

The Protection of Investors (Bailiwick of Guernsey) Law, 1987
Whitehead Mann Limited v Cheverny Consulting Limited [2006] EWCA Civ 1303
Wilson v Racher [1974] ICR 428
Enable Care & Home Support Ltd v Pearson [2010] UKEAT 0366_09_2605
British Waterways Board t/a Scottish Canals v Smith [2015] UKEAT 0004_15_0308
Geys v Société Générale, London Branch [2013] 1 AC 523
Sunrise Brokers LLP v Rodgers [2015] ICR 272
Cantor Fitzgerald International v Bird [2002] IRLR 867
El Ajou v Dollar Holdings Limited (unreported 2 December 1993)
Orr v Milton Keynes Council [2011] ICR 704
The Judgments (Interest) (Bailiwick of Guernsey) Law, 1985

Introduction

1. The Plaintiff, Andrew Morton, was an employee of The Channel Islands Stock Exchange LBG (“the CISX”) from 1999 and became an employee of the Defendant, The Channel Islands Securities Exchange Ltd (“the CISE”), when his contract of employment as Chief Operating Officer was transferred pursuant to a scheme of arrangement approved by this Court on 20 December 2013. That employment terminated on 31 January 2014 in accordance with a compromise agreement executed by the parties earlier that month. The compromise agreement provided for payment to the Plaintiff by the Defendant of £30,000. This action relates to that amount. The Plaintiff seeks to enforce payment and the Defendant argues that the terms of the compromise agreement entitle it to withhold any payment.
2. This judgment has been prepared in accordance with the provisions of section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008:

“(5) *A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –*

- (a) *the Jurats’ findings and decisions,*
- (b) *any dissenting findings or decisions made by different Jurats,*
- (c) *the identity of the Jurats making dissenting findings or decisions,*
- (d) *the Bailiff’s findings, decisions and directions of law and procedure, and*
- (e) *the application of his findings, decisions and directions of law and procedure to the facts.*

(6) *In this section “the Bailiff” means the person presiding over the proceedings.”*

The Deputy Bailiff did not sum up to the Jurats in open Court but instead indicated that the Court would reserve its judgment and retired with the Jurats, as he is permitted to do under section 14(2) of the 2008 Law.

3. In this judgment, the findings of fact are the unanimous findings of the Jurats.

Procedural background

4. The Plaintiffs’ Cause was tabled on 11 July 2014 and placed on the Rôle des Causes à Plaider. The Defence was tabled on 8 August 2014. A short Réplique was then tabled on 19 September 2014. An application for summary judgment pursuant to rule 19 of the Royal Court Civil Rules, 2007 dated 26 September 2014 was dismissed on 8 December 2014. In support of that application, the Plaintiff swore an Affidavit on 25 September 2014, to which reference was made at the trial. Thereafter, case management directions were given and the action was prepared for trial.
5. At the pre-trial review held on 11 March 2016, an application by the Defendant to adduce additional evidence from the Head of Regulation and MLRO of a subsidiary company of the Defendant was refused by the Deputy Bailiff. The issue arose as a result of a review of the case by the Defendant’s trial Advocate. The trial was listed for a two-day hearing commencing on 30 March 2016. The evidence in respect of which leave was sought was

from a person who had not been employed by the Defendant's subsidiary company at the material time and so was not first-hand factual evidence. Other witnesses on behalf of the Defendant were potentially able to conduct the same review of the documents that had been undertaken and there was material that could be put to the Plaintiff in cross-examination in any event. There was a risk that the trial timetable would be put in jeopardy and admitting evidence from an additional witness was not consistent with the overriding objective in rule 1 of the 2007 Rules.

6. At the start of the trial on 30 March 2016, the Defendant applied to admit into evidence seven documents. Two of those documents were not opposed on behalf of the Plaintiff, one of which was the Plaintiff's Affidavit of 25 September 2014, but the other five were. The Deputy Bailiff allowed this application on the basis that each of the disputed documents could properly be put to the Plaintiff and his witness in cross-examination for the purpose of testing their credibility and they were not being produced by the Defendant as evidence of facts that had not been included in the Defendant's pleaded case. In doing so, the Deputy Bailiff commented on a party's ongoing duty of disclosure set out in rule 70 of the 2007 Rules and expressed his concern that these documents had apparently only come to light very late in the day.
7. The parties' closing speeches could not be completed on the second day of the trial. Accordingly, the hearing was adjourned until the following Monday. When it resumed on 4 April 2016, the Plaintiff applied for leave to adduce two e-mails that had been received in unusual circumstances. As the Plaintiff's Affidavit sworn that day explains, an envelope containing a single sheet of paper with the text of the e-mails had been pushed through his home letterbox on the Sunday. There was no indication as to who had done this. The content of the e-mails opened up further questions to put to the Defendant's two witnesses, so the application also sought to recall them. Advocate Peter Ferbrache, on behalf of the Defendant, did not oppose the application, quite properly recognising that the Court should receive all evidence relevant to the issues it had to determine. However, one of the Defendant's witnesses was absent from Guernsey, so a further adjournment would be required. Advocate Ferbrache further indicated that it may be necessary for the Defendant to seek the Plaintiff's agreement to call one or two additional witnesses to deal with the issue raised by the e-mails or, if agreement could not be reached, an application would be made.
8. On 14 April 2016, the Deputy Bailiff sat alone to hear further applications prior to the trial resuming the following morning. The Defendant sought leave to adduce a further witness statement of one of its two witnesses, which would stand as their examination-in-chief on the matters addressed and also to call two further witnesses. Advocate Jeremy Le Tissier, on behalf of the Plaintiff, opposed only the calling of Carly Parrott as a witness on behalf of the Defendant, relying on rule 79 of the Rules of Professional Conduct of the Guernsey Bar, which provides:

“An Advocate must not accept instructions to act as an Advocate for a client if it is clear that he or she or a member of the firm will be called as a witness of the client, unless the evidence is purely formal.”

9. It was Advocate Le Tissier's submission that this rule was engaged because Ms Parrott is an employee of the firm instructed by the Defendant. Her evidence was likely to be more than purely formal because it went to a factual issue the Jurats had to resolve. On the other hand, Advocate Ferbrache invited the Court to be pragmatic and use common sense. The question of the Defendant needing to call Ms Parrott to give evidence had only arisen as a result of exceptional circumstances that had occurred when the trial had almost concluded. Further, the Commentary to the rule clarifies that the answer is not automatic and covers the situation in which the Defendant and its Advocate found themselves:

“1. An Advocate must exercise judgment as to whether to cease acting where he or she has already accepted instructions as an Advocate and then becomes

aware that he or she or a member of the firm will be called as a witness on behalf of the client.

2. *The circumstances in which an Advocate should continue to act as an Advocate, or at all, must be extremely rare where it is likely that he or she will be called to give evidence other than that which is purely formal.*
 3. *It may be possible for an Advocate to continue to act as an Advocate if a member of the firm will be called to give evidence as to events witnessed whilst advising or assisting a client. In exercising judgment, the Advocate should consider the nature of the evidence to be given, its importance to the case overall and the difficulties faced by the client if the Advocate were to cease to act. The decision should be taken in the interests of justice as a whole and not solely in the interests of the client.”*
10. The Deputy Bailiff decided that the Defendant should be permitted to call Ms Parrott as a witness and that Advocate Ferbrache should not be required to cease acting on behalf of the Defendant. Ms Parrott’s evidence was expected to be supportive of the facts given by other witnesses on behalf of the Defendant. It arose from the events she had been involved with as a legal adviser to the Defendant. Given the quantum of the claim and the specific aspect of the facts with which she would deal, it would be quite disproportionate to bring the trial to a halt and require the Defendant to instruct different Advocates. Appropriate directions could be given to the Jurats to explain the position of an employee of an Advocate for a party giving evidence and so it was in the interests of justice as a whole to proceed to hear her evidence as well as the further evidence that would be given as a result of the Plaintiff’s application to recall the Defendant’s two witnesses to ask them about the two e-mails that had unexpectedly come to light.
11. The Plaintiff made an application dated 12 April 2016 for specific disclosure pursuant to rule 70 of the 2007 Rules in relation to certain documents that were exhibited to the witness statements in redacted form in respect of which leave to adduce them had just been given and further documents that the Defendant may have, whether a claim of legal privilege attached to them or not, which should also be regarded as disclosable. The Deputy Bailiff granted that application in part, outlining the reasons for doing so and reserving full reasons to be incorporated into this judgment.
12. The trial continued and concluded on 15 April 2016.
13. Evidence at the trial was given by six people. The Plaintiff gave evidence and also called Donald Fraser. The primary witnesses for the Defendant were Diana Thompson and Jonathan Moulton and its other witnesses were Stephen Lansdown and Ms Parrott.

Privilege and waiver

14. Before turning to the matters in dispute between the parties relevant to the outcome of the action, it is convenient to set out the Deputy Bailiff’s reasons for directing that certain of the passages in the documents that had been disclosed in redacted form should be disclosed unredacted and for making an order for limited specific disclosure.
15. The Plaintiff’s application of 12 April 2016 sought first non-redacted copies of documents exhibited to witness statements being adduced on behalf of the Defendant and secondly that *“The Defendant shall disclose to the Plaintiff forthwith all documents, whether privileged or not, which concern or are relevant to the current action created during the period 13 January 2014 to 24 January 2014 inclusive”*. It was supported by a short Affidavit of Advocate Crawford sworn on 12 April 2016, referring to a document that had been handed to the Court on 4 April 2016 containing an e-mail sent by Ms Parrott to Advocate Thompson on 14 January 2014 timed at 19:42. Subsequent correspondence from Advocate Ferbrache suggested that only a redacted version of that document would be included within the trial

bundle. Advocate Crawford also explained that on 8 April 2016 an envelope had been delivered to his firm's offices addressed to Advocate Le Tissier without there being any indication as to the sender. That envelope contained copies of various e-mails between the Defendant and its Advocates. On behalf of the Plaintiff, it was contended that privilege had been waived by the Defendant with the consequence that disclosure should be made of all documents from around that time, whether they would normally attract privilege or not.

16. Advocate Le Tissier drew attention to the summaries of the applicable principles contained in Hollander's *Documentary Evidence* (12th ed.) in Chapter 23. The emphasis is on fairness. He relied first on the notion that cherrypicking is not permissible (para. 23-02), in which reference to what Elias J said *Brennan v Sunderland City Council* [2009] ICR 479 is made:

"In our view the fundamental question is whether, in the light of what has been disclosed and the context in which disclosure has occurred, it would be unfair to allow the party making disclosure not to reveal the whole of the relevant information because it would risk the court and the other party only having a partial and potentially misleading understanding of the material. The court must not allow cherrypicking, but the question is when has a cherry been relevantly placed before the court."

Because of the handing to the Court of a document that would otherwise be privileged, the doctrine of collateral waiver then arose. Paragraph 23-10 quotes the classic statement given by Mustill J in *Nea Karteria Maritime Co v Atlantic and Great Lakes Steamship Corp* [1981] Com LR 132:

"Where a party is deploying in court material which would otherwise be privileged the opposite party and the court must have an opportunity of satisfying themselves what the party has chosen to release from that privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."

17. Hollander then deals with the two issues that arise relating to what meaning should be given to deploying material in court and what is meant by "*the issue in question*". One question is whether there is a distinction to be drawn between deploying material at trial and only at an interlocutory stage. At para. 23-12, the explanation offered by Waller LJ in *Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901 is quoted:

"If in interlocutory proceedings a party has waived privilege ... then, that is a waiver for all purposes and the cherry picking principle applies ... If there is to be an exception to that principle it would need to be framed in the following way. It would need to be argued that since it was only for the purpose of the interlocutory proceedings and in relation to an issue in those proceedings that the waiver has taken place the waiver was in some way limited."

More generally, however, once material has been relied on in court it will be sufficient to assert that the privilege in it has been waived (para. 23-12). It would only be if it could be argued that the reason for waiving privilege was for some purpose outside the context of the trial itself that the possible exception referred to could be invoked. In the present situation, the document had been handed to the Court (and retained by it) and a copy provided to the Plaintiff's Advocate. Whilst this had not taken place with the Jurats present, it was in the context of what would happen next at the trial. Referring to para. 23-10, "*it will be difficult to turn the clock back and thus retrieve the position*".

18. In respect of the issue in question, para. 23-13 states:

"In Nea Karteria, Mustill J said that the collateral waiver relates to "the whole of the material relevant to the issue in question". In Tanter, Hobhouse J referred to "the

transaction in respect of which the [privileged] document is adduced or the evidence called". There is no difference of substance between these tests. ... The case law shows that without exception the courts have not extended the ambit of the waiver beyond what is necessary and if in doubt have taken a relatively restrictive view of "the issue in question". The other point of significance is that it is for the court and not the party to determine objectively what is the extent of the waiver."

Hollander also quotes from what Kerr LJ said in Banque Keyser Ullman v Skandia (UK) Insurance (unreported, 11 July 1986):

"What matters is that the contents of the statement or document have in fact been introduced into the evidence, admittedly not physically by producing the document and putting it to the witness, but by asking the witness about its contents. In those circumstances, the rule is that the best evidence, the document itself, becomes admissible if called for. It cannot make any difference whether the document is produced or read out or whether (as in this case) the witness, having previously consulted it, gives evidence about its contents."

19. In response, Advocate Ferbrache referred to four cases from England and Wales. In doing so, he drew attention to the fact that the documents that the Plaintiff's Advocates had received anonymously were the Defendant's confidential materials. He relied on the analysis of the nature of a claim in confidence set out by the English Court of Appeal in Imerman v Tchenguiz [2011] Fam 116. At para. 64, that Court explained that:

"It was only some 20 years ago that the law of confidence was authoritatively extended to apply to cases where the defendant had come by the information without the consent of the claimant. That extension, which had been discussed in academic articles, was established in the speech of Lord Goff of Chieveley in Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109. He said, at p 281, that confidence could be invoked "where an obviously confidential document is wafted by an electric fan out of a window ... or ... is dropped in a public place, and is then picked up by a passer-by."

Accordingly, the Court concluded (in para. 69):

"In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence. It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also to be able to enforce the return (or destruction) of any such document or copy. Without the court having the power to grant such relief, the information will, through the unauthorised act of the defendant, either lose its confidential character, or will at least be at risk of doing so. The claimant should not be at risk, through the unauthorised act of the defendant, of having the confidentiality of the information lost, or even potentially lost."

20. Advocate Ferbrache correctly identified that the principle of confidence could not, however, provide a complete answer to the question before the Court. This was because he acknowledged that he had handed to the Court, and to the Plaintiff's Advocates, a copy of an e-mail that contained legal advice that was, in the hands of the Defendant, ordinarily

privileged. As a result, he argued that any waiver of privilege was a very limited one. This principle is clear from Berezovsky v Hine [2011] EWCA Civ 1089 (at para. 29):

“... where privilege is waived, the question whether the waiver was limited, and, if so, the parameters of the limitation, must be determined by reference to all the circumstances of the alleged waiver, and, in particular, what was expressly or impliedly communicated between the persons sending, and the person receiving, the documents in question, and what they must or ought reasonably to have understood – cf. per Hoffmann LJ in Brown v Guardian Royal Exchange plc [1994] 2 Lloyd’s Rep 325, 328, as discussed by Aikens J in Winterthur Swiss Insurance Company v AG (Manchester) Ltd (in liquidation) [2006] EWHC 839 Comm, para 74.”

21. The applicable principles were summarised by Mann J in Fulham Leisure Holdings Limited v Nicholson Graham & Jones [2006] EWHC 158 (Ch) (at para. 11):

- “i) One should first identify the “transaction” in respect of which the disclosure has been made.*
- ii) That transaction may be identifiable simply from the nature of the disclosure made – for example, advice given by counsel on a single occasion.*
- iii) However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent. If it does, then the whole of the wider transaction must be disclosed.*
- iv) When that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed.”*

22. At para. 14, Mann J cited what Hobhouse J had said about the extent of the transaction in General Accident Fire and Life Assurance Corp Ltd v Tanter [1984] 1 WLR 100 (at p. 114):

“Sixth, by adducing evidence at a trial one does get involved in potential further waiver. The underlying principle is one of fairness in the conduct of the trial and does not go further than that. The fact that this principle does not arise unless you adduce the evidence at the trial is clearly stated in the judgment of Mustill J [in the Nea Karteria case] and it was clearly raised by the facts in the Doland case and it was likewise raised by the facts in the Great Atlantic and Burnell cases. Further, if the evidence is adduced, then the extent of the waiver relates to the transaction to which that evidence goes. The extent of the transaction has to be examined and where it is what somebody said on a particular occasion, then that is the transaction. It is not the subject matter of those conversations. It does not extend to all matters relating to the subject matter of those conversations.”

His conclusion (at para. 18) is that:

“The court will determine objectively what the real transaction is so that the scope of the waiver can be determined. If only part of the material involved in that transaction has been disclosed then further disclosure will be ordered and it can no longer be resisted on the basis of privilege.”

An example of how this approach can lead to the conclusion that the extent of the waiver is very limited is the final case to which Advocate Ferbrache referred, Dore v Leicestershire County Council [2010] EWHC 34 (Ch), but that case does not expound any further point of principle.

23. The Deputy Bailiff accepted that these principles of English law can properly be applied as reflecting Guernsey law. The privilege in communications containing legal advice belongs to the client and not to the lawyer. That information is confidential as between them. However, the client can choose to waive that privilege. In the context of disclosure in civil proceedings, there is an obligation to disclose that legally privileged communications exist but inspection of them can be denied. Once the privilege attaching to any of them is lost, the right to inspect arises. The extent to which privilege is lost will depend on an objective analysis of the transaction. The loss of privilege will extend no further than is necessary to be fair.
24. The Deputy Bailiff considered that the transaction involved related to why and how the e-mail message sent on 14 January 2014 timed at 19:42 was deployed. An issue had arisen during the trial about when the compromise agreement had been executed on behalf of the Defendant. There had been an element of ambiguity in what had been written amongst personnel within the Defendant, which had been put squarely into focus in a message sent by Mr Lansdown on 15 January 2014. In order to clarify the ambiguity that had arisen, the Defendant, through Advocate Ferbrache, provided an unredacted copy of the e-mail from Ms Parrott in which it was stated that *“the compromise agreement has already been signed”*. Insofar as it was suggested that this had been done solely for the purpose of showing that the agreement had been signed by that time and so the extent of waiver was limited to that purpose, the Deputy Bailiff disagreed. The context in which that statement was made by Ms Parrott could only properly be understood by reference to the remainder of the message because, by having regard to that, it was possible to understand why Mr Lansdown then wrote what he did. Accordingly, the transaction was marginally wider than just the act of executing the compromise agreement and related to the reasons why the Defendant did not then immediately provide a copy of the executed compromise agreement to the Plaintiff, but the transaction had to be treated as being primarily relevant to that question of timing and was not as broad as everything to do with the ending of the Plaintiff’s employment. In other words, it was not a complete waiver of privilege, but rather a limited one.
25. Although the e-mail in question had only been handed to the Court when the Deputy Bailiff was sitting without the Jurats being present, this was done within the trial that had already commenced. Having been so deployed, the principle of collateral waiver thereafter applied. The Deputy Bailiff looked at the various messages in their unredacted form and formed a view as to what parts of them were covered by his finding as to the transaction and any parts that could properly remain redacted because they referred to matters outside the ambit of the trial. Indeed, some of the passages related to another employee of the Defendant entirely and, as Advocate Le Tissier accepted, could quite properly be withheld from inspection by the Plaintiff.
26. Having decided that the transaction was founded on the timing at which the compromise agreement was executed, but extended to whether the Defendant wished to treat itself as bound by it, the further order for specific disclosure sought by the Plaintiff (*“all documents, whether privileged or not, which concern or are relevant to the current action created during the period 13 January 2014 to 24 January 2014”*) was couched in too broad terms. However, in order to avoid unfairness or misunderstanding of what had been disclosed, the waiver principle required the Defendant to search for, and if found, disclose, any other communications between it and Mourant Ozannes relating to whether the compromise agreement was to be relied on and the potential benefits either way surrounding that choice. In the event, no further documents fell to be disclosed.

General directions

27. The Deputy Bailiff reminded the Jurats of their respective roles: the Deputy Bailiff remains the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed that they must accept his directions on the law and follow them.

28. The Deputy Bailiff directed the Jurats that the burden of proof in respect of his Cause lies on the Plaintiff throughout. The standard of proof is the civil standard of the balance of probabilities and the Deputy Bailiff explained that to establish something on the balance of probabilities means to prove that something is more likely so than not so. Insofar as the Defendant sought to establish any fact, the burden of proof rested on it to prove that fact to the same civil standard.
29. The Deputy Bailiff further directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgments about the witnesses, and which evidence they treated as reliable, and which they considered was not. In relation to Ms Parrott's evidence, such as it was, the Deputy Bailiff highlighted the unusual circumstances in which an employee of the Advocate representing the Defendant came to be a witness on behalf of the Defendant. The Jurats were directed that they should consider the possibility of Ms Parrott's evidence being influenced as a result of that employment relationship but that they might also recognise that, as a qualified lawyer, she would understand the significance of having promised to tell the truth and her duty to do so. The Deputy Bailiff directed the Jurats that the facts of the case are their responsibility. They may take account of the arguments in the speeches they heard, but are not bound to accept them. Equally, if at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. The Deputy Bailiff summarised that position by clarifying that, when it comes to the facts of this case, it is the Jurats' judgment alone that counts.
30. The Deputy Bailiff emphasised the need for the Jurats to have regard to the cases pleaded by the parties because these formed the basis of the dispute between them. If the Jurats felt that they had heard evidence that did not concentrate on the central issues they were required to resolve, they could, save to the extent that such evidence went to the credibility of a witness, choose not to make any findings about what might be regarded as the surrounding circumstances of the case.
31. The Deputy Bailiff reminded the Jurats that the case turned on whether clause 4.6 of the compromise agreement had been breached by the Plaintiff, thereby entitling the Defendant to withhold payment of the monies claimed by the Plaintiff in his Cause. Clause 4.6 provides:

“As at the date of this agreement, the employee warrants and represents to the Employer and to the Company that save as already known by them:

4.6.1 there are no circumstances of which the Employee is aware or of which the Employee ought reasonably to be aware which would amount to a repudiatory breach by the Employee of any express or implied term of the Contract; and

4.6.2 the Employee is not aware of any conduct on the part of himself,

which would (or would have) in either case entitled the Employer to terminate the Employee's employment without notice or on payment in lieu of notice and any payment to the Employee under this agreement, including but not limited to the Termination Payment, is conditional upon this being so.

It was common ground that the issues to be resolved were whether the conduct of the Plaintiff on which the Defendant relies (and so has the burden of proof) was so serious that it justified dismissing the Plaintiff for gross misconduct and, if so, whether that conduct was already known to the Defendant (or to its predecessor as employer of the Plaintiff, the CISX) as at the date of the compromise agreement, whenever that was found to be.

The facts

32. There was considerable agreement between the parties about many of the facts.

33. The Plaintiff began working for the CISX as a contractor in October 1998 before moving to become a permanent employee with effect from 1 March 1999. He was provided with written terms and conditions pursuant to section 1 of the Conditions of Employment (Guernsey) Law, 1985. His job title was Manager, Market Regulation & Compliance. He reported directly to the Chief Executive Officer, Tamara Menteshvili. In 2004, the Plaintiff was promoted to Senior Manager, Finance and Administration and a year later he was again promoted to Chief Operating Officer. He was a member of an internal group known as the Market Authority (see Article 33 of the Articles of Association of the CISX).
34. Donald Fraser began work for the CISX in November 2001 as a consultant architect/developer. One of his early tasks was to analyse the system the company used for publishing news, trade, price and net asset value data to Reuters and to create a specification for an automated system to publish such data. The board of the CISX eventually signed off the specification and a system known as the Market Data Management Services (“MDMS”) was created and implemented. The system constantly evolved according to the needs of the CISX. In December 2005, Mr Fraser became a permanent employee of the CISX as the IT Manager. In 2007, he modified the MDMS so that the CISX was enabled to own all the trading data so as to be able to dispense with Reuters. In July 2008, as a result of an incident at the CISX, referred to as the Clerkenwell case, and after input from the Guernsey Financial Services Commission (“the GFSC”), Mr Fraser was tasked to add to the MDMS an automated market surveillance system for monitoring trade and quoted price data. Ms Menteshvili, the Plaintiff and the then Chairman of the CISX worked together to develop this specification.
35. Advocate Thompson commenced her permanent employment with the CISX in November 2003 having been on contract from approximately 1998. She held various positions, culminating in her being the company secretary. After the restructuring that took place in late 2013, she continues to work for the Defendant and its related company.
36. The International Securities Consultancy Limited undertook an independent evaluation of the market surveillance systems and procedures of the CISX in 2012. Its report dated 23 April 2012, para. 3 notes that:

“Alerts are not of themselves rule breaches. Furthermore, assigning a rule number breach to an alert may mislead staff into thinking that they are looking at a particular breach of a rule that is in fact something more serious. The recommendation in this regard is that CISX follow international standards and practice for market surveillance systems by utilising a system of alerts which Surveillance staff then investigate to determine which, if any, of the Exchange’s rules have been breached.”

The report also conveniently describes the basic operation of the MDMS:

15. ... Trade and quote price data, after passing basic data validation tests are subjected to tests which are run at the end of each day’s trading. Should any test trigger an alert, surveillance and breach logs are created and an email is forwarded to surveillance staff working within the Continuing Disclosure Department. ...
27. Once investigated, each Breach is signed off by a member of the Market Authority. This is normally the Chief Operating Officer and occasionally the Chief Executive. ...
30. Having created the Rule Breach, Continuing Disclosure/Surveillance staff contact the market maker to establish why the Rule Breach occurred. They also check the price of the security if listed on another market. The market maker excuse which is confirmed by email is entered into the Action report. ...

31. *If satisfied with the excuse, the Action is closed and the report is reviewed by Market Authority who sign off on the Action. ...*
32. *It is possible to view who created the Action, the date created, who last edited the case and when it was last edited.*
33. *Only the user who created the Action can edit it and a Rule Breach Action cannot be deleted once it has been reviewed.”*
37. Before this report, the MDMS ran at 10 pm every night and analysed the data entered into the system during the day. Any breaches identified would be automatically date and time stamped, so the time would always be 10 pm. Although the computer screen system viewed by staff of the CISX did not show the time part of any stamp, it was impossible to input a time manually. When Mr Fraser ran reports from the system, he was able to view the date and time stamp entries. Following the report, the CISX agreed to implement changes. As a result, Mr Fraser was required to review all existing breach records and retrospectively transport those surveillance events that were previously recorded as member breaches, but which had been explained not to be real breaches, into their own area on a new MDMS in an area known as surveillance event records.
38. On 22 November 2012, Mr Fraser was looking at tables of records, and had been for some hours, when he discovered records that appeared to have been backdated. He noted that each record had recorded the action date and the sign off date as the system event date. The MDMS report showed that the Plaintiff had created the records in question on 27 August 2010 and that Ms Menteshvili had signed them off on 2 September 2010 or on 27 October 2010. He subsequently worked out that there were 63 of these records. He sent an e-mail, timed at 16:16 that day, when he was angry and tired, to Ms Menteshvili and the Plaintiff, which included the following:

“... I have noted that inappropriate data has been entered by both yourself and Andrew.

I draw your attention to the fact that all price movement breaches are created at 10PM on a trading day. It is therefore impossible to a) have entered an excuse/explanation for the breach (Andrew) on the breach date and b) to have signed off on the breach on that date (Tammy).

You cannot use the excuse that we were simply entering historic data (for which the ability to enter the “sign off” date was created) given that all such breaches were created by automated systems.

The problem has been highlighted by the fact that the Surveillance event date uses date and time, making it blatantly obvious that the input data has been falsified.

Fortunately the system captures the “real” signoff date/time so that part can be rectified.

However the “excuse/explanation date” given cannot be magically generated. I can leave it as it but it will certainly look silly.

One proposal: alter the “excuse/explanation date” to be at least the next working day from the event date, given that they all occur at 10PM. ...

All in all it would seem to me that all such “false” data has been entered to make the “books” look clean.

As we are a regulatory exchange I find this behaviour hard to swallow.

I can easily rectify all signoff date/times but I can’t rectify the “excuse given” date/times.

Your feedback on how to proceed is welcome.”

Mr Fraser did not receive any e-mail response from Ms Menteshvili or from the Plaintiff. However, around two weeks afterwards, the Plaintiff did go to see Mr Fraser and offered an explanation as to the rationale for the actions the Plaintiff had taken, although Mr Fraser could not recall the precise details. At that time, no further action was taken.

39. Jon Moulton was chairman of the CISX from 19 April 2013. On the same day, Mr Lansdown was appointed a director of the CISX. Mr Lansdown became Deputy Chairman on 6 September 2013. The CISE was incorporated on 14 November 2013, with Messrs Moulton and Lansdown as the Chairman and Deputy Chairman respectively. Liquidators were appointed by the CISX as at 3 February 2014 and Mr Moulton remains a director of it during the liquidation.
40. Towards the end of 2013, Mr Moulton was unimpressed with the Plaintiff's contribution to the CISX. He set out his misgivings in an e-mail on 15 November 2013. It referred to Mr Moulton's intention to set up a formal performance review with the Plaintiff in the near future. At a salary review meeting on 5 December 2013, Mr Lansdown similarly commented on the Plaintiff's need to rise to the challenge presented by the reorganisation underway and present a good example to other staff.
41. By a letter dated 9 December 2013, the Plaintiff was formally told about the scheme of arrangement planned under the Companies (Guernsey) Law, 2008, as amended, under which his contract of employment with the CISX was to transfer to the Defendant, the CISE on the date this Court approved the scheme of arrangement. The Plaintiff indicated his consent to the proposed transfer by signing a copy of the letter on 10 December 2013.
42. On or about 7 January 2014, Mr Moulton asked the Plaintiff to attend a meeting with him and Advocate Thompson. Rather than pursue a performance review route, Mr Moulton suggested that the Plaintiff's employment with the CISE be terminated by the parties entering into a compromise agreement. The Plaintiff took advice and decided that he was prepared to negotiate the terms of a suitable compromise agreement. A draft agreement was received by Advocate Thompson from Ms Parrott and forwarded to Advocate Crawford on 10 January 2014. It was returned shortly thereafter with some proposed changes. Advocate Thompson then sent an execution copy for Advocate Crawford later that day. Advocate Crawford completed the independent legal adviser's certificate the same day and passed the document to the Plaintiff.
43. The weekend intervened. The Plaintiff signed the compromise agreement on 13 January 2014. He dated it alongside his signature. The compromise agreement provided for the Plaintiff's employment to terminate on 31 January 2014. He attended at the offices of the CISE at around lunchtime. He handed the signed copies of the compromise agreement to Advocate Thompson. In an e-mail to Ms Parrott timed at 12:27, Advocate Thompson confirmed that she had just spoken to the Plaintiff. The Plaintiff then went to collect a box of his belongings. He spoke to Mr Fraser.
44. After the Plaintiff had gone, Advocate Thompson and Mr Fraser spoke. Their discussion arose because Advocate Thompson requested on the telephone that Mr Fraser meet with her. (Their discussion did not arise, as Advocate Thompson stated it did, by Mr Fraser volunteering information about the Plaintiff.) Advocate Thompson appeared to want information about the Plaintiff and another of the CISE's employees. Her manner was quite aggressive. Advocate Thompson seemed particularly interested in matters relating to the other employee. Mr Fraser mentioned to her about the e-mail he had sent to Ms Menteshvili and the Plaintiff in November 2012. Advocate Thompson asked him to get a copy of that e-mail.
45. Mr Moulton attended the offices of the CISE that afternoon at some time after 3 pm. He was on his way to another commitment later that day. Whilst he was at the offices, pursuant to the authorisation given to him by the board of directors, after reading the document and in the

presence of Advocate Thompson, he signed the copies of the compromise agreement, although he did not add the date. Advocate Thompson informed Mr Moulton of what Mr Fraser had told her. Mr Moulton required Mr Fraser to attend a meeting with him and at that meeting he also asked Mr Fraser to locate a copy of the e-mail. By logging on to the system Mr Fraser was able to search for and retrieve a copy of the e-mail he had sent. He forwarded a copy to Advocate Thompson by e-mail timed at 17:16 that day. Almost immediately, Advocate Thompson forwarded the message to Mr Moulton. Mr Moulton responded that evening. He copied his response to Mr Lansdown and directed Advocate Thompson not to complete on the departure deal with the Plaintiff, to inform the GFSC, to ask the Plaintiff to explain and to take advice on summary dismissal for the Plaintiff.

46. On the morning of 14 January 2014, Mr Lansdown commented that the material he had seen “*does look bad*” and expected that the CISX would need to take legal action against Ms Menteshvili and the Plaintiff, although that would be something for the liquidator to consider. Advocate Thompson then confirmed that she had, as directed, contacted the GFSC, sought advice from Mourant Ozannes and not completed on the compromise agreement, by which she meant that the settlement monies payable to the Plaintiff under the agreement had not been processed. The response from Ms Parrott arrived shortly after her advice was sought. She drew attention to the provision in the compromise agreement that permitted non-payment of the termination monies in circumstances where the employee has breached any provision of the contract of employment, but indicated that this would need further consideration. Ms Parrott and Advocate Thompson also spoke during the day, during which Ms Parrott recalls being told that Mr Moulton had signed the agreement the previous day. Similarly, Advocate Thompson and Mr Lansdown spoke during the course of the day from which Mr Lansdown understood that the compromise agreement had been signed the previous day. Later that afternoon, Advocate Thompson asked for Ms Parrott’s views on some draft text to be sent to the Plaintiff requiring him to explain a breaches matter. Ms Parrott recommended waiting before sending anything to the Plaintiff as she had not completed her researches and wanted to get the strategy straight first. Because she had been informed the compromise agreement had been signed she was working on the assumption that it was binding on the parties. Within minutes, Advocate Thompson sent an e-mail to Mr Fraser asking him to advise her “*of any other matters that should be brought to my attention and/or the Board*”.
47. Ms Parrott then sent the e-mail timed at 19:42 to which reference has already been made. This document set out the benefits to the CISE of relying on the compromise agreement because of the provisions relating to waiver of claims, confidentiality and non-disparagement. She referred to clause 4.6 and advised that a full investigation should be undertaken so that the CISE would be able to prove that the conduct occurred and amounted to gross misconduct sufficient to justify summary dismissal. She recommended obtaining a statement from Mr Fraser and arranging for the Plaintiff to attend a meeting by adopting the same disciplinary process as for any employee.
48. On the morning of 15 January 2014, Advocate Thompson forwarded Ms Parrott’s e-mail to Messrs Moulton and Lansdown. Mr Lansdown responded agreeing with the advice of Ms Parrott, adding “*Sign the Compromise Agreement and rely on 4.6*”. Mr Lansdown acknowledged that his chosen wording was unfortunate because it left the impression that the agreement was still to be signed but, when considered in context, it was a response to the advice from Ms Parrott which stated unambiguously that the agreement had already been signed, which he had read and understood. He suggested requiring the Plaintiff, through his lawyers, to explain and the obtaining of a statement from Mr Fraser about what had been involved and how it was resolved. Advocate Thompson sought Ms Parrott’s advice on a revised draft message to be sent to Advocate Crawford. She explained that she remained the company secretary of both the CISX and the CISE. Ms Parrott offered some revised wording and recommended that the statement from Mr Fraser should be obtained before the message to Advocate Crawford was sent.
49. Mr Fraser produced the statement that he had been requested to prepare on 15 January 2014. Prior to completing this statement, Mr Fraser had explained to Advocate Thompson in

layman's terms what his earlier e-mail had covered. He appended to his statement some screenshots as an example of what he described. His statement included:

“The old MDMS system automatically generated trading breaches for all events, whether they were an actual breach or not. Late trade events are the only events that warrant an actual breach of the exchange's rules whereas all other events are for surveillance purposes only and warrant investigation, possibly leading to a breach depending on the outcome of the investigation.

Late trade breaches occur at the date and time the trade was reported.

The surveillance system runs at 10PM every night analysing trade and quote price data entered for that day. Therefore any breaches that were created in the old MDMS as a result of the surveillance system have a breach date and a breach time of 10PM.

As previously stated the breaches system was not interested in times and therefore it was not possible to see or enter a breach time and it would therefore not be possible to see the time of 10PM for breaches automatically created by the surveillance system.

On or before the date November 22nd 2012 it came to my attention, during my analysis of breach data to be transferred into the new surveillance event system, that a number of breach records had been falsified. The falsified data fields were:

- *Date breach signed off*
- *Date action taken*

Given that surveillance related breaches are all created at 10PM, it would not be possible to sign off the breach on the same date unless two people were in the office at or after 10PM.

Given that the MDMS audited data captures the date and time a record was last edited, and signing off a breach is the last action that can be taken after which nobody can edit or delete the record (enforced by the MDMS), the date and time a breach was actually signed off is captured by the audited data field “date/time last edited”.

What I discovered during my analysis were a number of breach records, which had been automatically created by the surveillance system, that had an action taken date and a signed off date matching the breach date.

I emailed the two people concerned on November 22nd 2012 asking for an explanation, to which I never received a reply.”

50. In the late afternoon on 15 January 2014, Advocate Thompson sent the e-mail she had discussed with Ms Parrott to Advocate Crawford. She attached the e-mail of 22 November 2012 written by Mr Fraser, explaining that it “*makes some very serious allegations about [the Plaintiff] falsifying company records (conduct, which, if proved, would constitute gross misconduct and justify summary dismissal)*”. She indicated that an investigation was underway and asked that the Plaintiff provide a written explanation. She referred to clause 4.6 of the compromise agreement, adding that, on the material the CISE had at that time, it took the view that the conduct described by Mr Fraser amounted to gross misconduct justifying summary dismissal and that the CISE would withhold the termination monies otherwise payable until it had ascertained whether there had been a breach of warranty. The following afternoon, the Plaintiff e-mailed Advocate Thompson asking her to send him a breakdown of the relevant breaches so that he could provide her with a comprehensive response. On 17 January 2014, Advocate Thompson asked Mr Fraser to e-mail to her all 70 breaches that had been referred to, which he did at the end of that working day, indicating that 63 of them related to the Plaintiff. Advocate Thompson forwarded a copy of the breach

example that Mr Fraser had appended to his statement to the Plaintiff at 12:06 on 20 January 2014.

51. The Plaintiff had responded to the request for a written explanation in an e-mail timed at 00:39 on 20 January 2014, before seeing those details. That response included the following:

“I believe that the breaches that you refer to relate to price movements only and not late trade breaches as these were treated differently to price movements that exceeded preset triggers in MDMS. From what I recall the breaches mentioned in Donald’s e-mail relate to securities that only had one market maker registered in them and therefore as per the rules of the Exchange any prices in this case are considered to be indicative (currently rule 5.12)

Under the MDMS system in place at the time all price movements that triggered the preset levels were logged as breaches, whether there was one or more registered market maker in the listed security. However the policy at the time in relation to price movements relating to securities in which there was only one market maker was that these were not considered to be breaches and as a result no action was taken for these. By no action I mean that the market maker was not contacted for an explanation of the price movement, the reason for the price movement was entered as “Indicative Prices” or some similar wording. The only other option available under the policies in place at the time would have been to mark the breach as invalid and then they would have been effectively not registered as I don’t believe that breaches marked as invalid were flagged anywhere at the time in question.

As a result of this policy the date of the reason was effectively the date the movement was logged as a breach and was entered as such. However all breaches that were flagged were reviewed when the e-mail was received. To demonstrate that the price movements were looked at, I should point out that as a result of my review of them an error was identified in the way that the percentage price movements were calculated. This should be backed up by Donald’s change log for MDMS enhancements as the formulas were changed following this.

However, the system only accepts a date against the reason but records both a date and time when the record is generated, this makes it impossible to match the two up when comparing them. This problem with the policy was not identified until the changes to the market surveillance system were implemented (as detailed in Donald’s e-mail).

By the time this issue was identified by Donald it was too late to correct the issue as the date had already been entered and signed off. In addition, I believe that some of these items logged as breaches had been looked at by the GFSC as part of an on site visit and had also possibly been sent to them as part of their current investigation, with this in mind it would have been inappropriate to make the changes that Donald suggested in his e-mail.

In relation to the sign off date you would need to ask Tammy for an explanation of this.

In relation to the warranty I would make the following comments:

As this matter occurred in 2012, it was not an incident that I recalled readily, and since the data was transferred across from the old breaches register to the new market surveillance events register I would have considered that any issues had been cleared to the satisfaction of the Exchange and Donald Fraser

All the actions and reasons were signed off with the person signing off having full sight of the relevant details at the time of signing off.

Therefore, as I recall the events I believe that this is not an issue that has any impact on the compromise agreement.

I should also like to take the opportunity to point out that as I was heavily involved in the design of the system I was well aware that the dates and times that data was entered into to [sic] the system were automatically recorded and that this has been the case since MDMS was first rolled out to provide an additional audit trail. As such it would be foolish for me to even considering [sic] falsifying company data.”

52. On 23 January 2014, the Plaintiff requested a signed copy of the compromise agreement from Advocate Thompson. His e-mail includes his assumption that Mr Moulton signed it shortly after he had signed it on 13 January 2014. Advocate Thompson replied within minutes promising to send a copy that day and requesting a response to the breach example she had forwarded on 20 January 2014. She repeated her request on 28 January 2014, when she also attached a larger document running to 22 pages on trading and surveillance events on which she wished the Plaintiff to comment. In the meantime, on 26 January 2014, Advocate Thompson informed staff through a general e-mail that, following the restructuring, the Plaintiff and another person had resigned from the Exchange.
53. On 28 January 2014, Mr Fraser provided Advocate Thompson with his comments on the Plaintiff’s explanation e-mail. Initially, he indicated his concurrence with the first two paragraphs quoted above and vaguely remembered what the Plaintiff was referring to in the third paragraph but needed to investigate further. Subsequently, Mr Fraser expanded on the third paragraph by acknowledging that there had been a calculation error detected by the Plaintiff and also that the Plaintiff had pointed out that the breach description needed the time of trade included because there could be more than one trade per day. He included an extract from the MDMS change log which shows that the bug was fixed on 26 April 2010.
54. During the evening of 28 January 2014, the Plaintiff replied to Advocate Thompson that the information provided in the documents on which she had requested him to comment appeared to be in accordance with the recollection he had set out in his previous response.
55. On 31 January 2014, Mr Fraser attended a meeting at the GFSC relating to the e-mail he had sent and the allegations. Advocate Thompson was also present. A witness statement dated 3 February 2014 was subsequently prepared. Mr Fraser made some minor changes to the draft and then signed the finalised version.
56. On 1 February 2014, Advocate Thompson provided Mr Moulton with a brief timeline relating to the surveillance anomalies. She noted first a letter from the GFSC requiring “*trading data on Arch*” to be provided by 6 August 2010. Against the date of 27 August 2010, it is stated that the Plaintiff and Ms Menteshvili entered “*some 60 – 70 surveillance actions*” and attached an example showing the surveillance action recorded at 22.00.00 in the MDMS on 6 July 2009 having been signed off at 00.00.00 that day. The next entry is the e-mail from Mr Fraser on 22 November 2012, where feedback was invited but none received. Finally, there is a reference to large bonuses for *inter alia* the Plaintiff in December 2012.
57. On 3 February 2014 Mr Fraser provided a fuller commentary on the Plaintiff’s e-mailed explanation dated 20 January 2014 sent to Advocate Thompson. He confirmed that the 70 records related to breaches that were created as a result of price movements surveillance checks and that, apart from two entries where there were two market makers, the remainder related to securities where there was only one market maker. He confirmed that the Plaintiff had detected the calculation error and the bug had been fixed. He believed that the matching of dates was “*an easy mistake to make when back-dating records*”. He had not expected any response to his e-mail of 22 November 2012 because, had the recipients taken up his offer, in his opinion “*they would be admitting to [his] allegations of falsifying data*”. He had not been involved in the visits of the GFSC but, because 15 of the entries related to Arch Cru, he rather assumed that the GFSC would have taken copies. In his covering e-mail, he confirmed that

the Plaintiff had been involved in the features of the MDMS and so was aware of the audit trail. Mr Fraser attached a report running to 35 pages with more details of the 70 breaches that had been found and analysed, of which 63 related to action by the Plaintiff.

58. On 4 February 2014, the GFSC served a notice on the Plaintiff pursuant to section 27 of the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended, requiring him to attend an interview on 10 February 2014. He duly attended. By a letter dated 19 February 2014, the Plaintiff was informed by the GFSC that its review had been completed and “*At this stage there is no proposal to take the matters forward*”. Mr Moulton on behalf of the CISE was similarly informed by a letter dated 10 March 2014.

59. By a letter dated 10 February 2014, Mr Moulton as Chairman of the CISE informed the Plaintiff that, following its investigation it had “*come to the view that during [his] employment, [he] falsified company documentation by back-dating breach actions and that such conduct, had it been known by the current Board during [his] employment, would have constituted gross misconduct*”. There appeared to him to be no reasonable or lawful justification for the Plaintiff entering the data for the records many months later. Accordingly, the CISE relied on clause 4.6 of the compromise agreement and would not be paying the amounts otherwise due under it. Mr Moulton also referred to the concerns that he and others had had about the Plaintiff’s performance and the way that they had been put to one side in an effort to agree an amicable exit with the Plaintiff but he added:

“... neither I nor the Board were aware that you had engaged in such conduct in the falsifying of company records and had the Board known of such conduct, it would not have proposed the compromise agreement.

This is an exceptionally serious matter and one that we have investigated thoroughly. The significant concern now expressed by the GFSC in respect of the matter further supports our view that your conduct was in fundamental breach of your duties owed to the business and whilst we understand that our decision will adversely impact you, the terms of the Agreement are clear and this is therefore an unavoidable decision.”

The letter sets out that in reaching this decision, the CISE had regard to the e-mail of 22 November 2012 from Mr Fraser, a sample of computer print offs showing the 70 trade price related “*breaches*” actioned in the MDMS in August/September 2010, the Plaintiff’s e-mailed response dated 20 January 2014 and Mr Fraser’s verbal and written comments on that e-mail.

60. On 1 October 2014, the GFSC published a public statement relating to the CISX. The background is set out in para. 3:

“In February 2012 the Commission commenced an investigation in to the CISX (the “Investigation”) in relation to transactions in the listed securities of Arch Guernsey ICC Limited or its incorporated cells, which transactions had been implicated in possible market manipulation and other forms of irregular trading (the “Arch transactions”).”

The GFSC and the CISX entered into a settlement agreement on 31 January 2014 under which the CISX admitted that it was seriously at fault and would pay a financial penalty and the GFSC agreed to take no further action against it. The wider investigation continued until the summer of 2014 and, upon its completion, the GFSC’s findings included that:

“13.1 The Commission is satisfied that the former Chief Executive did not breach any regulatory requirement in the Enforcement Recommendation, and that the investigation has revealed nothing that would justify any action in relation to her. She has throughout been and remains a fit and proper person in good standing. ...

13.3 The Commission confirms that its investigation has revealed nothing that would justify any action in relation to any present or former officer of the CISX.

Those individuals have throughout been and remain fit and proper persons in good standing.”

The compromise agreement and the warranty

61. The Deputy Bailiff explained to the Jurats that a compromise agreement is a mechanism by which the parties can settle employment disputes or potential disputes. Compromise agreements are recognised under section 30A of the Employment Protection (Guernsey) Law, 1998, as amended, which sets out the conditions that must be satisfied. As it was put in recital (D) of the compromise agreement between the parties:

“The Employee and the Employer have entered into this agreement to record and implement the terms on which they have agreed to settle any claims which the Employee has or may have arising out of the Employee’s employment or its termination against the Employer or its officers or employees, whether or not those claims are, or could be, in the contemplation of the parties at the time of signing this agreement including but not limited to any complaints under the Employment Law and/or the Discrimination Law.”

62. The warranty contained in clause 4.6 of the compromise agreement is of a type commonly found in such agreements. Examples were given by the Advocates of cases in which similarly worded clauses have fallen to be construed. In *Collidge v Freeport plc* [2008] IRLR 697, the obligation to make the payments under the compromise agreement was expressly “*Subject to and conditional upon the terms set out below*”, which included clause 7, beginning “*You warrant as a strict condition of this agreement ...*” and continuing in sub-clause (b) that “*there are no circumstances of which you are aware or of which you ought reasonably to be aware which would constitute a repudiatory breach on your part of your contract of employment which would entitle or have entitled the company to terminate your employment without notice.*” The English Court of Appeal upheld the decision of Jack J that clause 7(b) was a condition precedent or a pre-condition to the company’s liability to perform its obligations under the agreement and entitled it to withhold payment to the appellant. At para. 8 of the judgment of Jack J, it was described as “*a condition, a sine qua non, of the obligation to pay that the facts shall be as warranted*”.

63. The Deputy Bailiff directed the Jurats that it was common ground between the parties that this principle applied in the present case. Clause 5.3 of the compromise agreement provides that:

“The Employee acknowledges that the Employer has acted in reliance on these warranties when entering into this agreement and that any breach of these (or any other warranties in this agreement) will be regarded as material.”

The reference to “*these warranties*” is a reference to those set out in clause 5.2, which includes the Plaintiff’s warranty that he had received independent advice on the effect of the agreement before entering into it. One of the “*other warranties*” is, of course, clause 4.6 and clause 5.3, therefore, confirms that a breach of that warranty would be regarded as material. Clause 3.1 provides that the Defendant’s liability to make the payments that are the subject of the Plaintiff’s Cause is “*Subject to and conditional upon the terms set out below ...*”, with the consequence that, if the Defendant is correct that there had been a breach of the warranty in clause 4.6, it has a complete defence to the Plaintiff’s claim.

64. Although the parties disagreed as to when the compromise agreement was executed on behalf of the CISX and the CISE, both acknowledged that it constituted a binding agreement. This was because the Plaintiff could not pursue his claim if the agreement was not binding and the Defendant had not pleaded any defence asserting that there was no binding agreement. This was despite the omission from the agreement of certain dates. Before the signature blocks, the agreement provides that it “*has been entered into on the date stated at the beginning of it*”. However, no date was entered in the space at the beginning. It simply says “*January 2014*”. Clause 8.1 provides:

“This agreement shall be deemed to be without prejudice and subject to contract until such time as it is signed and dated by both parties hereto, and the Legal Adviser has signed the Adviser’s certificate, at which time it shall be treated as an open document evidencing a binding agreement.”

65. Advocate Crawford signed the Adviser’s certificate on 10 January 2014. The Plaintiff signed the compromise agreement and dated it on 13 January 2014. Mr Moulton signed on behalf of both the CISX and the CISE but did not add any date. Further, as the second party signing, he did not enter the date at the beginning of the agreement as he should have done. One argument is that he did not need to add a further reference to 13 January 2014 because that was the date he signed. Accordingly, the date entered by the Plaintiff governs the signatures of all the parties. Alternatively, both parties are waiving strict compliance with clause 8.1 and accept that the compromise agreement became binding for the date the Court finds that Mr Moulton signed. The Deputy Bailiff directed the Jurats that the absence of dating by Mr Moulton is not a material consideration for them. All they needed to do was to decide on the evidence adduced when Mr Moulton’s signatures were added to the agreement and that would be the effective date for the purposes of the opening words of clause 4.6 (see, eg, *Whitehead Mann Limited v Cheverny Consulting Limited* [2006] EWCA Civ 1303, at para. 45). In doing so, the Deputy Bailiff further directed the Jurats to disregard the submission made by Advocate Le Tissier that the compromise agreement only became binding when a copy of it was supplied to the Plaintiff. That is not what clause 8.1 provided. Such a timing for the agreement becoming binding was not in the contemplation of the parties. The intention was clearly that the agreement would be binding on signature (and dating) even if the party who signed first did not immediately receive his or its counterpart duly completed.
66. Under clause 4.6, the Plaintiff’s warranty and representation were given to both “*the Employer and to the Company*”. The definitions used for the parties show that the Employer is the CISE and the Company is the CISX. In respect of what was known to those entities, clause 4.6 refers to “*circumstances ... which would amount to a repudiatory breach*” by the Plaintiff of his contract of employment.

Directions on repudiatory breach

67. The Deputy Bailiff directed the Jurats that a repudiatory breach is one that is so serious that it goes to the root of the contract between the parties. In doing so, he referred to *Wilson v Racher* [1974] ICR 428, which was the case cited by the Defendant, albeit noting that the test in that case of an employee using insulting and insubordinate language to his employer referred instead to the degree involved being such that it was “*incompatible with the continuance of the relation of master and servant*”. The Deputy Bailiff further directed the Jurats that they were not considering the reasonableness or fairness of what the Defendant did, which was a concept relevant to the statutory remedy of unfair dismissal and not where a breach of contract is in issue (see *Enable Care & Home Support Ltd v Pearson* [2010] UKEAT 0366_09_2605, which identified the factual question of “*was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?*” as being the correct approach).
68. The conduct on which the Defendant relies as amounting to a repudiatory breach is confined to the allegation that the Plaintiff falsified company documentation by back-dating breach actions (see para. 5(m) of its Defences). Accordingly, the Deputy Bailiff directed the Jurats to pay particular attention to the evidence relating to those actions of the Plaintiff and to treat what they had heard about other allegations now being made against the Plaintiff as not being directly relevant to the basis on which the Defendant says it would have regarded the back-dating conduct as gross misconduct had it been known by the board of the CISE. By way of example, the Defendant had produced documents showing significantly more breaches occurring at the CISX than the 63 instances on which it relied as gross misconduct and had asked the Plaintiff questions about them. The Plaintiff’s responses might be of assistance to the Jurats in assessing his credibility, but they were expressly not being invited to make any

findings as to whether these other instances occurred. This was because the Defendant, and particularly Mr Moulton, did not have them in its mind when taking the decision to rely on clause 4.6. They did not feature as part of the investigation that the CISE undertook before reaching its decision. The Jurats were to decide what weight and relevance to attach to them but to recognise that they were not central to the parties' cases.

69. Although this case turns on whether or not the warranty in clause 4.6 has been breached by the Plaintiff, the Deputy Bailiff drew an analogy for the benefit of the Jurats with a case in which an employee has been summarily dismissed and makes a claim in the court (as opposed to before the Employment and Discrimination Tribunal) for damages for wrongful dismissal. In such a case, the plaintiff alleges his employer is liable for a breach of contract and the employer defends that claim by asserting that it was entitled to dismiss summarily because of the employee's gross misconduct. If the evidential findings of the Jurats are such that they find no misconduct at all or only misconduct that cannot be categorised as "gross", the defence fails and the employee's claim succeeds. The primary consideration in the present case is similar. The Defendant's reliance on clause 4.6 depends first on whether or not what the Plaintiff did in 2010 can properly be regarded as gross misconduct.

The witnesses

70. Although the events that have taken place are largely recorded through documents, the impression made by the witnesses who gave evidence has a bearing in respect of any matters that remained in dispute.
71. The Plaintiff presented as open and honest. The Jurats are satisfied that he understood the MDMS system sufficiently well that, when he made the 63 entries that he did, he realised that the system would show the date on which the entry was made as well as the date entered as the date of action. He did not attempt to downplay the fact that he chose to enter the date of the e-mail alert each time because he could not remember precisely when he had performed the review that was being recorded. He knew that the Chief Executive Officer would also need to review what he had done. That said, the Jurats formed the overall impression of the Plaintiff that his standards were not particularly high and not adequately high for the senior position he held. The capability route being contemplated by Mr Moulton and Mr Lansdown towards the end of 2013 would have been designed to assist the Plaintiff attain the levels required or identify that he was unable to do so.
72. The Jurats consider that Mr Fraser's evidence was also honest and open. When he wrote his e-mail of 22 November 2012, the Jurats consider that this was precisely the initial reaction that could be expected of an IT Manager who was frustrated that the system he had designed was not being used in the manner intended. The Jurats accept that Mr Fraser now feels that this stance was an overreaction and that he was tired and angry at the time he wrote it. They found him to be a professional and credible witness.
73. Insofar as the witnesses for the Defendant dealt with the issue of when Mr Moulton signed the compromise agreement, the Jurats accept their evidence. Mr Lansdown and Ms Parrott also presented as honest and open. However, their evidence was limited to that one question and so did not address anything that has been of particular value to resolving the case. Mr Moulton was an articulate and confident witness. As the person who viewed what the Plaintiff had done as amounting to gross misconduct, it was understandable that he was adamant that this was the case, but it also meant that he appeared to be unwilling to budge from his stated position on anything, even when to do so was not going to damage the Defendant's case, eg, on the question of whether there being a binding compromise agreement also had benefits for the CISE. Advocate Thompson was not regarded by the Jurats as a helpful witness and they formed the impression that she was not disclosing the full facts. At times her manner was unnecessarily aggressive, verging on unpleasant. She also came across as patronising. In respect of certain matters where the evidence for the parties differed, the Jurats found themselves inclined to believe Mr Fraser rather than Advocate Thompson.

Discussion

74. The facts of what took place in 2010 are not really in dispute. The Plaintiff did not seek to side-step what he acknowledged were his own failings in relation to recording on the MDMS system what had happened in a timely fashion. He did not attempt to lay the blame for what happened on anyone else. He accepted that within the space of a few hours on a single day he made the 63 entries that form the basis of the Defendant's case. The Jurats consider that some significance needs to be attached to the fact that what the Defendant relies on all took place on a single day. Whilst the number of records involved is quite large, showing that the delay in recording matters on the system by the Plaintiff cannot be treated as a handful of isolated incidents, the fact that the remedial action taken by the Plaintiff was not a regular occurrence, but rather a task undertaken all in one go, is something that needs to be factored into the consideration of how serious this was.
75. The 35-page document prepared by Mr Fraser at the request of Advocate Thompson shows the times at which the Plaintiff recorded (almost uniformly) "*Single Market Market [sic] – Therefore prices are indicative only*" and that no action was taken. Each is, apart from a gap over lunchtime, only a matter of seconds, rather than minutes apart. The Jurats formed the impression of the Plaintiff sitting at his computer mechanically inputting a record in this standard form (with the error of a second "Market" instead of "Maker" being repeated) almost as if he were working on a production line. The other seven records listed on Mr Fraser's document are different but they also show to the Jurats' satisfaction the prevailing culture within the CISX at that time. The Defendant did not adduce any evidence to suggest that the Plaintiff had not, as he explained, carried out the review required upon receipt of each prompt to what was a surveillance event generated automatically by the MDMS system. The Jurats accept the Plaintiff's evidence that he carried out these reviews as was expected of him in the time following receipt of the alert. They further accept that, when he spent the time he did making the 63 entries, he did so in a manner that was acceptable to the CISX. What happened should properly be regarded as a tidying up exercise. It does not warrant the description that has been given to it of falsifying company documentation if what was entered is viewed in the light of the approach then taken. The Plaintiff could have chosen to enter any time on any later working day following receipt of the e-mail alert overnight, which would not have led Mr Fraser to complain in the way he did a couple of years later. But that in itself would have been just as false an entry as using the day of the prompt. Accordingly, in the light of how the CISX was being operated in 2010, the Jurats are satisfied that the actions of the Plaintiff on the day in question cannot properly be categorised as gross misconduct. It may have been misconduct to fail to record in a timely fashion that no action was taken, though not gross misconduct, but the CISE's letter of 10 February 2014 relies on the falseness of the 63 records rather than the delay in acting: "*You entered the date of the action as being the same date as the date of the breach and explained each of the actions as "no action taken". By doing so, you back-dated the breach actions and falsified company records.*" The lateness of recording these matters by the Plaintiff is perhaps more symptomatic of his overall poor performance which had come to the attention of Messrs Moulton and Lansdown by the end of 2013.
76. The Jurats recognise that the CISE (and its predecessor, the CISX) are entities regulated by the GFSC and that they also act as regulator in respect of their listings. They appreciate that in early 2014 the CISE was a busy institution following the restructuring that had taken place at the end of 2013. None of these factors, though, excuses the CISE from approaching the situation surrounding the Plaintiff in anything other than that of any other employer. There may have been a degree of increased vigilance because of the ongoing investigation being undertaken by the GFSC. However, the Jurats are clear that the results of the investigation conducted, looking at the same material that the Court has had placed before it, could not properly have led to the conclusion that the actions of the Plaintiff more than three years earlier entitled the CISE to terminate his employment without notice or on payment in lieu of

notice. To suggest that it was is, in the Jurats' view, an over-reaction by Mr Moulton and the CISE.

77. The Jurats find support for their conclusion in the fact that the GFSC swiftly decided at the end of its own investigation into these events that there should be no further action. Moreover, the public statement made by the GFSC, although not directly as a result of that investigation but more as a result of other matters it had looked at, expressly stated that the former officers of the CISX “*have throughout been and remain fit and proper persons in good standing*”. If the GFSC had considered that the Plaintiff had, as the CISE found, falsified company records, it seems unlikely to the Jurats that that would not have had an impact on the way the GFSC has described *inter alia* the Plaintiff. Had the GFSC considered the Plaintiff had been guilty of the level of misconduct found by the CISE, some adverse comment was likely to have been forthcoming. The absence of comment is, therefore, consistent with those actions of the Plaintiff not being regarded as of the same seriousness as Mr Moulton believed.
78. On the question of whether there was a policy underpinning the way the Plaintiff acted, the Jurats are satisfied that there was no formal written policy. When Advocate Thompson rejected the existence of any such policy, they are satisfied that she was concentrating on the policy needing to be recorded. When the Plaintiff refers to there being a policy within the Market Authority, of which he was a part, the Jurats accept that there was an understanding amongst the members that a surveillance prompt that was generated in respect of a single market maker would, when reviewed, lead to there being no further action required because the price was indicative only. Whether it should be labelled as a policy in the absence of any written confirmation is irrelevant because the Jurats find that it formed part of the operational culture within the CISX at the material time.
79. Because the Jurats find that the actions of the Plaintiff on which the Defendant has relied to invoke clause 4.6 of the compromise agreement do not constitute circumstances amounting to a repudiatory breach by the Plaintiff of his contract of employment, there is no basis for the Defendant relying on clause 4.6. Accordingly, its defence to the Plaintiff's claim fails and the Plaintiff is entitled to judgment for the monies due to him pursuant to the compromise agreement.

Other matters

80. Having reached that conclusion, it is not strictly necessary for the Court to address any of the other matters raised before it. However, it will briefly set out its conclusions on them.

Waiver

81. Given the passage of time from when the Plaintiff made the 63 entries in August 2010 and the investigation and the decision to treat his actions as gross misconduct, the Plaintiff has argued that his employer lost the right to rely on those events through waiver, thereby affirming the contract. The Defendant does not accept that the CISX lost its right to terminate the Plaintiff's employment through passage of time. In doing so, it has referred to *British Waterways Board t/a Scottish Canals v Smith* [2015] UKEAT 0004_15_0308, but that case was an unfair dismissal appeal and does not appear to support the proposition that the passage of time is simply irrelevant to the question of whether there has been affirmation. The issue turns on who knew what and at which time and is not directed only to historic inaction. The CISE submits that within the CISX the only people who knew the position were Mr Fraser and Ms Menteshvili and that the latter was a co-participant in the wrongdoing. Accordingly, as soon as the CISE became aware of the misconduct, it carried out its own investigation meaning that the Plaintiff's contract of employment had not been affirmed by it.
82. The Deputy Bailiff directed the Jurats that in the relationship of an employer and employee it is possible for a party to commit a repudiatory breach of the contract that puts the innocent party to an election (see, eg, *Geys v Société Générale, London Branch* [2013] 1 AC 523, to which reference was made in *Sunrise Brokers LLP v Rodgers* [2015] ICR 272, at para. 18).

The breach can be accepted and the contract brought to an end in reliance on it or the breach can be waived, with the consequence that the contract continues. If the breach is waived in this way, that breach cannot then be relied upon later as the only reason to terminate the contract.

83. Looking at the 35-page document prepared by Mr Fraser, it is clear to the Jurats that Ms Menteshvili had notice of what the Plaintiff had done shortly after he did it. The Jurats note that Advocate Thompson produced a timeline of events that she provided to Mr Moulton on 1 February 2014. In it she refers to a letter received from the GFSC in July 2010 requiring trading data on Arch. Ms Menteshvili sent an e-mail to the then Chairman of the CISX during the afternoon of 30 July 2010 explaining about the request. The Jurats infer that the hand delivered letter from the GFSC was most likely received on that day rather than having been received any great period beforehand. The data needed to be provided by 6 August 2010, which was not considered to pose any problems. Advocate Thompson's timeline next records that the Plaintiff and Ms Menteshvili entered some 60-70 surveillance actions on 27 August 2010. This date is, in any event, after the deadline imposed by the GFSC. However, a close analysis of the 70 records on the 35-page document shows that these were not all carried out by both on the same day. It appears that Ms Menteshvili was the first to enter three actions on 27 July 2010, which were subsequently reviewed by the Plaintiff and signed off the system on 23 November 2010. Those three records related to cells in what was originally Arch (ie, SPL Guernsey ICC Ltd). However, the date of this action appears to the Jurats to be before the GFSC letter was received. Moreover, if it is suggested that there was some concerted effort between Ms Menteshvili and the Plaintiff to clean up the records before the deadline for information imposed by the GFSC, it is surprising that the review date was so many months later. It is further surprising that it was not until one month later that the Plaintiff carried out his own tidying up exercise. The reviews of his actions were carried out by Ms Menteshvili, but in two batches rather than on a single day. The first set of reviews was undertaken on 2 September 2010, with the second set only on 27 October 2010. Again, this does not support any suggestion that there was some conspiracy between them to falsify the records of the CISX. It also shows that the timeline supplied to Mr Moulton was inaccurate. It may have left the impression that there was a single day (27 August 2010) on which the two senior officers at the CISX acted together, whereas the picture painted by looking at the records themselves is a different one. Combining what took place with the request from the GFSC for Arch-related data is also potentially misleading. The Jurats are not at all persuaded that the underlying suggestion of jointly co-ordinated misconduct has foundation.
84. The Jurats therefore find that Chief Executive Officer of the CISX knew what the Plaintiff had done within a few days of him doing it and, in any event, within two months of him doing it. If this was misconduct warranting further action, Ms Menteshvili was in a position to take action against the Plaintiff. When Mr Fraser sent his e-mail on 22 November 2012 to Ms Menteshvili and the Plaintiff, it was arguably a further opportunity to take action. The absence of any response to Mr Fraser from Ms Menteshvili supports the finding that she had, on behalf of the CISX, not regarded what the Plaintiff had done as any form of misconduct at all. Indeed, that is consistent with the culture prevailing at that time. Through Ms Menteshvili's review of the Plaintiff's actions on two separate dates, the Jurats are satisfied that, to the extent that this was gross misconduct (which as previously stated is not what the Jurats find), it was then waived by the CISX acting through Ms Menteshvili, ie, there was affirmation in the sense of the everyday concept of "*letting bygones be bygones*" referred to in *Cantor Fitzgerald International v Bird* [2002] IRLR 867. Accordingly, there was no right continuing to be available to the CISX that was transferred to the CISE under the scheme of arrangement in December 2013 that entitled the CISE to treat the Plaintiff's actions as a repudiatory breach of his contract of employment. The right to do so, assuming it ever existed, had been foregone a long time before then.
85. Although Mr Fraser was not in a position to waive any breach on behalf of the Plaintiff's employer, insofar as it is relevant to Mr Fraser's subsequent reaction to events, the Jurats believe him when he explains that the more he thinks about what happened the more he recalls. Accordingly, his failure to mention in January or February 2014 that the Plaintiff had

gone along and talked through what had happened when he made the 63 entries in question does not mean that his subsequent recollection that this happened lacks credibility. In fact, what took place in November and December 2012 confirms the view the Jurats have taken that within the CISX what happened was not regarded as misconduct warranting sanction but that, even if it were viewed in that way, it was something that the CISX chose to discount by continuing the Plaintiff's employment without any action being taken against him. This is not a case where information only came to light in 2014, thereby enabling the CISE to address it for the first time. The Jurats are also satisfied that the events in 2010 and then in 2012 were sufficiently far removed from the Plaintiff's mind by early 2014 that they were not circumstances of which he continued to be aware, or of which he ought reasonably to have been aware, as being required to be drawn to the CISE's attention in accordance with clause 4.6.1 of the compromise agreement.

Execution of compromise agreement

86. As already indicated, the Jurats find as a fact that Mr Moulton signed the compromise agreement on the afternoon of 13 January 2014, most likely at around 4 pm. Mr Fraser's evidence confirms that Mr Moulton attended the CISE's offices that afternoon. Mr Fraser was summoned by Mr Moulton to attend a meeting with him and required to locate a copy of the e-mail of 22 November 2012. Although it is possible that this e-mail needed to be seen before Mr Moulton decided whether to execute the compromise agreement, the Jurats find it more likely than not that the events occurred in the order described by Advocate Thompson and Mr Moulton. There was a ring of truth to Mr Moulton's comment that when Advocate Thompson told him after he had signed the compromise agreement that Mr Fraser had informed her about the e-mail he had sent that he had a small inclination to wring her neck. The Jurats also accept the evidence of Advocate Thompson when she referred to not completing on the compromise agreement as it being a reference to not performing the obligations of the CISE under it. This terminology was not a concession that the CISE took some time to weigh up to pros and cons of actually executing the compromise agreement before concluding that it would be beneficial to have a signed and binding agreement. Accordingly, the Jurats find on a balance of probabilities that the compromise agreement was signed on 13 January 2014.
87. This means that Mr Moulton only became aware of the issue raised in Mr Fraser's e-mail of 22 November 2012 after he had signed the compromise agreement. However, Advocate Thompson was aware of it, although she had not by then seen the text of the e-mail itself before the compromise agreement was signed.
88. Although much was made in the submissions of Counsel about the timing of the execution of the compromise agreement, clause 4.6 refers to "*the date of this agreement*" and makes no reference to the time. Similarly, much was made about what the Plaintiff should have done by way of disclosure. It was suggested that the Plaintiff needed to disclose what he had done in 2010 because he could not know when the agreement would be executed. However, the terms of clause 4.6 do not say that. The construction to be given to the clause as a matter of law is that the Plaintiff was giving a warranty and making a representation to the CISE and to the CISX that there was nothing known to them as at the date when the compromise agreement became effective that was not already known to them. If it transpired that he had kept silent in the hope that something was already known to them and it turned out not to be known, that was a risky approach to take because the clause would then become operative against him. However, if it were to be found as a fact that both already knew whatever it was, then clause 4.6 would not entitle the withholding of the monies due under the compromise agreement.
89. The sequence of events in the present case is unusual. The Jurats are satisfied that the information provided by Mr Fraser on 13 January 2014 was elicited from him at the instigation of Advocate Thompson and was not volunteered by him. They accept that Advocate Thompson's interest was more in relation to a different employee but that, nevertheless, Advocate Thompson as an officer of the CISE became privy to information that

suggested there was something requiring investigation. She had set that investigation in train by asking Mr Fraser to locate a copy of the e-mail. Having done so, it is rather surprising, therefore, that within the space of a couple of hours, Advocate Thompson forgot to mention this when she first saw Mr Moulton. The importance of the information was reinforced later that afternoon by Mr Moulton also requiring that the e-mail be forwarded. It was then forwarded to them and was reviewed by Mr Moulton on the evening of 13 January 2014. The disclosure that the Plaintiff could have made, if so required by clause 4.6, was of information no more extensive than what was set out in Mr Fraser's e-mail. The investigation that subsequently took place did not affect the quality of the information that the CISE had by the end of 13 January 2014 insofar as that information could have been volunteered by the Plaintiff.

90. In those circumstances, although expressly not reaching a conclusion on the issue because no such conclusion is required, the combination of facts found and the construction to be given to clause 4.6 of the compromise agreement leads the Court to be inclined to view the CISE and the CISX as having already known as at the date of the agreement what the CISE now argues the Plaintiff was required to disclose to it. Accordingly, had the Jurats concluded that the Plaintiff's action constituted a repudiatory breach of his contract of employment that could still be relied upon, the likely outcome would have been that clause 4.6 still did not afford a defence to the claim. This is because the opening words of clause 4.6 involve considering what was known as at 13 January 2014 and the Jurats find that through Mr Moulton and Advocate Thompson the CISE knew the relevant facts. Mr Moulton indicated that he had authority on behalf of the CISE to deal with the matters relating to the Plaintiff, so his knowledge is material. Accordingly, the cases to which the Defendant has referred about when the knowledge of someone can properly be imputed to a company (ie, *El Ajou v Dollar Holdings Limited* (unreported 2 December 1993) and *Orr v Milton Keynes Council* [2011 ICR 704]) are of no assistance to it. Clause 4.6 does not involve considering what was known before the compromise agreement was signed by all parties to it and, in particular, it does not involve considering what was known before the Plaintiff signed it.

Conclusions

91. The Court, therefore, finds for the Plaintiff. He has established, as the Defendant has in any event admitted, that the amounts specified in the compromise agreement as payable under it have not been paid. The Plaintiff has claimed £30,000. The compromise agreement sets out that this is made up of a payment of £2,000 as a payment in lieu of notice and £28,000 as compensation for the termination of the Plaintiff's employment (the latter being defined as the "Termination Payment"). The Termination Payment was payable within 14 days following the Termination Date (clause 3.2), which was 31 January 2014. Accordingly, the latest date on which the Plaintiff should have received the monies he was due was 14 February 2014. The amount due to him was not paid because the Defendant relied on clause 4.6 of the compromise agreement. However, because the conduct of the Plaintiff on which the Defendant has relied, being his making of 63 entries in the MDMS system on 27 August 2010, does not constitute gross misconduct and so does not amount to a repudiatory breach of the Plaintiff's contract of employment, the Defendant is unable to rely on clause 4.6 in its defence (and, even if there had been gross misconduct, on the other facts found, the Court would have concluded that clause 4.6 could not be relied on). There will, therefore, be judgment for the Plaintiff in the sum of £30,000.
92. The Plaintiff also seeks interest pursuant to section 1 of the Judgments (Interest) (Bailiwick of Guernsey) Law, 1985. This aspect of the claim was not addressed by the parties. The Court can indicate that it would be minded to award interest under this section on the basis that the Plaintiff has wrongly been kept out of the monies to which he was entitled from 14 February 2014. If the Defendant accepts that principle, the parties are invited to attempt to agree the rate at which interest should be applied between 14 February 2014 and the date of this judgment. Judgment interest pursuant to section 2 of that Law at the rate of 8% will then accrue on the aggregate of £30,000 plus the interest so calculated. In the event that the parties cannot agree on an appropriate rate, the parties are required to submit brief written

submissions for the Court's consideration on the papers, unless either party wishes to seek to be heard on the issue, in which case the Court will list a further short hearing.

93. Similarly, the Plaintiff seeks his costs. The Deputy Bailiff indicates that costs are likely to follow the event. If either party wishes to argue for a different outcome, the matter should be listed at a suitable Interlocutory Court for the purpose of that further argument and an indication given to the other side and the Greffe of an intention to do so within 14 days of the date of this judgment. Otherwise, the default position will be that the Defendant will pay the Plaintiff's costs on the standard recoverable basis.