a failure to disclose a fundamental document, a matter of which C was unaware and could not have been aware;

c. On the words themselves it cannot be said that the Parties sought to achieve an extravagant result of releasing claims or applications of which they had and on C's case, could have, no knowledge.

64. Secondly, the factual matrix in this case is also important. The ET has before it the following relevant information, which would have reasonably been available to the parties at the time of the contract, taking into account the guidance in **Tishbi** regarding settlements reached during the course of the trial.

65. Reading the agreement in its practical context would involve a consideration of the following:

a. The extraordinary circumstances which led to C settling his claim, which started when he was still under oath; and concluded when he was under pressure of costs and wasted costs (albeit that the Claimant has said that he did not understand the significance of wasted costs);

b. The possibility of GMC referral and wasted costs had been raised in open court;

c. Wasted costs threats were driven by HEE (See [1543]; see also 1017, ¶66 - ¶68]);

d. Mr. Moon KC had threatened to recover from C the £55,000 paid under the May Agreement (which is particularly remarkable given the position HD now takes) [1543];

e. The without prejudice negotiations communicated in respect of that clause provide the ET with further key elements of the factual matrix. The wasted costs came down to a sole issue, which was the alleged non-disclosure of covert recordings. As put by C's previous counsel: "*The sole issue was in relation to the non-disclosure of covert recordings […] there was a mention by counsel for both Respondents as to the possibility of wasted costs arising from the late disclosure of these recordings vis-à-vis TJL*" [1543].

66. The above was confirmed by HD's counsel during C's cross-examination, where it was repeatedly emphasised that the intention of the parties in respect of that clause was to settle the threatened wasted costs order against C's then-solicitors. A reasonable person with this understanding of the background would understand there to be only one construct of that clause. It was plainly not intended to confer any benefit whatsoever on HD, and for HD to now suggest that it does is a very convenient absurdity.

67. Thirdly, a settlement agreement, as opposed to a COT3, must settle a specific claim which is identified in the agreement. In the employment context, a settlement agreement is confined to the particular complaint or proceedings involved (see above at ¶11). If it is not, then it is not a valid settlement agreement.

68. In light of the above, it is untenable that a reasonable person having this background knowledge could ever consider that the parties had intended to provide any protection against wasted costs whatsoever to HD, because the clause was entirely aimed at protecting C's representatives. Again, on a proper construction, it does not preclude C from bringing this application.

Sharp practice

69. Should the ET disagree with the submissions on construction of the Agreements as set out above, then C will invite the Tribunal to consider the effect of those Agreements as being unconscionable in reliance on Lord Nicholls' dicta in **BCCI**.

70. C contends that the failure to disclose in circumstances where HD plainly knew about the 2014 LDA or the possibility of the 2014 LDA is the sort of sharp practice which the courts find unacceptable.

71. There is a particular unconscionability here, given that Mr. Cooper KC, in his witness statement (see [1005] at ¶15), insinuated that the reason C had not disclosed the allegedly covert recording (he had in fact disclosed it in 2015 via his solicitors, to Mr. Wright of HD [1532, ¶71]) was because C had been focussing on the employment status aspect of his case. As such, the delay caused to the substantive hearing of C's trial as a result of HD's failure to disclose plainly affected memories of what had been disclosed and when.

72. On that basis, the ET should provide C with a remedy by not allowing HD to take advantage of its own sharp practice.

Setting aside the May 2018 and October 2018 Agreements

73. In a further alternative, the ET is asked to set aside the Agreements on the grounds of negligent misrepresentation, or further or alternatively, fraudulent misrepresentation. C's primary position is that the Agreements themselves simply do not bind him, but if the ET disagrees, then the Agreements should be set aside.
74. C's case on misrepresentation is that it centres on HD's representations, over a number of years, that no contract existed. In particular:
    a. Misstating the facts in the ET, and in particular stating that C's case that HEE had substantially determined his terms and conditions was 'fanciful', having instructed counsel to that effect;
    b. Going all the way to the Court of Appeal in 2017 in circumstances where either HD did not check or actively chose not to disclose a contract which was fundamental to the determination of the worker issue on the facts. Even on MW's account, he and Mr Farrar were aware of LDAs in 2016.
75. C relied on the disclosure provided by HD to support HEE's strike out application, which formed the background to his decision to:
    a. Enter into the CA Consent Order;
    b. Enter into the May 2018 Agreement;
    c. Enter into the October 2018 Agreement, and in particular agree to the drafting of a clause which is now purported to preclude this application.
76. C notes HD's submission in the skeleton argument at that there is no duty of utmost good faith in settlement agreements as contracts, but this is not relevant to the way C puts his case: there were multiple representations by HD around the time that the Agreements were concluded..
77. Given that HD drafted the 2014 LDA, which was the contract which was material to the period of C's claim, they plainly knew it was relevant and they plainly should have disclosed it. It was either negligent of HD to represent to C that no such contract existed, or it was fraudulent in that it was made knowingly or without belief in its truth or recklessly as to its truth.

Issue 1.6: HD's conduct

78. C contends that HD's conduct in failing to disclose the LDAs was unreasonable, further or alternatively improper, and further or alternatively, negligent. It is abusive conduct in the face of the court.

What HD knew or reasonably ought to have known

79. Mr. Wright's witness statement is particularly cagey on this point. There appears to have been no actual investigation into it (or at least none that Mr Wright has shared with the tribunal). Mr. Wright uses vague explanations as to his state of knowledge and the state of knowledge of the team (for example: "*as far as I am aware*", WS/MW at ¶9; "*nothing I have seen*" WS/MW at ¶32). There is no evidence that HD have done any investigation at all as to who knew what, when.

80. Given HD's expertise as a firm, and the symbiotic relationship they have with HEE (as well as a number of NHS Trusts), it is simply not plausible that HD did not know or could not have known about the 2014 LDA, because they drafted it – and (in answer to a question from the judge at the end of his evidence 'guidance that went with it).

81. There is also the allusion in Mr. Wright's witness statements to other ET cases which involved LDAs. Mr. Wright did not identified these in his witness statement, despite the fact that they may involve public judgments – there is no good reason for that.

82. C has no doubt from some of the statements made by HD's counsel during C's cross-examination, that HD will attempt to avail themselves of the benefit of the doubt on the basis that privilege has not been waived. That does not assist them.

83. Mr. Wright's witness statement discloses advice where it suits HD. An example of this is at ¶36 of his statement, where he discloses counsel's advice as to disclosure, and which documents they told HEE were necessary. This clearly had not been done previously, despite the issues being the same. C says that this shows that HD has cherry-picked the parts of its evidence that may be privileged, and revealed the advice only when it suits them. They must have discussed that with HEE.

84. Mr. Wright also refers, in a veiled manner, to things which are not privileged. Good examples of this are the standard disclosure letter setting out disclosure rules that all

solicitors send to the clients when litigation is contemplated (not when it is commenced), and the ET judgments which refer to LDAs.

85. Further, the ET will note that there is no evidence from the client setting out whether or not privilege is waived.

Breach of disclosure duties

86. The ET is reminded that a solicitor's disclosure duty arises not from the ET Rules, the CPR, or any other procedural rule of the court: it is far more fundamental. Solicitors are officers of the court, and disclosure is an integral part of the proper administration of justice.

87. It is no answer for HD to say that there was no disclosure order, though of course there was one in July 2017. To do so is to make light of what is a heavy burden and a high duty.

88. Further, applying the EAT's decision in **Birds Eye Walls**, once there has been some disclosure, a duty is placed upon the disclosing party to ensure that neither an opponent nor the court is misled as to the effect of that document by a corresponding failure to disclose. Despite this, that is exactly what has happened here: the Gold Guide was disclosed (and denigrated), but the corresponding LDAs that set out the relationship as between R1 and R2 were not disclosed at all. It seemed to be suggested in cross examination of C that his side could have requested documents referred to in the Gold Guide. However, to discharge the disclosure duty, it is not sufficient to scatter clues to the really relevant documents within less relevant documents and it is far from self-evident that documents referred to in the Gold Guide were potentially relevant.

89. Further still, even on HD's alleged understanding of the law in relation to s43K at the time, the LDA would have been an essential document. Any reasonably competent lawyer would understand that to assist the ET in determining which of R1 and R2 substantially determined C's terms, you would need to know the rules that governed the relationship between R1 and R2. Further, it had been specifically alleged by C that R2 determined his conditions of work in the particulars of the first claim [28].

90. In response to this, HD pleaded that:

a. While there was a training agreement, there was no contract of employment and C was neither an employee nor a worker of R2 (see ¶3, [55]);

b. C was not supplied as a worker by R2 to R2, and was "simply appointed to a training programme" and that R2 did not determine the terms on which C was engaged (See ¶8, [55- 56]).

Even on the basis of C's cross-examination, which seemed to suggest that C should have known all that was wrong, HD have been negligent in the non-technical sense.

91. The net effect of failing to disclose the LDAs was that quite aside from the legal issues arising from s43K, the ET, the EAT and the Court of Appeal were misled as to the facts and character of the tripartite relationships between C, R1, and R2.

92. In any event, to take the point now, on a wasted costs application, that there was no disclosure order and therefore no duty either way is not merely a weak evidential submission, it is a submission which underscores the notion that HD still considers it was acceptable not to disclose the LDA. They would do the same again.

The law at the material time

93. C notes that HD now also say via Mr. Wright that in any event, the LDA would have made no difference, but that also cannot be right, since R2 submitted at the original ET hearing that the Gold Guide "*on the wording of the Gold Guide it is submitted to be unarguable that the body which is responsible substantially for determining the Claimant's terms and conditions as regards work is other than R1*." [1580, ¶30].

94. R2 also submitted in the EAT that while it was permissible to have joint 'substantial determiners', it was a permissible conclusion of the ET that "*the Respondent was not the (or a) substantial determiner of the Claimant's terms of work*" [1592, paras 25-26]. This shows that R2's case on the facts was that there was no way for C to demonstrate that there were two substantial determiners. Had the LDA been disclosed, it is more likely than not that C would have been able to demonstrate this.

95. During cross-examination, HD's counsel spent considerable time on the Gold Guide, with the implication being that C should have known that there was a thing such as an LDA. There are numerous problems with this, not least of all:

a. The Gold Guide is guidance which expressly stated at 1.6 [1080] that it did not address issues relating to terms and conditions, and it was before the ET and the appellate courts. It was maintained throughout that it did not evidence that HEE substantially determined (or even determined at all) the terms upon which C worked. The LDA on the other hand is a contract.

b. If HD now, after ten years, wish to change their position on that and claim that the Gold Guide is contractual, then that simply serves to underscore that they must have misled the ET in February 2015.

c. If HD did not know about LDAs but had read the Gold Guide, they must explain why they did not seek out the LDA. It would have been obvious to them that they reasonably ought to have known a contract was in existence – especially as HD were drafting multiple LDAs at the time. If C is supposed to have been able to work out it and "discover" LDAs from references in the Gold Guide, then what does that mean for a firm of solicitors?

96. As to Mr. Wright's contention that R2 had not disclosed the LDA to HD, HD knew or reasonably ought to have known that LDAs were part and parcel of the employment relationship: they drafted the contracts, they defended cases on the basis of those contracts. HD would have known the nature of the documents referred to in the Gold Guide. Even in the absence of a waiver of privilege (in relation to which there is no evidence from R2), it is clear that HD had a duty to ensure that the LDAs were before the court. That is true even if the ET accepts the somewhat tenuous assertion that HD did not know that their commercial department was responsible for drafting such agreements: even the most junior lawyer would ask to see the contract governing the relationship between the parties, and a failure to do so is negligent.

Issue 1.5: Should the ET make a wasted costs order?

97. C contends that the answer to this issue is: yes. HD's conduct caused wasted costs as set out below at ¶106.

98. HD is a national law firm with particular expertise in healthcare, to the extent that it holds itself out as having expert healthcare lawyers across a range of practice areas. They have significant resources, both financial and in terms of manpower.

99. C, by contrast, has at times been a litigant in person, and is a junior doctor. The nature of the wasted costs in this case are particularly egregious, arising as they do out of serious failings over a number of years.

100. It is plainly just for the ET to make the order, and C invites the ET so to do.

Issue 1.4: Should the ET make a wasted costs order of its own volition?

101. If the ET does not consider that it can grant C's application (because of the operation of the Agreements), then C's application will stand as dismissed. The ET may then turn to the question of whether it can make a wasted costs order of its own volition under the ET Rules.

102. There is no authority on this point; however, the ET's case management powers are wide-ranging, and cannot be fettered simply because a party's application has been dismissed or otherwise cannot be determined.

103. Further, the use of the word "or" in Rule 82 is simply to indicate that a wasted costs order cannot be made twice. There is nothing in Rule 82 which precludes the ET from considering two routes to making an order and selecting one: that is precisely what Rule 82 is inviting the ET to do.

104. If C is prevented from making an application (because of the Agreements) then the ET will not have determined his application at all – and he is merely inviting the tribunal to use its own initiative. This is supported by the decision in **Banerjee v Royal Bank of Canada** [2021] ICR 359 at ¶¶30-37, where it was held that a party's submission to an employment tribunal at a remedies hearing that it should reconsider an issue decided at the liability hearing did not amount to an application for reconsideration under rule 71 and so did not preclude the tribunal reconsidering the issue 'on its own initiative' under rules 70 and 73.

105. It is therefore open to the ET to make a wasted costs order of its own initiative if C's application cannot be determined due to the Agreements.

Issue 1.7: The extra costs C has incurred

106. The quantum of C's wasted costs application is set out at [1378] – [1380], with supporting documentation at [1324] – [1377]; [1382] – [1388].[2]

[2] Please note that one of Mr. Linden's invoices is given inclusive of VAT.

107. C incurred the costs of and incidental to multiple hearings:

a. The 2015 ET strike out hearing;

b. The EAT hearing in February 2016;

c. The CoA hearing in 2017;

d. The May 2018 EAT hearing.

108. The total costs incurred as a result of the failure to disclose are £203,150 and the Claimant gives credit against that amount for the £55,000 already received.

109. The amount claimed by C as wasted costs in this application is £65,415.48 (including VAT) which are all costs at the ET level up to May 2018. There can be little doubt that these costs follow from the failure to disclose the LDAs.

110. HD, in their counsel's skeleton argument, attempt again to smear and belittle C, but make no substantive submissions on this point other than the entirely polemical and unwarranted claim that he is in violation of the indemnity principle because he has crowd-funded his legal costs. The ET is further invited to note that C was not cross examined on this at all.

111. For the avoidance of doubt, where a litigant has a funder, this plainly does not violate the indemnity principle. Were it to do so, then litigation funding would not exist, nor would it be a rapidly growing legal market.

112. CrowdJustice is a form of litigation funding, where the cost liability rests with the litigant, as is made clear by the following term in CrowdJustice's terms and conditions:

> *You represent and warrant that you are solely responsible for all legal costs and fees and adverse costs in relation to the litigation relating to your Case, and agree to indemnify any Backer for any damages, losses, costs and expenses it may incur as a result of any Pledge to your Case*

113. If the litigant recovers funds in the form of a costs order, the litigant must return the funds to CrowdJustice where, if it is not used to fund ongoing litigation, it will be returned to CrowdJustice who will use it for an Approved Cause, as defined by CrowdJustice's terms and conditions:

> *An "**Approved Cause**" is one of the following causes elected by the Case Owner:*

> *a new case which advances a cause the Case Owner reasonably believes to be the same as or similar to the cause advanced by the original Case and which the Case Owner reasonably expects the average Backer would support (a "**New Case**"); or The Access to Justice Foundation.*

114. The full terms and conditions are available here: https://crowdjustice.com/terms-and-conditions/

115. Accordingly, the ET is asked to dismiss the further slurs regarding C's intentions made in HD's skeleton argument, and to reject the submission that CrowdJustice funding somehow leaves a successful party in violation of the indemnity principle. Such arguments are not only fanciful, but could have a chilling effect on access to justice.

CONCLUSION

116. In light of the above, the ET is respectfully invited to grant C's wasted costs application.

Andrew Allen

Elizabeth Grace

24th October 2024