



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4112434/2021

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Held by Cloud Video Platform in Glasgow on 1 September 2022

Employment Judge M Kearns

10	Mr R Simons Alvarez	Claimant Represented by: Mr A Ismail - Counsel
15	Ecco Vino (Edinburgh) Limited	First Respondent Not present & Not represented [No ET3 lodged]
20	Bishopgate Consultants Limited	Second Respondent Not present & Not represented [No ET3 lodged]
25	Abbey Morgan Consultancy Ltd	Third Respondent Not present & Not represented [No ET3 lodged]
30	Mr D Sutherland	Fourth Respondent Represented by: Mr Grant - Solicitor
35	Mr W T Mcaneney	Fifth Respondent Represented by: Mr Grant - Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The reserved Judgment of the Employment Tribunal following the Preliminary Hearing was that:

(1) The claimant was employed at all relevant times by the first respondent.

- (2) There was no relevant transfer at any time from the first respondent to any other party.
- (3) The fourth and fifth respondents remain as parties in relation to the claims against them under section 47B Employment Rights Act 1996.
- 5 (4) Date listing stencils will be sent out to parties for the full hearing.

REASONS

1. Having complied with the early conciliation requirements, the claimant presented an application to the Employment Tribunal on 17 November 2021 in which he claimed that he was subjected to detriment(s) and/or dismissed
10 on the ground that he had made one or more protected disclosures (whistleblowing). He also claimed unfair dismissal, failure to consult regarding an alleged TUPE transfer and holiday pay.

Issues

2. A Preliminary Hearing ("PH") was held before Employment Judge O'Donnell
15 on 27 May 2022 at which today's hearing was fixed to consider the following preliminary issues:
- a. Who was the claimant's employer?
- (i) Was he employed by the first respondent?
- (ii) Was there a relevant transfer in terms of the Transfer of
20 Undertakings (Protection of Employment) Regulations 2006 from the first respondent to either the second or third respondent of an undertaking in which the claimant was employed so as to transfer his employment to either the second or third respondent?
- (iii) If so, when did any such transfer take place?
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- b. Should the fourth and fifth respondents be discharged as parties to the claim?

(i) If not, in what capacity and on what basis do they remain as parties?

c. If the second or third respondent was the claimant's employer then were the complaints against them lodged in time?

5 (i) If not, should the Tribunal exercise its discretion to hear those claims out of time?

3. At the start of today's hearing parties' representatives set out their respective approaches to the case. The claimant's position was that the first respondent was his employer at all relevant times and that there was no evidence to suggest that there had ever been a relevant transfer from the first respondent to either the second or third respondent. Question c. above did not, therefore arise. However, if the Tribunal concluded that either the second or third respondent was the claimant's employer then Mr Ismail submitted that the Tribunal should exercise its discretion to hear the claims against those respondents out of time because the claimant had been unaware of the possibility that he was employed by either of them. It would therefore have been not reasonably practicable for him to include them in the claim.

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4. The position adopted by Mr Grant on behalf of the fourth and fifth respondents was that the first issue of the identity of the claimant's employer was a matter for evidence and that he proposed to lead evidence on behalf of the fourth and fifth respondents. He stated that the only claims against the fourth and fifth respondents were the claims under section 47B Employment Rights Act 1996. Mr Grant clarified that he was not proposing to argue that the fourth and fifth respondents should be discharged as parties. He also stated that as he was not acting on behalf of the second or third respondent, it would not be appropriate for him to make any submissions on question c.

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Evidence

5. For the preliminary issues requiring evidence, the parties had prepared a joint bundle of documents and they were referred to by page number ("J"). The claimant had also lodged a number of bank statements in an additional bundle. The claimant gave evidence on his own behalf. The fourth and fifth respondents also gave evidence on their own and each other's behalf.

Findings In Fact

6. The following facts were admitted or found to be proved.
7. The first respondent is Ecco Vino (Edinburgh) Limited, a company incorporated under the Companies Acts on 11 January 2018. The first respondent has 100 shares. The fourth and fifth respondents hold 33 shares each. Mr David Fulton holds 33 shares and Ms Lauren Sommerville holds 1 share. The fourth and fifth respondents and Mr Fulton are listed at Companies House as persons with significant control of the first respondent (J112 - 3).
8. In or around August/September 2018 the claimant was interviewed by the fourth and fifth respondents and was engaged by them as the General Manager of their restaurant, 'Ecco Vino Edinburgh', situated at 19 Cockburn Street, Edinburgh EH1 1BP. In the interview, the fifth respondent told the claimant that he and the fourth respondent were 'directors' and that there was a third 'director' called David Fulton who was unavailable to attend the interview.
9. The claimant's employment began on 10 September 2018. On or about 1 November 2019 the fifth respondent gave the claimant a "contract of employment" (J77) which he asked him to sign on that date. The fifth respondent also signed it. At the top of the first page it stated: *"CONTRACT OF EMPLOYMENT" "This document dated 1st November 2019 sets out the main terms of your employment in accordance with the Employment Rights Act 1996. You should also refer to the employment handbook for further information on policies and procedures applicable to your employment with Ecco Vino, 19 Cockburn Street, Edinburgh EH1 1BP"*. 'Ecco Vino' was

referred to throughout the contract as “the Company”. Paragraph 18 is entitled ‘Disciplinary and Dismissal Appeals’. It states: *“If you are dissatisfied with any disciplinary or dismissal decision taken in respect of you, you may appeal to the individual nominated by the Director”*. Under paragraph 19, formal grievances must also be submitted to the *“Director”*.

10. The claimant worked at the restaurant premises at 19 Cockburn Street, Edinburgh. He managed seven members of staff and was himself line managed by the fourth and fifth respondents. His principal line manager was the fifth respondent, though the fourth respondent was more present once the business reopened after the pandemic. In or around February 2020, the claimant questioned the fifth respondent about why the name of the payer of his salary was shown in his bank statements as *‘Bishopgate Consu Ltd’*. The fifth respondent told him that Bishopgate was a payroll service provider that the business was using to pay staff wages.

11. On or about 28 May 2021 the claimant approached the fourth respondent by email (J91) with a grievance about his treatment by the fifth respondent. On 31 May 2021, the Claimant emailed the fourth and fifth respondents asking for a salary increase and for an explanation on the first respondent’s bonus scheme (J84). In or about June 2021 the fourth and fifth respondents suspended, disciplined and ultimately dismissed the claimant from his employment at Ecco Vino Edinburgh, purportedly using *“the companies [sic] disciplinary procedure”* (J92 - 95).

12. At some point in June 2021, the fourth respondent showed the claimant a letter (J97 - 98) dated 8 June 2021 which purported to be a complaint to the fourth and fifth respondents about him by the Ecco Vino Head Chef and other staff. The letter began: *“Dear Billy, Derrick As I brought to Billy’s attention the other week, Roberto is out of order, he needs to be told he cannot bully the staff. We the staff would collectively like to inform you that we can no longer work under the manager. ..”* The letter finished: *“Unless you as owners act on this, we the under signed offer our notice and refuse point blank to work under the current Manager/regime!”*

13. In an email to the claimant dated 13 June 2021 (J92) the fourth and fifth respondents stated: *7 am writing in response to written complaints about you from your work colleagues. Due to the seriousness of this and in line with the companies disciplinary procedure Billy and I have no alternative but to suspend you from your position while we investigate further... This means you cannot enter the premises of Ecco Vino or make contact with any member of staff, customers or suppliers until further notice.* The email was signed 'Derrick & Billy'. On 21 June 2021, a telephone meeting was arranged between the fourth and fifth respondents, the claimant and his trade union representative (J95).
14. On 21 June 2021, the claimant's employment was terminated by email to him from the fifth respondent (J94). The email informed him "*we believe we have no alternative but to terminate your employment*". The employer/ payer name on his final payslip dated 31 July 2021 (J83) was "Ecco Vino Edinburgh". This had been the employer name on all his payslips. On his bank accounts, it appeared that various companies had been used to pay his wages. The claimant asked the fifth respondent about the names in his bank statements and the fifth respondent told him they were payroll companies that Ecco Vino used to sub-contract the payment of salaries. The names variously included: 'Bishop Consu Ltd'; 'Janusian HR Limited'; 'Rich Cap Con Ltd'; 'Mark Mason A/C'; and 'Piretek Ltd'. The claimant's salary payments were generally between £1,800 and £1,900 and many of the entries on his bank statements referred to "*wages Ecco Vino*".
15. Between 6 October 2019 and 12 July 2021 the claimant received a number of letters from the National Employment Savings Trust ("NEST") (J86 - 86M) telling him that they had reported his employer, Ecco Vino to the pensions regulator for breach of their legal duty to pay contributions. The first respondent had deducted the pension contributions from the claimant's salary but had failed to pay them into his pension.
16. On 26 July 2021 the claimant received his P45 (J88). This stated at box 13 that the "*employer name and address*" were "*Ecco Vino Edinburgh, 19 Cockburn Street, Edinburgh*". The post code was "*EH1 1BP*".

17. On 1 July 2021, the claimant received a letter from HMRC (J90A) following a phone call he had with them on 11 June concerning the failure by his employer to pay to HMRC the tax and National Insurance they had deducted from his salary. The letter stated that HMRC had recorded the following "sources of income" in respect of the tax year ended 5 April 2020:

Employer/pension provider	Start date	End date
Abbey Morgan Consultancy Ltd	6/4/2019	5/4/2020
RM 2010 Limited	11/9/2018	8/6/2019
Janusian HR Limited	1/6/2019	31/12/2019

18. In respect of the 'source of income' for the tax year ended 5 April 2021, HMRC had recorded this as Abbey Morgan Consultancy Ltd.

Observations on the evidence

19. Where there was a conflict between the evidence of the claimant and that of the fourth and/or fifth respondents, I had no hesitation in preferring the evidence of the claimant for the following reasons. The fifth respondent's evidence was evasive, inconsistent and lacking in credibility on the subject of the identity of the claimant's employer and generally. In his evidence in chief, he stated of the claimant's employer: *"the restaurant is called Ecco Vino. He was employed by the restaurant"* In the next breath, and with reference to a payslip (J83) which suggested the employer was "Ecco Vino Edinburgh" (J83) he said that he believed the claimant's employer was Janusian HR Ltd. He then said firstly that the 'wage service' had been outsourced to Janusian and other companies and then implied that they were in fact employment agencies who supplied Ecco Vino with staff.
20. The fifth respondent next stated that the claimant was employed by the third respondent, Abbey Morgan Consultancy Ltd and the second respondent, Bishopgate Consultants Limited but he did not suggest how that might have

come about. His solicitor asked him: *"At the time of the termination of the claimant's employment who do you say he was employed by?"* The fifth respondent replied that it was the second respondent, Bishopgate Consultants Limited. In relation to the various other names shown on the claimant's bank statements as having paid his wages on behalf of Ecco Vino, he suggested that these were in fact bank accounts used by Bishopgate. He testified that he had authority to terminate the claimant's employment. Asked by Mr Ismail how he had authority to terminate it if the claimant was employed by Bishopgate at the time of termination, he said he had had a discussion with Mr Mason of that company and had made the decision to terminate the claimant's employment jointly with Mr Mason. He could not explain how it was that the claimant's P45 (J88) showed his employer as "Ecco Vino Edinburgh". Taken to the claimant's contract of employment with 'Ecco Vino Edinburgh' (J77) which he, the fifth respondent had signed, the following cross examination then took place:

Mr Ismail: *"Did you sign that contract on behalf of Ecco Vino (Edinburgh) Limited?"*

Fifth respondent: "No".

Mr Ismail: *"in what capacity did you sign that contract?"*

Fifth respondent: "As owner of the business. "

Mr Ismail: *"Which business?"*

Fifth respondent: "Lycidas (377) Limited. "

21 . The fifth respondent later came full circle and said the claimant was employed by *"the restaurant Ecco Vino"*. Asked (with reference to print outs from Companies House J101 -107) whether either the second or third respondents operated a restaurant, the fifth respondent said: *"No. We operated the restaurant as line managers."* He then said for the first time out of the blue that he and the fourth respondent had been appointed by the second and third respondents to operate the restaurant as line managers. Mr Ismail asked him: *'7 thought you said you were appointed by Lycidas (377) Limited?'* The fifth

respondent then said that was *“absolutely correct. You’re allowed to be employed by more than one entity”*. As submitted by Mr Ismail, I considered that this was a further example that the fifth respondent’s evidence lacked credibility.

- 5 22. The fourth respondent, Mr Sutherland’s evidence was very vague. However, asked in relation to the claimant’s employment contract (J77) who he thought the fifth respondent was signing it on behalf of he replied: *“Us, the owners of the business.”* When asked about the decisions he took jointly with the fifth respondent to suspend and ultimately dismiss the claimant, the fourth
10 respondent initially indicated that they were acting as owners of the business and then claimed they were acting as owners of the building.

Discussion and Decision

a. Who was the claimant’s employer?

(i) Was he employed by the first respondent?

- 15 23. The claimant could only have contracted with a natural or legal person. A restaurant is not a legal person; neither is a building. The claimant’s case was that from 10 September 2018 until the date of his dismissal on 21 June 2021, he was employed by the first respondent.

- 20 24. It was clear from the Companies House records in the bundle (J112 —3) that the fourth and fifth respondents, together with Mr David Fulton were joint-
T owners of the first respondent and “persons with significant control” of that company. I accepted the claimant’s evidence, supported by the wording of paragraphs 18 and 19 of his employment contract (J77) that the fourth and fifth respondents, as well as being joint-owners of the first respondent, held
25 themselves out as directors of the first respondent when the claimant was interviewed by them and entered into employment. I concluded on the basis of the facts set out below that throughout the claimant’s employment with the first respondent, the fourth and fifth respondents continued to present themselves as directors and, at all material times, acted on behalf of the first
30 respondent.

25. As Mr Ismail submitted, the starting point in determining whether there was a contract of employment between the claimant and the first respondent is the written contract of employment dated 1 November 2019. The contract is stated to be "*with Ecco Vino, 19 Cockburn Street, Edinburgh EH1 1BP*" [77].
5 The employee's name is "*Roberto Simons-Alvarez*", the Claimant. The contract of employment is signed by the claimant and the fifth respondent [82]. Mr Ismail submits that applying the ordinary principles of construction, there is a contract of employment between the Claimant and the first respondent.
26. In his evidence, the fifth respondent suggested that the words "*your employment with Ecco Vino*" [77] refers merely to the location of the restaurant rather than the employer. The fourth respondent suggested that it was a reference to the building. Mr Ismail submitted (and I accepted) that it is absurd to suggest that "employment with", in a contract of employment, should have the same meaning as 'employment at'.
- 15 27. As set out in the observations above, the fifth respondent testified that he signed the contract of employment in his capacity as "owner of the business". Asked which business, he responded: "Lycidas (377) Limited". In cross-examination he said that the Claimant's employer, at the time of the contract, was Janusian HR Limited. He could not provide an explanation for why his signature appeared in a contract of employment, which on his account, was allegedly with Janusian HR Limited. Neither Janusian HR Limited nor Lycidas
20 (377) Limited were mentioned in the contract of employment. The only company name in the contract was "Ecco Vino". For the reasons given above, I reject the fifth respondent's evidence.
- 25 28. On behalf of the fourth and fifth respondents, Mr Grant submitted that the fourth respondent had been adamant that the claimant was never employed by the first respondent. He stated that the fifth respondent's evidence had been that at the time of his dismissal, the claimant was employed by the second respondent, Bishopgate Consultants Limited. He said that the fifth
30 respondent had testified that although the pay slip at J83 referred to Ecco Vino Edinburgh, the PAYE reference number in fact belonged to the second respondent. (There was no evidence to support this assertion.) Mr Grant

submitted that if the fifth respondent's position (that the claimant's employer was Bishopgate) was not accepted, then the only other conclusion available was that his employer was the third respondent (Abbey Morgan) on the basis that the fifth respondent had been adamant that the claimant was not employed by the first respondent. I have explained in the observations section above why I did not accept the evidence of the fourth and fifth respondents.

29. Aside from the oral evidence of the fourth and fifth respondents, Mr Grant relied upon two factors: (i) he submitted that the first respondent never traded as a company; and (ii) he noted that the contract of employment only referred to "Ecco Vino" and did not set out the full name "Ecco Vino (Edinburgh) Limited".

30. In response to these points, Mr Ismail submitted that it was not relevant to the question of the formation or construction of a contract of employment whether or not the first respondent traded as a company. It was not denied that the first respondent existed as a company, and therefore as a legal person, at the time of the contract. He argued that the issue for the Tribunal is to consider what the document conveys to a reasonable person, having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract (*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896,912).

31. Mr Ismail submitted that on the express terms of the contract of employment dated 1 November 2019, there was a contract of employment between the Claimant and the first respondent. Insofar as it is relevant whether or not the first respondent traded as a company, no evidence had been provided to the Tribunal to support this allegation. I accepted Mr Ismail's submission on this point since it was plainly correct. The only evidence led before me that the first respondent had not traded was the word of the fourth and fifth respondents to that effect. I did not accept their evidence as credible for the reasons set out in the observations above.

32. With regard to the second argument raised by the fourth and fifth respondents, that reference to "Ecco Vino" in the contract is not a reference to the first respondent because it does not have the words "*(Edinburgh) Limited*" >Mr Ismail submitted that this was implausible. He reminded me that the fourth and fifth respondents' central argument had been that this was a contract between the claimant and Janusian HR Limited and/or Bishopgate Consultancy Limited and/or Lycidas (377) Limited, despite the fact that those names do not appear anywhere in the document. Mr Ismail submitted that applying the ordinary principles of interpretation of the contract, the term "Ecco Vino" plainly referred to the first respondent. I concluded that this submission was well founded.

33. Aside from the terms of the contract itself, Mr Ismail submitted that the following additional facts strongly supported the claimant having been employed by the first respondent at all material times:

(i) In the sample of bank statements provided to the Tribunal, a number of the bank transactions in which the claimant received his wages in his bank account contained "Ecco Vino" in the description.

(ii) From 6 October 2019 to 12 July 2021, the claimant regularly received letters from the National Employment Savings Trust ("NEST") which described "Ecco Vino" as the his employer (85, 86A - 86M). Each letter notified the claimant that the first respondent had been reported for failing to pay pension contributions on time or failing to notify NEST that contributions weren't due to be paid.

(iii) On 28 May 2021, the claimant emailed the fourth respondent with a grievance about his treatment by the fifth respondent (J91).

(iv) On 31 May 2021, the Claimant emailed the fourth and fifth respondents asking for a salary increase and for an explanation on the first respondent's bonus scheme (J84). This showed his contemporaneous understanding that the fourth and fifth respondents were acting on behalf of the first respondent.

- (v) A number of staff at the first respondent, led by the “*Head Chef at Ecco Vino*”, purportedly wrote a letter of complaint dated 8 June 2021 which was addressed to the fourth and fifth respondents, raising allegations about the claimant’s behaviour at work (J97).
- 5 (vi) On 13 June 2021, the fourth and fifth respondents emailed the claimant ‘to suspend him from his position while they investigated further’ following alleged written complaints about the claimant from his work colleagues (J92). The email also stated that the Claimant “cannot enter the premises of Ecco Vino or make contact with any member of staff, customers or suppliers until further notice”.
- 10 (vii) On 21 June 2021, a telephone meeting was arranged with R4, R5, the claimant and his trade union representative (J95).
- (viii) On 21 June 2021 the fifth respondent (copying in the fourth respondent) emailed the claimant to dismiss him from his employment at the first respondent (J94).
- 15 (ix) The claimant’s P45 dated 26 July 2021 stated his employer’s name as “ECCO VINO EDINBURGH” (J88).
- (x) The claimant’s final payslip dated 31 July 2021 stated “ECCO VINO EDINBURGH” as his employer (J83).
- 20 34. Mr Ismail submitted and I accepted that the evidence strongly suggested that in the period between 10 September 2018 and 21 June 2021, the claimant was employed by the first respondent. He also submitted and I also accepted that the fourth and fifth respondents at all times acted as agents of the first respondent. I concluded accordingly that the claimant was employed by the first respondent. It seemed to me that the only other construction that could have been placed upon the facts of this case is that the fourth and fifth respondents ran the Ecco Vino restaurant as a partnership and that they employed the claimant jointly and severally as individuals. However, neither party contended for that.
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35. With regard to his specific role, the fifth respondent accepted in cross-examination that he was the claimant's line manager and that he was the responsible person for effecting a salary increase and bonus payments for the claimant. Further, he accepted in cross-examination that he was responsible for the handling of complaints from staff, including the claimant's "Formal Complaint" dated 28 May 2021 and the alleged complaint from the staff at Ecco Vino dated 8 June 2021 (J97). In relation to dismissal, the fifth respondent accepted in cross-examination that he, along with the fourth respondent, had the authority to terminate the claimant's contract of employment.

36. I agreed with Mr Ismail that it was not credible for the fourth and fifth respondents to suggest that as owners of a building, alleging no other connection to an individual's employment, they would have the authority to discipline, suspend and dismiss an employee, as well as determine his salary. Only an individual's employer, or a person acting on behalf of his employer, would have the capacity to carry out those actions. There is no plausible evidence whatsoever to suggest that the fourth and fifth respondents were acting on behalf of any other company other than the first respondents. Therefore, I accepted Mr Ismail's submission that the claimant was employed by the first respondent and that the fourth and fifth respondents were acting on behalf of the first respondent as its agents. It follows that as the fourth and fifth respondents were at all times acting as agents of the first respondent, the correspondence between those parties is evidence of the claimant's continued employment with the first respondent throughout the period between 10 September 2018 and 21 June 2021.

37. With regard to the payroll service providers, I concluded that they were simply that. There was no cogent evidence to suggest that they were the claimant's employers.

(ii) Was there a relevant transfer in terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006 from the first respondent to either the second or third respondent of an undertaking

in which the claimant was employed so as to transfer his employment to either the second or third respondent?

38. Regulation 3 TUPE provides, insofar as is relevant:

"3. - A relevant transfer

5 (1) *These Regulations apply to—*

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

10 *(b) a service provision change, that is a situation in which—*

...

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

15 ...

(6) A relevant transfer-

fa) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor. "

20 39. Regulation 4(1) TUPE provides that (unless the employee objects) the effect of a relevant transfer will be that the contract of employment of any person *"employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer³",* shall have effect after the transfer as if originally made between the person so employed
25 and the transferee.

40. As Mr Ismail submitted, Tribunals will determine first whether there is a relevant and sufficiently identifiable economic entity within the meaning of TUPE and secondly whether or not there is a relevant transfer. Mr Grant was not instructed by the first, second or third respondents. None of them had lodged ET3s. On behalf of the fourth and fifth respondents, he submitted that the 'economic entity' in this case was 'all the staff of Ecco Vino'. However, that was his only submission in relation to TUPE. His position in relation to the first respondent (as discussed above) was not that the claimant transferred from it, but that he was never employed by it. There was no evidence in this case of any transaction, whether contractual or otherwise. There was no evidence of the transfer of any employment contracts including that of the claimant. Whether there was or was not an economic entity that retained its identity, in the absence of anything that could amount to a transfer, TUPE does not apply.

b. Should the fourth and fifth respondents be discharged as parties to the claim?

(i) If not, in what capacity and on what basis do they remain as parties?

41. As explained above, Mr Grant did not argue that the fourth and fifth respondents should be discharged as parties. It was agreed that the claims against the fourth and fifth respondents are made under section 47B Employment Rights Act 1996.

Employment Judge: Mary Kearns
Date of Judgment: 08 September 2022
Entered in register: 12 September 2022
and copied to parties

I confirm that this is my Judgment in the case of Mr R Simons Alvarez v Ecco Vino (Edinburgh) Limited and others 41 12434/2021 and that I have signed the Note by electronic signature.