EMPLOYMENT TRIBUNALS

Claimant: Ms G Thom

Respondent: Hobart Real Estate Partners Limited

Heard at: London Central (remotely by CVP)
On: 14, 15 & 16 June 2021

Before: Employment Judge Heath

Representation
Claimant: Mr Stephen Butler (Counsel)
Respondent: Mr Giles Powell (Counsel)

RESERVED JUDGMENT

The tribunal does not have jurisdiction to hear the claimant's claim for unauthorised deductions from wages, and it is dismissed.

REASONS

Introduction

1. By an ET1 presented on 19 November 2020 the claimant claims unauthorised deductions from wages under Part II of the Employment Rights Act 1996 ("ERA"). She claims to be entitled to, essentially, a 10% profit share in relation to a substantial commercial real estate transaction in which the respondent was involved. She further claimed for what she alleged was a shortfall in her statutory redundancy payment. This latter claim was not pursued before me having been dismissed on withdrawal by Employment Judge McKenna on 13 April 2021.

The issues

2. The issues I have considered in determining this matter are lengthy, and set out in an appendix to this decision, and are headed "[~~AGREED~~ DRAFT] AMENDED LIST OF ISSUES" (*sic*). They were the subject of some dispute between the parties, which I will set out very briefly under the heading **Procedure** below.

Procedure

3. On 22 September 2020 ACAS received Early Conciliation notification from the claimant, and the certificate was issued on 22 October 2020. The claimant presented her ET1 to the tribunal on 19 November 2020.

4. The respondent's ET3 was filed on 11 January 2021, and in their Grounds of Resistance it asserted that the claims should be dismissed and/or struck out, or alternatively a deposit order should be made at a preliminary hearing. It took a point that the tribunal had no jurisdiction to hear a claim under Part II ERA for an unquantifiable sum, nor a claim against a third party, and asserted that the claim had no, or little, reasonable prospects of success. The respondent further argued that the claim was out of time.

5. The matter was listed for a final hearing with a time estimate of one day on 13 April 2021. It came before Employment Judge McKenna on 13 April 2021, and for reasons set out in her Judgement and Case Management Summary, the final hearing did not go ahead and was converted into a preliminary hearing. The respondent's applications to strike out the claim and for a deposit order were refused, and case management orders were made including setting the matter down for a final hearing on 14-16 June 2021.

6. Mr Powell told me that both he and Mr Butler made strenuous efforts to agree a List of Issues during the course of this day (and indeed before the date of the hearing). Employment Judge McKenna incorporated an Agreed List of Issues into her Case Management Summary but gave provision to the parties to write the tribunal by 1 June 2021 if the list was thought to be inaccurate or incomplete. On 1 June 2021 the claimant's solicitors emailed the tribunal indicating that they had considered late disclosure of spreadsheets [472] by the respondent at 5:30 PM on the evening before the original final hearing. In short, they alleged that it had appeared that further payments may have been made to an affiliate of the respondent which should be taken into consideration in determining the claimant's claim. These were matters which went both to quantum and to limitation. They attached a proposed Draft Amended List of Issues.

7. The respondent did not agree to the proposed amendments, the parties remained at odds as to what the List of Issues should be for the hearing, and this was something I had to decide as a preliminary matter at the start of the hearing after taking the first morning to read into the case.

8. I decided to use the Draft Amended List of Issues as the List of Issues I would consider in determining the case, for reasons which I gave in a brief oral decision. In brief, I decided that:

    8.1. Employment Judge McKenna had left the door open for revisiting the List of Issues in her Case Management Order, and the claimant took advantage of this mechanism within the timescale;

    8.2. Although the list had been agreed by lawyers it was difficult to assess fully the strength of the respondent's point that information contained in the later disclosed documents actually appeared in documents disclosed in an earlier round disclosure;

    8.3. Mr Butler assured me that the added issues would not affect the hearing, and that it was "just a matter of cross-examination and submissions" on the additional points;

8.4. The respondent had not resisted the amendment to the list of issues on the basis that it was disadvantaged, but rather that the new issues raised had no evidential foundation. Indeed, Mr Powell appeared confident the respondent could meet the issues;

8.5. The claimant should not be shut out from advancing matters which went to the tribunal's jurisdiction and to quantum and which appeared to be within its pleaded case;

8.6. Allowing the amendment ensured the parties were on an equal footing (noting that the respondent was not asserting that it was disadvantaged by the amendment), was proportionate to the complexity of the issues, and did not cause delay or add expense;

8.7. I did, however, clarify that reference in paragraph 2, paragraph 9(b)(ii) and 11(b)(ii) of the Draft Amended List of Issues to "any other corporate entity" should be amended to "any of its corporate entities" to reflect the claimant's pleaded case.

9. I was provided with a 657 page trial bundle and witness statements from Mr Saswat Bhadra and Mr Jeffery Harris (the respondent's two directors), and a witness statement and a supplemental witness statement from the claimant, all of whom gave evidence. Prior to the hearing both counsel supplied skeleton arguments (and a supplemental skeleton argument from Mr Powell) and after the close of evidence Mr Powell provided further written submissions and both counsel made oral submissions.

10. Although Employment Judge McKenna had timetabled the case to allow time for evidence, submissions, deliberation, judgment on liability and consideration of remedy, final submissions were not concluded until 5.20pm on 16 June 2021. I therefore reserved my decision.

The facts

<u>The parties</u>

11. The claimant has a degree in Quantity Surveying, is a member of the Royal Institution of Chartered Surveyors and has more than 30 years experience working in UK commercial real estate. She has considerable experience working in the central London office asset and development management market and has worked for a number of other organisations prior to working for the respondent.

12. The respondent is a company involved in the management of commercial real estate properties in the UK. As at the date of hearing it had been involved in the management of two properties, both in central London, the first being Barnard's Inn, and the second (the property which is the focus of this claim) Worship Square. The respondent is managed by Mr Bhadra and Mr Harris, its two directors. The respondent is owned by two companies, KB Real Estate Ltd and Hobart Partners Ltd, of which Mr Bhadra and Mr Harris and their wives are shareholders. Mr Bhadra and Mr Harris are involved in other companies, namely Hobart Real Estate Asset Management, a refurbishment and re-letting business, Hobart Capital Ltd., a debt advisory company, Hobart Barnard's Inn, an investment vehicle concerned with the Barnard's Inn property which the respondent managed, and Hobart Retail Ltd, a retail company. A further company was set up in relation to the other property the respondent managed, namely Hobart Worship Street Ltd ("HWSL"), of which Mr Bhadra and Mr Harris were directors and shareholders.

The claimant's work for the respondent

13. On 14 June 2016 the claimant agreed to work for the respondent [280]. Terms of employment were discussed in email correspondence, and in particular the following was proposed by Mr Harris on 14 June 2016 "*3. Performance fee - 15% share of HREP's performance from the 86 Fetter Lane investment* [this is Barnard's Inn]*. A minimum 10% share of HREP's performance fee from future investments where you are the designated Asset Manager*." In relation to this particular proposal the claimant asked later that day "*Will this be negotiated and agreed in advance on each project?*" There was further correspondence between the claimant and Mr Harris and the claimant took advice from her accountant about tax issues. She did not seek legal advice on employment issues at this stage.

14. On 1 October 2016 the claimant began working for the respondent under a consultancy agreement dated 21 November 2016 [82].

15. On 12 December 2016, the claimant took up an offer of employment with the respondent. At all relevant times, she was the only employee of the respondent, although two other people worked for the respondent as consultants. Initially her basic salary was £90,000 gross per annum, which had increased to £105,000 per annum at the time of her dismissal. The claimant and the respondent negotiated the terms of a written contract of employment in 2016 but did not sign it until 12 June 2018 [86-104]. The contract contained the following provisions:

    "*PERFORMANCE FEES*

    …

    6.2 You may receive a minimum 10% of the Company's performance fee (subject to the appropriate deductions) from future investments where you are the designated Asset Manager. The terms and percentage of each performance fee will be negotiated with you and agreed in advance of each project provided you remain in employment with the Company and are not working under notice at the time the performance fee is paid.

    6.3 The sums on clauses 6.1 and 6.2 will be within 2 months of the date of the Performance Fee being paid to Hobart.

    …

    ENTIRE AGREEMENT AND VARIATION

    26.1 This Agreement contains the entire agreement and understanding between you and the Company as at the date of this Agreement and supersedes any previous contract of employment between you and the Company which is deemed to have been terminated by mutual consent as from the date of this Agreement.

    26.2 We reserve the right to make reasonable alterations to the terms and conditions of your employment. Any such alterations will be by written notice to you."

16. The claimant was employed by the respondent as a Director of Asset & Development Management. As stated above, the two assets which the respondent managed were Barnard's Inn and Worship Square. Her role was, in terms of asset management, to prepare buildings for vacancy so they could be redeveloped and to manage managing agents to ensure that buildings were correctly maintained with minimal expenditure. In terms of development

management, her role was to procure and manage a design team to design and deliver a new redevelopment or to refurbish an existing building, in either case so that the building was right for the relevant market both architecturally and physically. A part of the claimant's role was in relation to obtaining planning consent and to deliver projects and works where relevant.

The Worship Square Development

17. Worship Square is a commercial real estate property comprising two commercial blocks known as Tower House and Quick House in Shoreditch. At some point in 2017 HWSL was incorporated with a view to developing Worship Square. Mr Bhadra and Mr Harris were HWSL's sole directors and sole shareholders, owning one share each. In around August 2017 HWSL entered into discussions with Bridges Property Alternatives Fund IV LP, acting by its manager Bridges Property Alternatives Fund IV (General Partner) LLP ("Bridges") with a view to investing in Worship Square.

18. In August 2017 a presentation was prepared by Bridges [105-124] which outlined the proposed investment in Worship Square by Bridges "*in partnership with Hobart Partners, a specialist real estate asset manager and investor"* [107]. The plan was that following planning consent there would be a complete redevelopment of the existing offices into mid-rise buildings with office use. This development was forecast to be implemented once vacant possession of the building had been secured in December 2020. The plan was to let office space to SME tenants when the development was complete, which was projected to be by spring to summer 2023. A timeline of the project is set out at [117]. The respondent was described in this presentation as a "*JV Partner*" (although Mr Bhadra gave evidence that this term "*is simply a commercial term that is commonly used in the industry*") and short biographies or profiles of Mr Harris, Mr Bhadra, the claimant and a Mr Baines (consultant) appeared in it [121]. The claimant's role was described as "Development/Asset Management". Mr Bhadra accepted in cross-examination that the claimant was the designated asset manager for this project.

19. In around September/October 2017 Bridges decided that a special purpose vehicle ("the SPV"), Shoreditch QT Guernsey Limited, would be incorporated to purchase Worship Square. Worship Square was acquired by the SPV around this time. The claimant says in her witness statement that this took place on 20 October 2017, while the respondent asserts in the chronology that it took place on 20 September 2017. Nothing turns on this for the purposes of my decision, and I simply find that the transaction took place in September or October 2017. The respondent's evidence, which I accept, was that it was very common for SPVs to be used in commercial real estate transactions such as the Worship Square one.

20. On 6 October 2017 HWSL and Bridges entered into an LLP Members Agreement ("the LLP Agreement") in respect of the SPV [156-200]. The LLP agreement contained a definitions and interpretation section which provided that *""Promote Fee" means the performance related fee payable by the LLP to Hobart pursuant to clause 22.1(f)(ii)*" [166]. Clause 22.1(f) provided [189]:

    (f) the remainder of the Distributable Profits shall be allocated as follows:

    (i) 70% shall be allocated to Bridges; and

    (ii) 30% shall be allocated to Hobart as a Promote Fee.

    "Hobart" in the LLP Agreement meant HWSL [163].

21. HWSL was a junior partner to Bridges in the LLP Agreement, making a capital contribution (raised by third party debt finance) of £350,000 compared to Bridges' capital contribution of £18 million. The capital contributions were subsequently reduced by a variation to the LLP Agreement on 2 July 2019, but Bridges remained, to a very large extent, the larger capital contributor. This ratio of capital contributions was reflected in the decision-making powers under the agreement.

22. Also on 6 October 2017 the respondent entered into an Asset Management Agreement [125–155]. This agreement set out the asset management services respondent was to provide in respect of Worship Square and provided that the respondent received an annual management fee of £158,000.

23. On 10 October 2017 Bridges solicitors, Taylor Wessing LLP, emailed Mr Bhadri, Mr Harris, the claimant and others, attaching a number of transaction documents, including the LLP Agreement and the Asset Management Agreement [303-4]. The claimant was not asked to do anything in respect of these documents, the documents were not saved in the respondent's shared drive, they were not documents which the claimant had any involvement in negotiating and drafting and I find that she was not aware of the details of these agreements despite being emailed them. I accept her evidence that her busy asset and development management role did not require her to focus on transactional issues of this nature and that she would not and did not concern herself with the detail of these documents.

24. Once Worship Square was acquired, the respondent, and the claimant in particular, worked on managing and developing this asset. The claimant worked with the buildings' managing agents to ensure the building was maintained correctly. She also was involved in the procurement and management of the design team which was engaged to deliver the redevelopment and refurbish the building. The architects appointed to design the redevelopment were contacts from the claimant's professional network, and she put forward recommendations for the structural engineer and the mechanical and electrical design consultants who were appointed. While these were the claimant's contacts and/or recommendations their appointment was made by a committee consisting of a Bridges director, a consultant appointed by Bridges, Mr Bhadra and the claimant. The Bridges director had the final say on all matters.

25. Integral to the redevelopment was the obtaining of planning consents. A central feature of the redevelopment was increasing office floor space from 58,000 ft² to 135,000 ft² of office space. As stated above, the claimant had a role in the appointment of the design team which worked on obtaining planning consent. The claimant did not attend all of the planning meetings in respect of the development, and Mr Bhadra and the Bridges director and a planning consultant would attend the planning meetings with the planning authority, the London Borough of Hackney. The claimant, nonetheless, had a substantial involvement in managing the process whereby planning consent was granted in respect of the increase in office floor space, which had a significant impact on the value of the redevelopment.

<u>Performance fee issues February-April 2019</u>

26. On Saturday 23 February 2019 the claimant sent an email to Mr Bhadra and Mr Harris in which she raised "*a few things that have been on my mind recently and which think are important to raise, from my perspective*". She set out her

concerns in a number of bullet points, most of which related to the way in which the business was run [306-7]. In the final bullet point she wrote:-

> "*I asked last year to fix my profit share on Worship Square and I want to do this now and agree this in writing– I am proposing 25% since I have been underpaid for 2 years and have received no bonus at all – the profit share on BI [*Barnard's Inn*] is minimal and would be well under what someone in my role would expect to this needs to make up for it*".

27. Mr Harris emailed the claimant the following day to ask if she was free to meet the day after that. On 25 February 2019 the claimant, Mr Bhadra and Mr Harris met. At this meeting they discussed the workplace issues the claimant had raised. They also discussed the performance fee. The claimant is candid that she could not remember the precise detail of what was discussed at the meeting on this issue, and wryly observed that it was impressive that anyone could claim to remember precise detail. She is satisfied that the emails that followed the meeting accurately reflect what happened in it. Given that there were no agreed minutes of this meeting, the emails are likely to give the best record of what happened at the meeting. Given the ensuing correspondence, I find that there was a discussion at this meeting about the percentage of a proposed performance fee for the claimant, but no agreement at this stage as to what it should be (see conclusions at paragraphs 90-91 below).

28. Following the meeting Mr Bhadra and Mr Harris exchanged proposed draft responses to the claimant's email of 23 February 2019 (which were not sent to her). Mr Bhadra proposed the following draft (in red) to the claimant's proposals on profit share as follows in an email on 26 February 2019:

> *"I am proposing 25% since I have been underpaid for 2 years and have received no bonus at all – the profit share on BI is minimal and would be well under what someone in my role would expect so this needs to make up for it*
>
> *We have discussed this, and we have in the past maintained this to be 10%. Please bear in mind that this is not the only pot for you. We will continue to share promote in future office deals with you as well, as discussed*".

29. On 27 February 2019 Mr Harris proposed a draft response in relation to the claimant's profit share proposal, as follows: "*We have allocated to you a 10% profit share from the Worship Square investment, which is subject to the performance fee calculation in the asset management agreement with Bridges".* Mr Bhadra responded that both emails were the same, but suggested using his draft as it was more personal. He observed "*We need to bear in mind who we are dealing with as well!!*"

30. On 6 March 2019 Mr Harris emailed the claimant a response to her email of 23 February 2019. In it he said "*We have allocated to you a 10% profit share from the Worship square investment, which is subject to the performance fee calculation agreed with Bridges".* He cut and pasted the claimant's bullet points from that email and responded to each with his replies in red. In relation to the claimant's profit share proposal he responded as follows: -

> "*We allocated to you a 10% profit share from the Worship Square investment. Going forward, we will continue to share with you profit in future office deals, given your participation in the asset management plan*".

He concluded his email *"Please let us know if you would like to further discuss*".

31. Just over a month and half later, on 24 April 2019 the claimant replied to Mr Harris's email of 6 March 2019. She began her email "*I keep meaning to reply to this and then forgetting*". She then made comments in green in relation to Mr Harris's responses in his 6 March 2019 email. Her responses included (in green): -

> *"We have allocated to you a 10% profit share from the Worship Square investment, which is subject to the performance fee calculation agreed with Bridges.*
>
> *As discussed, the minimum profit share from the projects is 10% and the employment contract states that this is negotiable between the parties. I have no idea where we are on profit for this at present but 10% for 5 years of work might be a very low reward so as far as I'm concerned, until we know the future of the project and what the outcome might be I think that this should be parked for now and discussed at a later stage"*
>
> *…*
>
> *We allocated to you a 10% profit share from the Worship Square investment. Going forward, we will continue to share with you profit in future office deals, given your participation in the asset management plan.*
>
> *You are aware, above, what my employment contract says*".

32. Mr Harris replied to this email and 29 April 2019 saying that he and Mr Bhadra would be available discuss matters later in the week. He went on to write "*We allocated to you a 10% profit share from the Worship Square investment. We believe this decision is appropriate*". There was no further email correspondence and no further discussion between the parties on the matters which had been covered by this email exchange until August 2019.

33. Bridges maintained a financial model document which was reviewed every fortnight. One version of this working document appeared in the bundle at [321-7] which presents a snapshot the financial picture around June 2019. This document shows an estimated "Partner Promote" of £544,691 and a "Partner Total Return" of £1,591,216. The Partner Promote represented a profit-sharing arrangement with Bridges. The "Partner Total Return" figure represented, according to Mr Bhadra, £544,691 Partner Promote, sums payable over the course of the development to the respondent under the Asset Management Agreement (£158,000 per annum), return of equity and interest on equity, and an acquisition fee.

34. However, the Worship Square project, as is often the case with real estate development, was constantly changing. The projected yield from this development constantly evolved depending on build costs, rental values, fluctuations to the market dependent on such matters as the popularity of the area, and on whether planning consents were granted.

35. When she proposed a profit share arrangement of 25% on 23 February 2019 the Claimant had absolutely no idea of what financial return the project might deliver.

<u>Non-development of Worship Square</u>

36. On or around 3 July 2019 planning consent for the development of Worship Square was granted. After planning consent was granted Mr Bhadra messaged the claimant on 4 July 2019 to say "*just to say thank you for your hard work and it is finally paid off… Proper celebrations when you are back*".

37. Around this time the LLP decided to pursue a sale of Worship Square, rather than developing it over the course of the next few years. Although this was the decision of the LLP, the decision-making powers under the agreement meant that the decision was initiated by Bridges, and that HWSL had little option but to agree. On 29 November 2019 the LLP agreement was terminated. Mr Bhadra and Mr Harris did not inform the claimant of this.

38. At some point in the latter half of 2019 or early 2020, the claimant became aware that there was at least a possibility that Worship Square might sell, as she had been made aware of certain unsolicited offers. This was alluded to by the claimant in an email to Mr Bhadra on 13 January 2020 [334].

39. On 4 February 2020 a solicitor at Taylor Wessing emailed Mr Bhadra, Mr Harris and the claimant [339], telling them "*As the Quick & Tower sale is to be by way of share sale of Propco rather than a property sale of Quick & Tower House, we are removing Propco from the advisory services agreement we put in place when we restructured the group earlier this year*". The email attached the Advisory Services Agreement ("ASA") and amendments.

40. The ASA was an agreement between HWSL and the SPV, and the copy of it in the bundle was undated, but had been prepared in 2019. Mr Bhadra and Mr Harris had not told the claimant about the termination of the LLP agreement nor the entering into of the ASA. Shortly after Mr Bhadra received the 4 February 2020 email from Taylor Wessing he responded "*Luc, please don't include Jill in these confidential emails, she is an employee and not a principle. It will put us in a difficult place in the year end in terms of managing expectations…"*.

41. The ASA was expressed to be an "Agreement relating to the provision of advisory services" with HWSL being "the Advisor" [241-2]. The ASA provided for a "Success Fee" to be payable to HWSL following the disposal of Worship Square. Under the ASA, the Success Fee: -

> "*means a fee payable to the Advisor following a successful Disposal triggering the Minimum Investment Value, such fee being a sum equal to:*
>
> *(a) if the Disposal is by way of a Share Sale, 30 per cent. of the remaining net proceeds (after the deduction of the amounts to be otherwise paid under clause 5.2) of Holdco immediately following such Disposal; or*
>
> *(b) if the Disposal is by way of a Property Sale, 30 per cent. of the remaining net proceeds (after the deduction of the amounts to be otherwise paid under clause 5.2) of Propco immediately following such Disposal, in each case calculated on an After Tax Basis, and paid in accordance with clause 5*".

42. On 4 February 2020 the claimant was also invited to a Zoom meeting, subject "Worship Update Call before Closing" to take place on 21 February 2020. The invitation attached documents in relation to the sale of Worship Square. She was sent the agenda of the meeting on 20 February 2020. The claimant did not attend the meeting.

43. On 27 and 28 February 2020 the claimant sent messages and emails to members of the design team and others involved in the proposed development referring to the fact that the sale of Worship Square had completed on 27 February 2020. On 2 March 2020 she emailed Mr Schlegel at Bridges to suggest arranging a meal with the design team "*now that Worship Square is sold*".

44. On 9 March 2020 Mr Bhadra had a meeting with the claimant in which he told her that she was at risk of redundancy. I find that the claimant asked Mr Bhadra in this meeting in general terms about profits on the sale of Worship Square, and that Mr Bhadra told her words to the effect that the company had not made any money. I find that the claimant asked Mr Bhadra and Mr Harris verbally on a couple of occasions round this time about profits concerning the Worship Square development but was told that the company was making no money from the deal. This finding accords with the documentary evidence above and below suggesting that Mr Bhadra was seeking to minimise the amount of information reaching the claimant about the sale and its proceeds. I do not find on the available information that Mr Bhadra and Mr Harris lied to the claimant, but it is likely that they probably told her that "the company", i.e. the respondent, had not made any money. Strictly speaking this would be true, but they did not tell her, and withheld from her, the fact that HSWL (admittedly another company, but one owned and controlled solely by Mr Bhadra and Mr Harris) was about to be paid a great deal of money.

45. On 10 March 2020 the claimant was emailed by Kerrie Ropers at Sanne, asking her to "*confirm the account details where we need to send the funds*". The claimant queried which funds were being transferred, and was told that "*The funds being transferred is the Shoreditch QT Guernsey Limited sales proceeds distribution*". Later that day Mr Bhadra, who was CCed in these emails, responded to Kerrie Ropers "*Please keep Jill out of all the distribution emails. She is an employee and it puts us in a difficult situation*" [347-8].

46. On 11 March 2020 Mr Bhadra wrote to the claimant informing her that she was at risk of redundancy now that one of the two assets for which she had been responsible had sold, the completion having taken place the previous week. If no alternative position were found the claimant would be given three months' notice on 1 May 2020.

47. On 12 March 2020 HWSL was paid £546,114 in respect of "Advisory fees in relation to disposal of shares" (as per invoice number 3101 at [345]) and £3,181,971.89 (as per invoice number 3102 at [346]). Neither Mr Bhadra nor Mr Harris told the claimant about these payments.

48. On 24 April 2020 Mr Schlegel emailed Mr Bhadra to say that a total of £3,814,435.27 has been paid to "Hobart" which included repayment of outstanding equity of £86,349. This email further referred to the only outstanding payment to "Hobart" being:-

    - "*any recovery monies from the BNP electricity amounts in proportion as agreed under the ASA (30%) and'*
    - *any remaining, our news contingency should be minimal based on the received invoicing schedule as per Jill Thom/Hobart on completion and the other professional fees in relation to the sale*".

<u>The claimant's redundancy and discussions between the parties</u>

49. After the UK had been put into "lockdown" on 23 March 2020 the claimant, Mr Bhadra and Mr Harris all worked from home and were not in the office together. On 29 April 2020, Mr Bhadra proposed that the claimant's notice period should be put back by two months to start 1 July 2020 [356]. On 24 June 2020 he proposed that the notice period should start 1 August 2020 [355].

50. On Friday 31 July 2020 Mr Bhadra wrote to the claimant warning of possible redundancy. He pointed to the significant reduction in workload and the COVID-

19 pandemic and the consequent downturn in the market. He proposed a consultation meeting to be held on the following Monday, 3 August 2020. On 3 August 2020 the claimant emailed Mr Bhadra to say that she considered that her notice had begun, but was happy to have a discussion that day [364]. She said that Mr Bhadra's letter had not addressed "*any of the discussion we had last week or in terms of the package you were proposing on the redundancy*". Mr Bhadra responded later that day to say that notice period had not begun but a letter would be issued after their discussion. The claimant and Mr Bhadra had a telephone discussion later that day. Mr Bhadra gave evidence initially that he did not remember this conversation, but having read the email exchange asserted that this conversation focused on the claimant's leaving date and handover of work, and that he did not acknowledge that the claimant was owed a performance fee. The claimant's evidence was that Mr Bhadra told her during this conversation that her performance fee or profit share would be wrapped up into a settlement agreement, and this was the first and only time that her profit share was acknowledged by the respondent. Given that the claimant's email at [364] specifically refers to her concerns about a proposed redundancy package I find it unlikely that finances were not mentioned. However, I find it unlikely, given the position the respondent was to adopt, and given this was not asserted by her or her solicitors in the disclosed open correspondence that was about to ensue, that Mr Bhadra would have acknowledged at this meeting that a performance fee or profit share was owing to the claimant. I find the likeliest explanation is that during the course of this discussion conversation turned to what sums might be due to the claimant and Mr Bhadra indicated that this would all be dealt with within the settlement agreement.

51. On 7 August 2020 the claimant was given three months' notice of termination of her employment by reason of redundancy [367]. It set out the calculation of a statutory redundancy payment of £2421.

52. On 13 August 2020 Mr Bhadra emailed the claimant attaching a draft settlement agreement (not in the bundle). The email suggested that the claimant, Mr Bhadra and Mr Harris have a call the following week to go through the commercial points, and that any further queries could be answered by the respondent's lawyers. Amendments were proposed to one of the clauses of the agreement in further correspondence the following day.

53. On 18 August 2020 the claimant instructed solicitors, Royds Withy King ("RWK") as the respondent had agreed a contribution to legal costs in relation to the settlement agreement.

54. On 21 August 2020 the claimant emailed Mr Bhadra and Mr Harris about her settlement agreement [372]. Much of this email is redacted, but she asked "*please provide me with the details of the Worship Square performance fee as I believe that there should be transparency on this. In accordance with my Employment Contract my 10% share was due within two months of payment to Hobart and clearly this time has now passed*". Mr Bhadra responded to this email on the same day, saying "*In terms of Worship Street - best if three of us get on a call. We can explain the fees received and structure and what we have proposed. I can easily put this in writing today, but it may jeopardise your tax position. Following our call we can put this in writing if you prefer".* Later that day the claimant emailed back indicating she was not sure how this would jeopardise her tax position, and asked for something to be put in an email for her to consider prior to any further discussion.

55. RWK emailed Mr Bhadra and Mr Harris a without prejudice letter to her on 26 August 2020, and emailed the respondent's solicitors, Ince Gordon Dadds ("Ince") the letter on the same day. On 28 August 2020 there was further without prejudice correspondence between RWK and Ince and the claimant and the respondent.

56. On 14 September 2020 RWK wrote an open letter to Mr Harris and Mr Bhadra [374-7] setting out their understanding of the contractual position between the parties, the factual matrix, the legal position and proposed next steps. In the letter it was asserted that the claimant's *"acceptance of Mr Harris's email of 29 April 2019 constituted a concluded agreement that Ms Thom would be paid "… A 10% profit share from the Worship Square investment*"". They also asserted "*Further Hobart was obliged to pay Ms Thom's performance fee within two months of the completion of its involvement in the Worship Square project - so, by the end of April at the latest".* They proposed that the respondent disclosed financial information supporting the remuneration respondent had received by 21 September 2020, and payment of 10% of this remuneration by 24 September 2020.

57. On 22 September 2020 the claimant gave ACAS notification of early conciliation.

58. On 23 September 2020 Ince replied to RWK's letter of 14 September 2020. [378-80]. In its they confirmed that the respondent "*has received no performance fee/profit share whatsoever for the Worship Square transaction. The mechanism entitling the company to receive such fee was unfortunately terminated in November 2019. Following completion of the transaction and advisory fee relating to the sale of shares was paid to the company* (sic)*. As you will appreciate, such fee differs from a performance fee/profit share"…. "No performance fee was received by the company and thus no proportion of it can be paid to Ms Thom"… "…the company has not received any performance fee/profit share relating to the Worship Square development. This means that there is no information available to provide safe the confirmation that no such fee(s) were received by the company"…. "….your client is not entitled to, nor will she be receiving any payment whatsoever in relation to Worship Square*".

59. There was further without prejudice correspondence between the parties on the 13 and 16 October 2020. On 20 October 2020 the claimant was placed on garden leave [381-3]. The claimant responded to the notification of garden leave by email in which she said *"I am entitled to be paid all my contractual entitlements. You are already aware that the company is in breach of my contract by failing to pay the entitlement arising upon the sale of Worship Square. All my legal rights in that regard (and generally) are expressly reserved*".

60. On 4 November 2020 RWK wrote to Ince [385-6] stating "*Your client has continued to refuse to provide Gill and ourselves with information (and supporting documentation) to verify the amount it received consequent upon the disposal of the Worship Square development, still less make payment of the profit share to which Gill was thereby entitled. In the circumstances she has no alternative but to initiate legal action and preparation of the claim is now in hand*".

61. On 7 November 2020 the claimant's employment terminated following the expiry of her notice period.

62. On 19 November 2020 the claimant presented her claim to the employment tribunal.

63. On 7 June 2021 the Property Fund Controller at Bridges emailed Mr Bhadra to confirm that payments totalling £3,814,435.27 to HWSL on 12 March 2020 with the only payments made to HWSL, Mr Bhadra, Mr Harris or any "*relevant other third party related to them in respect of the Worship Square Project*", in respect of electricity charges, contingency fund or any other sum. True to his word, Mr Butler explored the issue of payments in relation to electricity charges or contingency funds in cross examination, but in closing did not pursue any claim to an entitlement to any such sums.

The law

Unauthorised deductions from wages

64. Section 13(1) ERA provides that an employer shall not make unlawful deductions from the wages of a worker unless the deduction is required or authorised by statute or the worker's contract, or the worker has given written consent to the making of the deduction.

65. Section 13(3) ERA provides: -

> *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion"*.

66. Section 27(1) ERA sets out the meaning of "wages" as:-

> "*any sums payable to the worker in connection with his employment, including –*
>
> > *(a) any fee, bonus, commission, holiday pay or other emolument preferable to his employment, whether payable under his contract or otherwise…"*.

67. Section 23(1) ERA provides that: -

> *"(1) A worker may present a complaint to an employment tribunal—*
>
> > *(a) that his employer has made a deduction from his wages in contravention of section 13*…"

68. It is not necessary for there to be a strict contractual entitlement to a payment for sums to be considered "wages properly payable" by the employer. It is enough that the employer is rendered liable to pay "either under the contract of employment or in some other way" (***Farrell Matthews & Weir v Hansen*** **[2005] ICR 509** citing ***New Century Cleaning Co Ltd v Church*** **[2000] IRLR 27**).

69. The tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under Part II ERA is properly payable, including issues as to the meaning of the contract relied on (***Agarwal v Cardiff University*** **[2018] ICR 433**).

70. In order for the tribunal to have jurisdiction to hear a claim for unlawful deductions the claimant must be for an identifiable sum (***Coors Brewers Ltd v Adcock*** **[2007] IRLR 440**). In ***Coors*** Wall LJ observed that Part II ERA "*is essentially designed for straightforward claims where the employee can point to a quantified loss. It was designed to be swift and summary procedure".*

71. However, quantified or quantifiable does not necessarily mean that the employee has to be able to quantify their claim at the point at which it is presented (***Smith v Chelsea Football Club*** **[2010]EWHC 1168).** A claim does not fall out of the jurisdiction of the tribunal under Part II ERA merely because quantification of the claim might be difficult, indeed "very difficult", to resolve (***Lucy v British Airways*** **UKEAT/0033/LA**).

Interpretation of contracts and contractual principles

72. The tribunal's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The court must consider the language used and ascertain what a reasonable person, who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant (***Investors Compensation Scheme v West Bromwich*** **[1998] 1 All ER 98,** ***Arnold v Britton*** **[2015] AC 1619**).

73. The tribunal must be alive to the possibility that one side may have agreed to something which, with hindsight, did not serve its interest. It is not for the hypothetical reasonable person nor the tribunal to seek to re-write the parties' agreement if it appears that it has led to a bad bargain for one side. Commercial common-sense is only relevant to the extent that of how matters would or could have been perceived by the parties or the reasonable person at the time of the formation of the contract (***Wood v Capita*** **[2017] AC 1173** and ***Arnold***).

74. "*An acceptance is a final and unqualified expression of assent to the terms of an offer. The objective test of an agreement applies to an acceptance no less and to an offer*" (*Chitty* 2-026). Sometimes it is difficult to say whether or when an offer has been made and accepted in the course of lengthy negotiations. "*The court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms*" (*Chitty* 2-027). Sometimes parties continue to negotiate after they appear to have agreed terms. When this is the case, the court should look at the entirety of negotiations to decided whether an apparently unqualified acceptance did in fact conclude the agreement (*Chitty* 2-028).

Time limits

75. Under section 23 ERA the time limit for bringing a claim is three months beginning with the date of payment of the wages from which the deduction was made with an extension for early conciliation, unless it was not reasonably practicable to present the claim in time and it was presented within such further period tribunal considers reasonable.

76. One factor in deciding whether it was reasonably practicable to present a claim within the time limit is whether "*there were crucial or important facts unknown, and reasonably unknown, to the employee which then became known as facts to her such as to give her a belief, and a genuine belief, that she had a claim to be brought before the industrial tribunal* " (***Machine Tool Industry Research Association v Simpson*** **[1988] ICR** 558).

77. The test is not whether it was practically possible to have presented the claim within a time limit, but whether "*it was reasonable to expect that which was possible to have been done*" (***Asda Stores v Kauser*** **UKEAT/0165/07/RN**).

78. Where the reason for the failure to launch the claim within the time limit is reliance on advice from a professional adviser, this will generally mean that it

was reasonably practicable for the claimant present a claim in time (***Dedman v British Building and Engineering Appliances Ltd*** **[1973] IRLR 379.**

Conclusions

What the parties agreed

79. The primary task for me in this case is ascertaining what the parties agreed. As set out above in the section on the law, I must seek to ascertain what the reasonable person, apprised of relevant background matters, would have understood the parties to have agreed.

The contract of employment

80. A certain amount of repetition is probably helpful to the reader of this judgment to spare them having to refer back to previous pages. The key provision in the contract of employment is at Cl. 6.2: -

> *6.2 You may receive a minimum 10% of the Company's performance fee (subject to the appropriate deductions) from future investments where you are the designated Asset Manager. The terms and percentage of each performance fee will be negotiated with you and agreed in advance of each project provided you remain in employment with the Company and are not working under notice at the time the performance fee is paid.*

81. Standing back somewhat, and not getting too involved in the detail or relevant background at this point, the reasonable person would no doubt form the general impression that the parties were seeking to set out a practical clause relating how the respondent would remunerate the claimant. It is a profit-sharing arrangement that seeks to set out the scope of her participation in money that the respondent makes from investments where the claimant has been the designated Asset Manager.

82. The reasonable person would conclude that this was a clause that was not geared towards one particular transaction or investment, but was a clause to set out how the parties would approach transactions/investments in general, including ones as yet unidentified. Indeed, it expressly talks about "future investments". The parties had agreed a profit-sharing arrangement whereby the claimant "may" receive a minimum percentage of the respondent's "performance fees" in deals where she was the designated asset manager, but the fine detail, as to terms and final percentage, would be negotiated and agreed with her prior to each particular transaction.

83. How, then, would the reasonable person understand the language "You may receive…"? (Emphasis added). First, there is nothing within the written contract that specifically helps understand this apparent retention of discretion by the respondent. On the face of the contract, and not delving into any background, it would appear that the respondent is seeking to retain a discretion as to payment, but not circumscribing in any way how that discretion is to be exercised, either in terms of whether to pay at all, or what amounts to pay, subject to the minimum 10%.

84. However, I do not focus on this sentence in isolation, but read it with the sentence that follows. The parties envisaged that that there would be negotiation and agreement as to the precise percentage (over and above 10%) and terms of each investment. I find that the respondent retained a discretion to pay a minimum 10% of a company performance fee, that would crystalise into a contractual entitlement once the terms of the individual future deal was negotiated and agreed.

85. I find the discretion retained by the respondent is narrow in scope but nonetheless significant. The respondent has not sought to circumscribe it, and I find that the respondent had a discretion as to whether to pay or not and what it negotiated and agreed with the claimant, such discretion not to be exercised unreasonably, capriciously, arbitrarily, perversely or irrationally. This, I find, is the unambiguous meaning of the clause.

86. The real difficulty I have had with this case is what happens if the parties fail to agree (for whatever reason) under Clause 6.2. The contract envisaged agreement, but did not provide for what would happen if there was none. I will return to this matter below after considering the Worship Square investment.

Negotiations concerning Worship Square

87. The emails between the claimant, Mr Bhadra and Mr Harris between 23 February 2019 and 29 of April 2019 and the meeting of 25 February 2019 are, in essence, the negotiation in relation to an individual investment envisaged by the second sentence of clause 6.2 of the contract of employment. This negotiation in 2019 was clearly not in advance of the Worship Square project, but no point has been taken about this, and I consider that these negotiations are those contemplated by the second sentence of clause 6.2.

88. There was clearly negotiation, but was there agreement? Again, I will repeat some of the relevant correspondence to spare the reader going back to previous pages.

89. The negotiation started with the claimant proposing a 25% profit share from Worship Square on 23 February 2019. This was discussed in a meeting between Mr Bhadra, Mr Harris and the claimant on 25 February 2019. In the absence of minutes and looking at the correspondence as a whole, I have found that no agreement was reached at this meeting.

90. Mr Harris and Mr Bhadra considered their position after the meeting and on 6 March 2019 Mr Harris wrote "*We have allocated to you a 10% profit share from the Worship Square investment, which is subject to the performance fee calculation agreed with bridges*". He additionally responded to the bullet point in the claimant's 23 February 2019 email in which she proposed the 25% profit share, by saying "*We allocated to you a 10% profit share from the Worship Square investment. Going forward, we will continue to share with you profit in future office deals, given your participation in the asset management plan*". The use of the present perfect "We have allocated" and the past perfect "We allocated" is, in isolation, suggestive of a concluded position. However, once again, I have looked at the whole train of emails. This is more suggestive of the respondent adopting and setting out a position in negotiations which were ongoing and which had not concluded. The claimant's next communication makes this clear.

91. The claimant's response on 24 April 2019 was "*As discussed, the minimum profit share from the projects is 10% and the employment contract states that this is negotiable between the parties. I have no idea where we are in profit this at present 10% for five years of work might be a very low reward so far as I'm concerned, until we know the future of the project and what the outcome might be I think that this should be parked for now and discussed at a later stage*".

92. Mr Harris's response on 29 April 2019 was "*We allocated to you a 10% profit share from the Worship Square investment stop we believe this decision is appropriate*". He invited further discussion in the email, but there was none on this point.

93. The claimant's position, as articulated in Mr Butler's skeleton argument, was that Mr Harris's email of 29 April 2019 recorded the final position between the parties. This reflected the case pleaded at paragraph 16 of the Grounds of Complaint. In his skeleton argument Mr Butler states that the claimant accepted this position as was shown by her subsequent conduct. The claimant, in her witness statement, says that she decided to accept the respondent's entrenched position, carried on working and decided not to raise the point again (paragraph 42).

94. The respondent's position has not always been consistent. It did not take the point that, apparently, the parties had failed to agree a percentage and terms in the spring of 2019 in its Grounds of Resistance. The point first made its appearance in the respondent's application to strike out the claimant's claim. There is even a degree of inconsistency in the respondent's evidence before me. In paragraph 101 of Mr Bhadra's witness statement he deals with the fact that he would have told the claimant in August 2020 that she was not entitled to anything by way of a performance fee because HWSL had only received an advisory fee and not a performance fee. He was unable to give a meaningful response as to why he felt he needed to deal with this argument if his case was the entirely straightforward fact that the claimant and the respondent simply had not agreed terms.

95. However, I am not persuaded by the claimant's argument here because, looking at the entirety of the correspondence: -

    95.1. What happened on 29 April 2019 was that Mr Harris reiterated a position that the claimant had previously expressly not accepted.

    95.2. She had not accepted it on the basis that the percentage profit share could prove too low, and that the matter should be revisited when the parties knew more about the future of the project. She had no idea about the profit of the investment at that stage and was clearly disinclined to commit herself.

    95.3. This was not one of those cases where the performance which was the subject matter of the negotiations has actually been rendered, where I might be anxious to hold that continuing negotiations have resulted in agreement.

    95.4. Her silence and her continuing to work did not indicate that the parties had reached agreement. The claimant continued working pursuant to her contract of employment, and not under the terms parties were negotiating relating to the performance fee.

<u>Absence of agreement</u>

96. Clause 6.2 of the contract of employment says that the terms and percentage of each performance fee "*will be negotiated with you and agreed in advance of each project*". The contract does not say what will happen if there is no agreement. What, therefore, happens when the parties have failed to agree percentage and/or terms?

97. As indicated above, I find that the first sentence of clause 6.2 sets up a discretion to pay a sum which crystalises into a contractual entitlement on further negotiation and agreement. The way I understood Mr Butler's case in closing is that even in the absence of agreement the employer could be rendered liable to pay the 10% through the exercise of discretion. This must be right. The second sentence of clause 6.2 has fallen away in the absence of agreement, but the first sentence still bears meaning standing alone. The

claimant may receive a minimum 10% of the company's performance fee.

98. Mr Butler submitted that the respondent said what it was going to do, i.e. pay the claimant a minimum of 10% of a company performance fee; it said that it had allocated it; it did not vary this. Mr Butler submitted that this was on all fours with ***Hansen***, and that it was a perverse exercise of any discretion the respondent retained for it to refuse to pay a 10% performance fee.

99. I found a superficial attraction to this argument. However, while I am inclined to accept that it was a perverse exercise of the respondent's discretion to refuse to pay the claimant anything at all, I found it difficult to find that it was a perverse exercise of a discretion to refuse to pay the claimant a sum based on a percentage that she had expressly not accepted (see paragraph 31 above). I cannot therefore find that the rational exercise of any discretion would inevitably lead to an ascertainable sum.

100. Additionally, what was put forward on 6 March 2019 by Mr Harris was "*We have allocated to you a 10% profit share from the Worship square investment, which is subject to the performance fee calculation agreed with Bridges"* [emphasis added]. In the ensuing correspondence the claimant did not address the Bridges calculation aspect of the proposal, perhaps because the percentage was the key stumbling block. It may be the case that the claimant had no difficulty with this aspect of the proposal, but it is simply not addressed by her. This compounds the difficulty in finding that the parties had agreed terms that would allow for the calculation of an ascertainable sum in respect of the Worship Square investment.

Overall conclusions on jurisdiction

101. The tribunal only has jurisdiction to hear an unauthorised deductions from wages claim in respect of a quantifiable sum. I have concluded that the parties did not reach agreement under clause 6.2 of the contract of employment as to the percentage of the company's performance fee that would be paid to the claimant in respect of Worship Square. It follows that any claim in respect of such a sum would be a claim for an unquantified and unidentified sum. I have further concluded that in the absence of agreement, there would be a discretionary entitlement under the first sentence of clause 6.2. However, as I concluded that it would not be a perverse or irrational exercise of any retained discretion for the respondent to fail to pay her something she had expressly not accepted, I also conclude that this would be a claim for an unquantified and unidentified sum. In respect of both claims, I consider that the absence of agreement to the "calculation agreed with Bridges" further prevents the sum from being quantifiable. In all the circumstance I conclude that the claimant's claims, however she puts them, are for unquantified sums.

102. It follows that I do not have jurisdiction to consider the claimant's claims. I have determined Issue 1 in the Amended List of Issues against the claimant. As I have found at this stage that I do not have jurisdiction to consider the claim I will not proceed to determine the remaining issues. The claimant's claim is dismissed.

Employment Judge **Heath**

Date: 28 August 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 10/09/2021.

FOR EMPLOYMENT TRIBUNALS

Claim no: 2207227/2020

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL
B E T W E E N:

MS GILLIAN THOM

Claimant

and

HOBART REAL ESTATE PARTNERS LIMITED

Respondent

[~~AGREED~~DRAFT] AMENDED LIST OF ISSUES

Drafted/amended by the Claimant following further disclosure by the Respondent

JURISDICTION – SUBSTANTIVE

1. Does the Tribunal have jurisdiction to determine C's claim under s.13 ERA 1996?

   a. Is C's claim for a performance fee a claim for *"wages"* within the meaning of ss.13 and 27 ERA 1996? (Issue 13 below~~13 below12 below~~)

   b. Is it a claim for an unquantified discretionary bonus or payment of a sum which is not an identifiable sum? If so, does this mean that the Tribunal does not have jurisdiction to determine C's claim?

   c. Is C's alternative claim for a performance fee [Paragraphs 3, 14, 29 and / or 32 of the Grounds of Claim] a claim for an unquantified discretionary bonus or payment of a sum which is not an identifiable sum? If so, does this mean that the Tribunal does not have jurisdiction to determine C's claim?

JURISDICTION – LIMITATION

2 On what date or dates did HWSL, R, the Directors, or any other Corporate Entity receive payment or payments under an Advisory Service Agreement dated 13 February 2020 ("the AS Agreement")[1]?

~~2.~~3. The following dates are ~~are~~ agreed.

a. The Claimant's Performance Fee[2] in respect of the Worship Square Project was due/to be paid[3] (if it was payable, which R denies) by ~~12 May 2020 (~~two months after the payment or payments received by HWSL, R, the Directors, or any other Corporate Entity.~~12 March 2020).~~

b. The 'primary' time limit for presenting the unlawful deduction from wages claim was three months after the relevant deduction or, if there was more than one deduction forming a series of deductions, after the last deduction in the series (subject to the extension of that period by Early Conciliation). The date of the relevant deduction(s) is to be determined as Issue 16 below~~16 below15 below~~.

c. C commenced ACAS Early Conciliation ('Day A') on 22 September 2020.

d. ACAS issued an Early Conciliation Certificate ('Day B') on 22 October 2020.

e. C presented her claim on 19 November 2020.

~~3.~~4. Was it reasonably practicable for C to have presented her claim within the primary time limit?

~~4.~~5. If not, was C's claim presented within such period as was reasonable in all the circumstances?

UNLAWFUL DEDUCTION FROM WAGES – S.13 ERA 1996

~~5.~~6. Was a 10% profit share payment, a performance fee, properly payable to C by R as wages, for the purposes of section 13(3) of the Employment Rights Act 1996, calculated by reference to all

[1] C's pleaded case is that any payment satisfying the conditions/definitions set out in her Grounds of Complaint are relevant payments. R's position is that the only potentially relevant payments are payments made under the AS Agreement (although R does not admit that C has any valid claim in relation to such payments). C reserves her right to rely upon her pleaded case in full, including relying upon any other relevant payments in the event that any other payments within the scope of C's pleaded case are found to have been received.

[2] This is the term used by C in her Grounds of Complaint. No admission is made by R by the use of that term in this List of Issues.

[3] There is a dispute as to the meaning of clause 6.3 which appears to have a word missing

or some of the fees received by HWSL ~~on 12 March 2020~~ under an Advisory Service Agreement dated 13 February 2020?

~~6.~~7. What is the proper construction of Clauses 6.2, 6.3 and or 26 of the Claimant's Employment Contract, in the context of the whole contract:-

a. Do the terms "Company's performance fee" and "Performance Fee" in relation to the Company or Hobart mean sums received by the Respondent or any of its Corporate Entities or the Directors (Mr Bhadra or Mr Harris), whether directly or indirectly, by way of sale proceeds and/or profits and/or other payment resulting from or contingent upon the sale of an investment (usually a development property), regardless of the specific label which is given to any such payments at the time [p23 Para 9]

OR

Do they mean a sum(s), a performance fee, paid to the Respondent and / or (in this case) paid pursuant to the LLP Agreement [P51 Para 48 and 49]?

b. Does the "Performance Fee being paid to Hobart" mean the Performance Fee being paid to Hobart, whether directly or indirectly, including a payment to one or more of the Corporate Entities or the Directors. [p23 Para 10]

OR

Do they mean a sum(s), a performance fee, paid to the Respondent and / or (in this case) paid pursuant to the LLP Agreement [P51 Para 48 and 49]?

c. Do the terms properly construed mean [p23/24 Para 11]: -

i. the Claimant had an entitlement to be paid a sum of money ("the Claimant's Performance Fee") in relation to investments (usually development projects) in respect of which the Claimant was the designated Asset Manager;

ii. the precise terms, including the amount, of the Claimant's Performance Fee were to be negotiated and agreed in advance of or during each investment project, but would always be calculated by reference to a percentage of the Company's performance fee (as defined above), and the percentage would always be at least 10%;

iii. the Respondent had a discretion in relation to what it negotiated and agreed in relation to the terms of any Claimant's Performance Fee, but that discretion was subject to various fetters or limits, (set out) including that it had to be exercised rationally and in good faith;

OR did Clause 6.2 properly construed mean:-

iv. Whether R was to pay C any sum was at its sole and absolute discretion (subject to irrationality etc) and remained at its discretion, even if a percentage and terms for payment had been agreed between C and R?

v. Any sum was only due to be paid by R to C in respect of a particular future investment where the terms and percentage of each sum had been negotiated with C and agreed in advance of each project, provided she remained in employment and was not under notice?

d. Did Clause 6.3 properly construed mean and provide for payment of C of the performance fee within 2 months of R being paid its / the performance fee or if the clauses extends to payment to another entity of payment to that entity **OR** did the contract otherwise provide by Clauses 5.1 and 6.3 for payment to C on 28th of the month.

~~7.~~8. Was any agreement made between C and R, pursuant to Clause 6.2, between 25 February 2019 and 29 April 2019, by the alleged WS Performance Fee Agreement, to pay C a specific performance fee, a profit share, at a specified percentage of 10% in relation to Worship Square?

~~8.~~9. If so, what were the terms of the agreement?

a. Was it agreed that C would be entitled to be paid by R a payment equivalent to, or of, (referred to by C as a 'Claimant's Performance Fee') 10% of any Company's performance fee in respect of the Worship Square Project (where C was the designated Asset Manager)?

b. Was any agreement which was made between C and R made:-

i. In respect of and subject to contractual arrangements (including the calculation of performance fees) under an LLP Members' Agreement dated 6 October 2017 and payment of the performance fee defined as 'the Promote Fee' in that agreement, which agreement was terminated without any performance fee payment being made under it?

ii. To pay C any performance fee in respect of fees received by HWSL, R, the Directors, or any other Corporate Entity ~~HWSL on 12 March 2020~~ under an Advisory Service Agreement dated 13 February 2020 and / or in respect of that Advisory Service Agreement including the sums received by HWSL on 12 March 2020?

~~ii.~~iii. In respect of any other payments?

c. Is the proper construction of Clause 6 of C's contract of employment (as above) that it only provides for payment of a performance fee to C in the event of and in respect of payments made to R [and not to third parties]? If so, does that preclude C and R from reaching agreement that the sum would by calculated by reference to payments to the Directors or any related Corporate Entity?

d. Was it a term of the agreement between C and R that the sum would be calculated by reference to payments to the Directors or any related Corporate Entity?

e. Does the entire agreement clause of C's Employment Contract, Clause 26, have effect:

   i. such that Clause 6 of C's contract of employment is limited to and only provides for payment in the event of and in respect of payments made to R [and not to third parties]?

   ii. to denude the alleged WS Performance Fee Agreement of the legal effect contended for by C?

f. Did R continue to have or retain a discretion whether to pay C any performance fee under any such agreement?

g. By reference to what was the 10% calculation to be made?

h. Does 'Company's performance fee' for the purposes of such agreement mean:

   i. sums received by R, any of its Corporate Entities or the Directors (Mr Bhadra or Mr Harris), whether directly or indirectly, by way of sale proceeds or profits or other payment resulting from (or contingent upon) the sale of Worship Square Property, regardless of the specific label given to such a payment (as alleged by C);

   ii. only sums received directly by R, (as alleged by R);

   iii. only sums paid pursuant to the LLP Agreement (as alleged by R); or

   iv. something else?

i. If C's entitlement to payment was subject to the exercise of a discretion by R, what were the scope and limits of R's discretion and, particularly, did R have a discretion to refuse to pay the Claimant's Performance Fee to C in the event that such a payment had been agreed and a corresponding Company's performance fee had been paid?

j. If C has a conditional entitlement to a Claimant's Performance Fee, what are the conditions for payment?

k. If C has a discretionary entitlement to a Claimant's Performance Fee, what are the limits of R's discretion in relation to payment or non-payment, and does R have a discretion to refuse to pay C the Claimant's Performance Fee?

l. Are there any other relevant terms?

~~9.~~10. Alternatively, did C have a discretionary entitlement to a Claimant's Performance fee and, if so, on what terms?

~~10.~~11. If C is entitled to a Claimant's Performance Fee, has that Claimant's Performance Fee become due and payable?

a. If C's Performance Fee is conditional, have the conditions for payment been satisfied? Depending on the Tribunal's answer to Issues ~~7~~6 to 9 above~~9 above8 above~~, this may require the Tribunal to determine the following issues.

i. Are either or both of the following payments (either individually or collectively, totaling £3,728,086) payment of a 'Company's performance fee' (within the meaning to be determined by the Tribunal at Issues ~~7~~6 to 9 above~~9 above8 above~~) in respect of Worship Square:

1. a 'success fee' of £3,181,972 paid to HWSL on 12 March 2020 pursuant to the AS Agreement;

2. an 'advisory fee' of £546,114 paid to HWSL on 12 March 2020 pursuant to the AS Agreement?

ii. Are any other payments to HWSL, R, the Directors or any other Corporate Entity payment of a 'Company's performance fee' (within the meaning to be determined by the Tribunal at Issues 7 to 9 above) in respect of Worship Square and, if so, what was the amount of those payments?

~~11.~~12. If R has a discretion in relation to payment or non-payment of the Claimant's Performance Fee:

a. has R purported to exercise that discretion; and

b. if so, has R exercised that discretion in a way which is outside the limits of the discretion because it is unreasonable and/or capricious and/or arbitrary and/or perverse and/or irrational and/or not exercised in good faith?

~~12.~~13. Is C's entitlement (on the basis and terms determined by the Tribunal) an entitlement to *"wages"* which were *"properly payable"* within the meaning of ss.13 and 27 ERA 1996? In particular:

a. is the Claimant's Performance Fee *"sums payable to"* C; and

b. are those *"sums"* payable *"in connection with* [C's] *employment"*, including being either *"any fee, bonus, commission ... or other emolument referable to* [C's] *employment, whether payable under* [C's] *contract or otherwise"*?

~~13.~~14. If C is entitled to a Performance Fee, to how much is she entitled? Is she entitled to:

a. 10% of both of the sums paid to HWSL pursuant to the AS Agreement ~~totaling £3,728,086~~ (Issue11 above~~11 above10 above~~);

b. 10% of nothing;

c. 10% of the sum or part of the sum (Issue 11 above~~11 above10 above~~) or other sum after deduction by R of expenses and taxes; or

d. some other sum?

~~14.~~15. Was the amount of the Claimant's Performance Fee deducted from C's wages and, if so, was any such deduction(s) unlawful?

a. It is agreed that R has not paid any sums in payment of C's claimed Claimant's Performance Fee (R denies that it is obliged to make any such payment). It is agreed that, if C was entitled to be paid a Claimant's Performance Fee (which R denies) and if it is wages, then R does not contend that there was a lawful basis for making a deduction for the purposes of s.13(1) ERA 1996.

16. If there was an unlawful deduction(s):

~~a.~~ ~~–~~when was the deduction(s) made? Was it/they made:

~~i.~~ from C's payslip dated 28 May 2020;

~~ii.~~ on 12 May 2020; or

iii. on some other date?

~~c.~~b. if there was more than one deduction, did the deductions form part of a series of deductions with the gap(s) between each deduction not exceeding three months?