Neutral Citation Number: [2020] EWHC 166 (Comm)

Case No: CL-2017-000225

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

GOLDA AJAYI

Claimant

- and –

EBURY PARTNERS LIMITED

Defendant

- -
- -

Alexander Rozycki (instructed by **Harper James Solicitors**) for the **Claimant** on 1-4 July 2019 and the Claimant acting in person on 9 September 2019

Jamie Riley QC (instructed by **EMW LLP**) for the **Defendant**

Hearing dates: 1-4 July and 9 September 2019
Further representations received from Claimant 4 and 26 November 2019, 13 December 2019 and 10 and 17 January 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HENSHAW

Mr Justice Henshaw:

(A) INTRODUCTION

1. This judgment follows the trial of claims for damages made by the Claimant ("***Ms Ajayi***") based on alleged breaches by the Defendant ("***Ebury***") of its Articles of Association and of an agreement pursuant to which Ebury promised to grant share options to Ms Ajayi.

2. Ebury counterclaims £118,000 as liquidated damages arising from Ms Ajayi's alleged breach of confidentiality in respect of a COT3 agreement pursuant to which the parties settled their proceedings in the Employment Tribunal.

3. The trial before me lasted five days. The parties made opening submissions on the morning of 1 July 2019. Factual evidence occupied the rest of 1 July 2019 and all of the remaining three days (2-4 July 2019) for which the trial had been listed. The parties served written closing submissions on 24 July, 31 July and 14 August 2019, and made final oral submissions on 9 September 2019.

4. After I had reserved judgment, Ms Ajayi on 4 and 26 November 2019 sent me the further information referred to in §§ 99 and 100 below, and I have explained in those paragraphs the approach I took to it. In addition, following circulation of the draft judgment on 10 December 2019, Ms Ajayi submitted on 13 December 2019 a thirteen page document, on 10 January 2020 a ten page document, and on 17 January 2020 a short email. Each of these documents, though put forward as corrections, included a

considerable amount of further submissions. I have carefully considered each of the points Ms Ajayi has made. I have made certain revisions on points of fact where I thought it appropriate in the light of Ms Ajayi's documents and/or the suggested corrections filed on behalf of Ebury on 13 December 2019. I have added text responding specifically to further submissions from Ms Ajayi in §§ 54 and 101-102 below. Where Ms Ajayi's comments in substance sought to reargue the case, I have not altered the text of my judgment, though as already indicated I have given consideration to all of her comments.

(B) BACKGROUND

5. Ebury is the holding company for Ebury Partners UK Ltd, which was a finance technology start-up company co-founded by Mr Juan Lobato and Mr Salvador Andres Garcia in November 2009. It is now a substantial establishment that employs around 1,000 employees, including 220 staff in London.

6. Before setting up the Ebury business, Mr Lobato was involved in a company called Basekit Platform Limited ("***Basekit***"), of which he was the CEO until 2015. Basekit is a provider of content management software to the hosting industry. Before joining Ebury Ms Ajayi was the Finance Director of Basekit, and Mr Lobato and Mr Garcia were familiar with her from that role, as well as (since 2005) from a previous business.

7. Ms Ajayi worked for Ebury from March 2013 until around December 2015-January 2016. She says that she was also engaged by Ebury from May 2011 until February 2013 albeit with no remuneration. Mr Lobato denies that Ms Ajayi ever worked for Ebury without remuneration.

8. During at least part of the period that Ms Ajayi worked for Ebury, she invoiced Ebury through a limited liability partnership called XP One Consultants LLP ("***XP One***"). From March to October 2013, XP One invoiced Ebury at the rate of £1,000 a month. Ms Ajayi says that she was forced to issue invoices because Mr Lobato refused to include her on Ebury's payroll. Mr Lobato denies this.

9. In the initial period of Ms Ajayi's engagement with Ebury, one of her primary tasks was to set up an Enterprise Management Incentive Scheme ("***EMI Scheme***") for Ebury. In order to put the parties' contentions in their context, it is necessary to describe the nature of the EMI Scheme in some detail.

10. The purpose of an EMI Scheme is to enable qualifying small and medium sized enterprises (SMEs) to grant share options to their employees in a manner that incentivises them by giving them a stake in the company's fortunes and does so in a tax efficient way. As HMRC's manual *"Employer Tax Advantages Share Scheme User Manual"* (published 26 August 2015, updated 17 August 2016) ("the ***User Manual***") explains, in order to qualify as an EMI Option, an option "*must be granted for genuine commercial reasons, to recruit or retain an employee in a company*". In particular, a scheme will not qualify if its main purpose is tax avoidance.

11. Different valuations of the shares which are the subject of an option may be relevant for different purposes.

12. First, the User Manual uses the terms 'Actual Market Value' ("***AMV***") and 'Unrestricted Market' ("***UMV***"). A difference between AMV and UMV arises where the shares over which options are granted carry restrictions (including restrictions on transfer) or a risk of forfeiture. In such cases, the AMV is the market value of a share after taking into account those restrictions or risk of forfeiture, whereas the UMV is the market value ignoring the restrictions and any risk of forfeiture. In the present case, there was no difference between the AMV and the UMV.

13. Secondly, particularly in relation to shares in private companies for which no ready market exists, HMRC will frequently approve an AMV and UMV that is less than the price which the shares would be likely to sell for on the open market in the event that a buyer could be found. Purely for ease of exposition, I refer to the latter as the "*real*" market value. HMRC's Shares and Assets Valuations ("***SAV***") team determines the AMV/UMV, for share option purposes, of the shares as at the date of the grant, including in particular any discount from the real market value. In practice this may be a matter for negotiation between HMRC and the company operating the option scheme.

14. The significance of the approved discount to real market value is that, as the User Manual explains:

> "Provided that the price to acquire the shares under option is equal to or in excess of the AMV at the date of grant, the options are not regarded as being discounted options and so can be exercised without incurring a charge to tax. UMV at the date of grant is only used for the purpose of the individual and company limits, not for the purpose of establishing a charge to tax."

15. Thus to take a hypothetical example, an employee might agree to sacrifice £9,000 of salary and be awarded in lieu options over 10,000 shares with a real market value (provided a buyer can be found) of £1 a share, exercisable by paying a strike price (or 'exercise price') of 10p a share or £1,000 in total. Assume that HMRC approves an AMV equivalent to the strike price, i.e. at a discount of 90% to the real market value. (The facts of the present case illustrate that that is not an unrealistic assumption.) If the options vest and are exercised, and the shares are at that stage worth £1 a share, then the employee will gain shares worth £9,000 (net of the strike price paid). Instead of paying income tax on £9,000 of income, the employee will pay only capital gains tax (CGT), likely to be at a lower rate than the employee's marginal rate of income tax. The difference between these two rates is a tax advantage of receiving share options compared to salary. The employee should be worse off, compared to the position had he/she received salary, only if the shares' value deteriorates by an amount greater than the tax advantage just referred to. If the shares appreciate, then the employee will receive an additional benefit.

16. On 26 April 2013, Ms Ajayi wrote to HMRC on behalf of Ebury seeking advance approval for Ebury's EMI Scheme. That letter was accompanied by a set of documents including some background information about Ebury, a copy of Ebury's Articles of Association and its statutory accounts for the period ended April 2012. In or around this period, Ms Ajayi also prepared or presented several other documents relating to Ebury's EMI Scheme including Ebury's EMI Rules (which were adopted

on 13 June 2013). These documents were largely based on – in fact, Ms Ajayi says, a replica of – the EMI documents of Basekit, which had been prepared with the assistance of solicitors.

17. In November 2013, according to Ebury Ms Ajayi felt that her work for Ebury was taking up more time than she had originally envisaged. According to Ms Ajayi, Mr Lobato wished her to increase her work for Ebury because it wanted to produce more robust accounts reporting, and asked her to work 50% for Basekit and 50% for Ebury. Ms Ajayi entered into discussions with Mr Lobato to vary the terms of her remuneration. Ms Ajayi alleges that their email communication in this regard resulted in an agreement pursuant to which Ebury agreed to grant her 22,472 options (i.e. £40,000 worth of options assuming each share to be worth £1.78, the AMV which HMRC in due course approved). Ebury contends that the agreement was only in respect of 3,000 options.

18. In summary, the relevant email correspondence between Ms Ajayi and Mr Lobato was as follows.

19. Ms Ajayi wrote to Mr Lobato:

> "Can you send me the Ebury offer?
>
> I would like to consider it before I get to work tomorrow
>
> Thanks"

20. On 7 November 2013, Mr Lobato replied, "*I was thinking £45k per year for you do (sic) decide cash/equity. Could be all equity*".

21. On 19 November 2013, Ms Ajayi wrote to Mr Lobato again:

> "I'm trying to work out how much of the £45k package to take as equity or cash. Can you tell me how many shares £45k works out at?
>
> Thanks"

22. Mr Lobato replied:

> "share price is at £17.8
>
> you can choose all equity or al (sic) cash or in between, let me know what you want
>
> we will do this under EMI (as we do for all of us, this is more tax efficient, and the company picks on the cost os (sic) exercising the strike) you will vest each month 1/12 of the total from 1st November"

23. The same day, Ms Ajayi confirmed that:

> "…I would like £40k in equity and £5k in cash. Would you ask Jane to draft the contract or should I draft it? Start date is 1st November 2013"

Mr Lobato replied:

> "I can draft it with you over the coming days."

24. On 11 December 2013 Mr Lobato wrote to Abel Anguiano Solé of Ebury (copying in Ms Ajayi) to confirm that Ebury would pay Ms Ajayi £500 per month from that month.

25. In the meantime, the process of seeking HMRC approval for Ebury's EMI Scheme continued. On 6 January 2014, Ms Ajayi presented on Ebury's behalf a valuation report seeking HMRC's approval of a 90% discount on the share price of Ebury as part of its EMI Scheme. The market price of Ebury shares at the time was £17.80. The application asked HMRC to confirm £1.78 as both the AMV and UMV of the option shares in connection with the grant of EMI options. Notably, in an earlier round of the grant of options (referred to as "***EMI 1***"), HMRC had approved a 90% discount for Ebury shares allotted through its EMI Scheme. On 15 January 2014, HMRC approved £1.78 as the AMV and UMV for ordinary B shares in Ebury under the new Scheme ("***EMI 2***"). The letter stated:

> "Thank you for your letter dated 6 January 2014 and supporting documents.
>
> On a strictly without prejudice basis, and without detailed examination, I am willing to accept your proposed Actual Market Value of £1.78 and Unrestricted Market Value of £1.78 per ordinary B shares for the purposes of granting EMI options.
>
> For the avoidance of doubt, this acceptance is without prejudice to the valuation of these or any other shares, in this or any other Company, for any other HMRC purpose."

26. An option agreement was signed by Ebury and Ms Ajayi dated 12 March 2014. This agreement relates to 3,000 ordinary B shares in Ebury. There is a disagreement between the parties about this document. Ms Ajayi contends that Mr Lobato issued the agreement in October 2014 and that it was then backdated to March 2014. Mr Lobato alleges that Ms Ajayi prepared the agreement and signed it. He does not recall the agreement being backdated.

27. By late 2014/early 2015, the relationship between Ms Ajayi and Ebury deteriorated. In late 2014, Ebury decided to employ a new Finance Director, Rupert Morton, who was due to start his role in January 2015. On 22 November 2014, Ms Ajayi informed Mr Lobato that she was not keen to continue at Ebury "*without clarity as to what my role is, a proper title and a contract*".

28. On 18 March 2015, Ms Ajayi wrote to Mr Lobato:

> "It will be 3 months at the end of March since Rupert started his role as the FD of Ebury Group. I believed (sic) he had (sic) now settled in hence I will be finishing my engagement with Ebury on 31st March 2015."

29. In the event, though, Ms Ajayi's engagement with Ebury extended beyond 31 March 2015. Her evidence is that this was because Mr Lobato pleaded with her to withdraw her resignation. Mr Lobato's evidence is that Ms Ajayi had a change of heart following her 18 March email. In any case, Mr Lobato asked Mr Morton to draft a Consultancy Engagement Agreement for Ms Ajayi running from April 2015 until 31 January 2016, and he did so. That agreement was never signed. On Ebury's case, the parties proceeded on the basis that its terms were agreed. On Ms Ajayi's case, the terms were not agreed and she carried on working as an employee.

30. By the summer of 2015, the relationship between the parties had deteriorated again. On 15 September 2015, Ms Lobato and Ms Ajayi had a meeting during the course of which he expressed a number of concerns about her performance at Ebury including in relation to her behaviour with others at Ebury. The next day Ms Ajayi wrote an email to Mr Lobato complaining about his treatment of her.

31. In the meantime, Ms Ajayi attempted to exercise her EMI options. On 6 July 2015, she wrote to Mr Lobato stating:

> "I mentioned to you that I never received my copy of the options agreement following your signature. You stated both Ebury's copy and my copy must be with EMW. Are you happy for me to ask Nick to send me a copy? I need it for m[y] files as soon as possible.
>
> Secondly, I would like to exercise my right to convert the options into shares now. The options have vested and I have paid for them in full following the £40k salary I sacrificed. Can I therefore them into shares ASAP and a share certificate to me?"

Mr Lobato replied the following day:

> "absolutely yes to both, Nick is on holidays this week, so give it a week"

32. On 16 September 2015, a day after her meeting with Mr Lobato, Ms Ajayi wrote to the Board of Directors of Ebury indicating that she wished to exercise her right to convert 3,000 options to shares. She also wrote to Mr Nick Lloyd of EMW (Ebury's solicitors) on 28 September 2015 attaching a letter "*officially exercising the right to convert my shares to options*". The attached letter referred to 3,000 options granted on 12 March 2014.

33. On 22 October 2015, Mr Lobato wrote to Ms Ajayi that "*we are going to exercise options for all options holders (you are one of them) this is being done as part of the transaction we are working on. So the timings here are the timings that apply to everyone… this is now a matter of days…"*. On 3 November 2015, Ms Ajayi wrote to

Mr Lloyd again asking him for advice as to how she could exercise her options, reiterating her point that she had already paid £40,000 by way of salary sacrifice. On 5 November, Mr Lloyd stated that Ms Ajayi's exercise letter of 28 September had not fulfilled the requirements for a notice to exercise the options, *inter alia* because it was not accompanied by payment of the strike price of £5,340 (i.e. £1.78 * 3,000). The same day Ms Ajayi confirmed that she had now made the payment. On 26 November, Ebury's Board resolved to issue a share certificate to Ms Ajayi for the 3,000 shares and the share certificate was issued the same day.

34. Ms Ajayi's engagement at Ebury terminated in or around December 2015. There is some discrepancy as to the exact date (at to which see paragraph 77 below). After the termination of her engagement, Ms Ajayi initiated proceedings against Ebury in the Employment Tribunal. However, the parties eventually compromised those proceedings by entering into a COT3 settlement agreement.

35. In the meantime there had been two rounds of share sales at Ebury. On 28 April 2017, various members of Ebury entered into an agreement to sell their ordinary shares to a Dutch company called Finbart BV at £78.05 a share. Subsequently, on 9 August 2017, three members of Ebury entered into an agreement to sell their B ordinary shares to Vintage Investments Partners VI (Israel) LP and Vintage Investment Partners VI (Cayman) LP, also at £78.05 a share.

(C) THE CLAIMS

36. Ms Ajayi makes two claims in these proceedings:

    i) Ms Ajayi alleges that, in lieu of her salary sacrifice of £40,000, Ebury had agreed to grant her options. Using the HMRC approved AMV of £1.78 she contends that she was entitled to 22,472 options (i.e., £40,000/£1.78). Had she been granted these options, she would have converted them to shares and sold the shares for the market price of £78.05 a share. Accordingly, she alleges that she suffered a loss of £1,753,939.60 (***the "Salary Sacrifice Claim"***).

    ii) Ms Ajayi alleges that she became a "*Good Leaver*" within the meaning of Ebury's Articles of Association when she left Ebury on 31 December 2015. Thereafter, she says, Ebury failed to implement the share transfer provisions contained in its Articles of Association. Had it done so, she would have been able to sell her 25,472 shares (i.e. 22,472 + 3,000) in or around January 2016 (or alternatively in May or August 2017) at £78.05 per share. In this way, she alleges that she suffered a loss of £1,988,089.60. Alternatively, Ms Ajayi makes the corresponding claim on the basis that (contrary to her Salary Sacrifice Claim) she was entitled to 3,000 options. (Together, ***the "AoA Claim***").

37. Ebury counterclaims £118,000 as liquidated damages arising from Ms Ajayi's alleged breach of confidentiality in respect of the COT3 agreement pursuant to which the Employment Tribunal proceedings were settled (***the "Counterclaim***").

(D) WITNESSES

38. On behalf of the Claimant, I heard from Ms Ajayi and Mr Adrichem. Ms Ajayi's strength of feeling about this case was clear from the way in which she gave evidence; and at times she appeared reluctant to accept the possibility that documents could be inconsistent with her case, at least so far as concerns the Salary Sacrifice Claim. For example, she was unduly reluctant to accept that a schedule dating from April 2014 relating to the allocation of options under EMI 1 indicated that the number of options awarded to members of staff participating in that scheme was worked out by dividing the remuneration sacrificed by the real market value the shares had at that time (£8.19 a share) rather than the discounted HMRC-approved AMV of £0.82 a share. In this and other parts of her oral evidence, I had the impression that Ms Ajayi had become wedded to her view of the merits of her case to such a degree as to lack objectivity.

39. Mr Adrichem was Ebury's Country Manager in the Netherlands from late 2013 to December 2017, and thus a senior employee. I was satisfied that he was a truthful witness. He was not involved in the discussions between Ms Ajayi and Ebury relevant to the present dispute.

40. On behalf of Ebury, I heard from Mr Lobato (Ebury's main witness), Mr Garcia (Ebury's other co-Chief Executive Officer), Ms Suzie Yong (Ebury's head of HR from July 2015) and Mr Lloyd (a partner in EMW LLP, Ebury's solicitors, who had certain email correspondence with Ms Ajayi in November 2015 when she sought to exercise her options). I found each of them to be truthful witnesses.

41. I have also had the benefit of two expert reports, from Cameron Cook and Gordon Hodgen, a joint report by the experts and a supplementary report by Mr Cook. As explained in more detail below, it became apparent in the course of the trial that there was no relevant disagreement between the experts. Accordingly, I decided that there was no need for them to be cross-examined.

(E) THE SALARY SACRIFICE CLAIM

42. In the Re-Amended Particulars of Claim (pursuant to permission to re-amend which I granted in the course of trial), the Salary Sacrifice Claim is formulated as follows:

> "4. By email dated 19th November 2013, the Claimant was asked if she wished to take her salary in equity or money or part of each, following which:
>
> a. The Claimant replied that she would like "£40k in equity £5k cash".
>
> b. That was agreed. On 11th December 2013, Mr Lobato of the Defendant sent an email saying that the Claimant should be paid £500 per month from December.
>
> c. From December 2013 to November 2014, the Claimant was paid only that £500 per month.

> d. The balance of her salary was sacrificed for options under an EMI scheme at the rate of 1/12 of the £40,000 per month, ie £3,333.
>
> e. The said options vested on a month by month basis, something which was confirmed by Mr Lobato in his email of 25th April 2014 as follows "all these options have vested because they have been given in lieu of pay".
>
> f. An AMV of £1.78 was approved by HMRC on 15 January 2014."

43. Thus the alleged contract is a written agreement concluded by exchange of emails. It is common ground that, in determining the terms of that agreement, the court's task is to consider the correspondence between the parties as a whole and decide, on its true construction, what a reasonable person would have understood the parties to have agreed.

44. Ms Ajayi says the effect of the agreement was that, in lieu of her salary sacrifice of £40,000, she would be granted share options of equivalent value; and for that purpose, the number of options to which she was entitled is to be found by dividing the salary sacrificed (£40,000) by HMRC-approved AMV per share of £1.78. Thus, Ms Ajayi submits, the effect of the parties' email agreement was that Ebury had agreed to grant Ms Ajayi 22,472 options (i.e. £40,000/£1.78).

45. Ebury's position is, first, that Ms Ajayi had no automatic entitlement to any particular number of options: that was a matter for negotiation. Secondly, the correct interpretation of the exchange of emails was that Ebury planned to award options by reference to the real share price at the time the options were granted, which was £17.80. On that approach, Ms Ajayi would have been entitled to 2,247 options. Mr Lobato's evidence was that he rounded this up to 3,000 options to take account of the fact that Ms Ajayi would have to pay the strike price of £1.78 per share to exercise her options, and because at the time he was happy with Ms Ajayi's performance at Ebury.

46. I have concluded that Ebury's construction is to be preferred, for the following reasons.

47. First, the email communications between the parties provide no support for the view that the number of options to which Ms Ajayi would be entitled should be calculated by reference to the discounted share price of £1.78 rather than the real market value of £17.80. On the contrary, Mr Lobato's response on 19 November 2013 to Ms Ajayi's query "*Can you tell me how many shares £45k works out at?*" was "*share price is at £17.8*". The clear meaning that a reasonable person would attribute to this response is that Ebury proposed to grant options by reference to that share value.

48. Secondly, various aspects of the context in which the email correspondence between the parties took place support the view that the agreement was concluded by reference to the undiscounted share price.

49. The alleged agreement was made in November 2013. However, it was not until January 2014 that HMRC approved Ebury's proposal for a 90% discount, for AMV

purposes, to the real share value. At the time of the email correspondence, therefore, the parties could not have known for sure whether HMRC would grant a discount and, if so, what the quantum of that discount would be. In her evidence, Ms Ajayi said that there was an expectation that, since a 90% discount had been granted in relation to EMI 1, the same discount would follow through for EMI 2. But, as she recognised, this was no more than an expectation. It seems highly unlikely to me that parties would have based their agreement on the basis of that unconfirmed expectation. As Mr Lobato explained in his evidence, if they had done so it would have had the consequence that the parties could not be certain about the number of options that were allotted to an employee until the discount was approved by HMRC.

50. Another aspect of the relevant context consists of contemporaneous documents relating to the previous scheme, EMI 1. In particular, the documents include a spreadsheet that set out the way in which options in lieu of other compensation were allocated to Ebury employees as part of EMI 1. The spreadsheet shows that the number of options that each employee was allotted was calculated by reference to the undiscounted share price (£8.19 at the time) rather than discounted share price (£0.82). Although not conclusive in itself, the spreadsheet strongly suggests that options were allocated under EMI 1 by reference to the real current market price rather than the discounted AMV.

51. In cross-examination, Ms Ajayi suggested that the spreadsheet was wrong, and did not reflect what was reported to HMRC. For example, the spreadsheet shows that Louis Pierce, an Ebury employee, was allotted 15,263 options at the rate of £8.19 a share in lieu of compensation worth £125,000. However, in the Notice to HMRC under Schedule 5 of the Income Tax (Earnings and Pensions) Act 2003, the total UMV of Mr Pierce's unexercised EMI options was indicated as being £12,515.66.

52. However, I do not consider there was any discrepancy in this regard. The figure of £12,515.66 in the HMRC notification is stated to be the "*total unrestricted market value*" of Mr Pierce's options, i.e., the UMV. As noted earlier, the UMV, like the AMV, reflects the discounted value that HMRC has chosen to accept. In the case of EMI 1, a 90% discount to real market value had been approved. The statement of the UMV in the notification is irrelevant to the question of what share value Ebury may have used when deciding how many options to allocate to any given employee, a matter which for the reasons explained earlier would be more likely to be broadly based on the real market value of the shares.

53. Thirdly, the commercial consequence that would follow from Ms Ajayi's approach also suggests that it is incorrect. It would mean that in lieu of a salary sacrifice of £40,000, Ebury agreed to grant Ms Ajayi options with a current real market value of more than £400,000 (£17.80 * 22,472) as at the date of grant, and which might be expected to appreciate further. Even accounting for the fact that Ms Ajayi would have had to pay the strike price to convert the options into shares, the value of what Ms Ajayi would have received would be far in excess of her salary sacrifice and amount to an extraordinary windfall. Moreover, the difference between the strike price and the shares' value would be subject only to CGT and free of income tax.

54. Ms Ajayi relies on evidence given by Mr Adrichem, who stated that his annual compensation (base salary and commission, excluding his share options) with Ebury ranged from €260,000 to €300,000. In 2015 he was granted 5,853 options which he

regarded as a form of performance bonus. At the time he entered into his option agreement, the share price was £19.20 and so, applying the 90 per cent discount for the AMV under the EMI scheme, the agreed strike price was £1.92. Thus Mr Adrichem's options entitled him to acquire shares at the time worth £112,378 (5,853 * £19.20) for a strike price payment of £11,237.76. By the time he exercised the options, the share price had risen to £78.05, making his shares worth £456,826. Mr Adrichem said during his cross-examination that Mr Lobato had told him his (Mr Adrichem's) options were worth more than £400,000, and that he recalled his wife being very happy about that. Ms Ajayi has correctly drawn my attention to the fact that Mr Adrichem's evidence in cross-examination was that Mr Lobato told him this at the time the options were granted, in 2015. It would seem surprising if he had done so, as it was only subsequently that the shares became worth in the region of £400,000. In any event, Ms Ajayi's main point in relation to the options granted to Mr Adrichem is that he was granted options with a real market value (at the time of grant) of £112,378 for which he only paid, upon exercise, the strike price of £11,238 i.e. 10% of the shares' value. Likewise, Ms Ajayi says she should have received options over shares worth £400,000 (at the time of grant) in return for sacrificing salary of £40,000. However, that approach conflates the strike price paid on exercise of the shares with the overall level of remuneration Ebury as employer seeks to confer on the particular employee. In Ms Ajayi's case, in lieu of £40,000 salary sacrificed, Ebury granted options worth (at the time of grant, net of strike price and ignoring tax benefits) about £48,060 ((£17.80 - £1.78) * 3000). In the case of Mr Adrichem, Ebury chose to award a bonus in the form of options worth, on the same basis, about £101,140 ((£19.20 - £1.92) * 5,853). It does not follow, however, that the agreement to grant Ms Ajayi £40,000 worth of options meant she was in fact entitled to options worth ten (or, net of strike price, nine) times that amount.

55. Ms Ajayi submitted that if Ebury's approach to grant of options were correct, then employees would have no incentive to accept share options. If their entitlement to shares were to be computed by reference to the shares' real current market value, then they would be in a worse position than other ordinary investors. After all, even an external investor could purchase the shares at their current market price.

56. I am not persuaded by that submission. There are at least two reasons why the EMI scheme would still have served a useful purpose from the perspective of employees. First, as explained in §§ 14-15 above, so long as the strike price is equal to or in excess of the AMV (which it was in this case), then the options are not regarded for tax purposes as having been granted at a discount. As a result, the employee should save the income tax he/she would otherwise have paid on the sacrificed salary, less CGT likely to become due on the difference between strike price and eventual sale price (likely, according to Mr Lloyd's oral evidence, to be at a rate of 10% for an employee shareholder). Secondly, the User Manual indicates that part of the purpose of the scheme is "*to recruit or retain an employee in a company*". As Mr Garcia explained in his evidence, giving employees an ownership stake in the company gives them an incentive to help increase the company's performance and hopefully its share value.

57. Ms Ajayi also submitted that Ebury's approach was contrary to the guidance in the User Manual. It is certainly true that HMRC uses the discounted share price, i.e. AMV or UMV, for various purposes. That price is, for example, used to evaluate

compliance with the maximum individual limit of £250,000 per employee as well as the company limit. As the Manual puts it, "*UMV at the date of grant is only used for the purpose of the individual and company limits*". It is also apparent from the Manual that AMV is used to compute the charge to tax, as outlined earlier: "*provided that the price to acquire the shares under option is equal to or in excess of the AMV at the date of grant, the options are not regarded as being discounted options and so can be exercised without incurring a charge to tax*". It does not follow, however, that an employer is in any way constrained from having regard to the real current market value of the shares when deciding or negotiating how many options to grant in lieu of a given salary sacrifice.

58. The fact that HMRC uses UMV for the purpose of assessing compliance with the maximum individual limit answers another of Ms Ajayi's points, namely that if options were allotted by reference to the market value rather than discounted price, then many employees of Ebury would have been in breach of the maximum individual limit. That contention overlooks the express statement in the User Manual that the individual maximum limit is applied by reference to the UMV. Consistently with this, Ebury's valuation application dated 6 January 2014 asked HMRC to confirm that "*£1.78 represents both the restricted market value and the unrestricted market value for the purposes of the £250,000 EMI limit*".

59. Ms Ajayi drew attention to the wording of HMRC SAV team's Notice of Determination of Market Value dated 15 January 2014:

> "*On a strictly without prejudice basis, and without detailed examination, I am willing to accept your proposed Actual Market Value of £1.78 and Unrestricted Market Value of £1.78 per ordinary B shares <u>for the purposes of granting EMI options</u>*" (emphasis added)

60. It was suggested that this means that the market value as determined by SAV must be used when deciding how many options to allocate. I do not accept that submission. The wording quoted above in my view means no more than that HMRC will accept the stated AMV and UMV for the purpose of assessing the tax consequences of the grant of the options. It does not seek to stipulate how many options the company must allocate to its employees (provided, of course, that the applicable maxima are not exceeded). That is a matter for negotiation between the company and its employees.

61. For those reasons, I find that the parties concluded their agreement by reference to the real market price of Ebury's shares, and that Ebury did not agree to grant Ms Ajayi 22,472 options. Her entitlement was to the 3,000 options referred to in the option agreement.

(F) THE AOA CLAIM

62. The AoA Claim alleges that Ebury failed to implement the share transfer provisions in its Articles of Association by preventing Ms Ajayi from selling her shares. In Ms Ajayi's Re-Amended Particulars of Claim, the AoA Claim is asserted in respect of two categories of shares: the 3,000 shares that were allotted to Ms Ajayi pursuant to the 12 March 2015 option agreement (which Ms Ajayi converted to shares on 26

November 2015) and the shares that Ms Ajayi says she would have had if Ebury had granted her 22,472 options.

63. Ms Ajayi's written closing submission appears to indicate that the AoA Claim is pursued only in respect of the 3,000 shares: "*the [alleged] breach of contract was the failure to grant her these shares, rather than a breach of the share transfer process in the Defendant's Articles of Association. The Claimant's loss [in relation to the 22.472 options] is therefore the value of the shares at the current time as the breach has persisted to date*".

64. In any event, in view of the conclusions that I have reached in relation to the Salary Sacrifice Claim, Ms Ajayi's AoA Claim in respect of the claimed options over 22,472 shares does not strictly arise for determination. In the remainder of this section, therefore, my focus will be on Ms Ajayi's AoA Claim in relation to the 3,000 shares.

65. It is necessary to set out the relevant provisions of Ebury's Articles of Association in some detail. The relevant starting point is Article 20. Article 20.1 provides:

> "Upon a person becoming a Leaver… an irrevocable Transfer Notice shall be deemed to have been issued in respect of all the Bad Leaver Shares on the date 21 days after the date on which such person becomes a Leaver in which case the provisions of Article 18 will apply provided that the transfer price for such Bad Leaver Shares shall be the amount subscribed for such Bad Leaver Shares." (emphasis added)

66. Article 20.2 provides:

> "Upon a person becoming a Leaver… an irrevocable Transfer Notice shall be deemed to be issued in respect of all the Good Leaver Shares on the date 21 days after the date on which such person becomes a Leaver in which case the provisions of Article 18 will apply and the transfer price for such Good Leaver Shares shall be the Transfer Price agreed or determined in accordance with Article 18." (emphasis added)

67. Thus, an irrevocable transfer notice is deemed to have been issued in respect of all of the shares held by a "*Leaver*" of Ebury on the date 21 days after the date on which they became a Leaver. A "*Bad Leaver*" is entitled to receive only the amount that they paid to subscribe for the shares, whereas a "*Good Leaver*" is entitled to have their shares valued according to the procedure set out in Article 18.

68. Article 18 is entitled "*Share Transfer Procedure*" and lays down the procedure that any member of Ebury who wishes to transfer shares must follow. According to Article 18.1, the member is required to give a transfer notice to Ebury specifying the number of shares they wish to transfer, the price at which they wish to sell those shares, the name and address of any third party to whom they propose to transfer the shares, and whether the transfer notice is conditional on all the shares being sold. Article 18.2 provides that the sale price of the shares shall, subject to the approval of the Board and the Investor Director, be the price specified in the transfer notice. According to Article 18.3, when a transfer notice is deemed to have been given, *inter*

alia, pursuant to Article 20, it is treated as having specified that all the shares registered in the name of the vendor are included for transfer and that the transfer notice is not conditional upon all of the shares so specified being sold pursuant to the offer.

69. Articles 18.4 to 18.6 set out the procedure for valuing the sale price of shares when a transfer notice is deemed to have been given. Article 18.4 provides that the seller of the shares, the Board and the Investor Director shall seek to agree the sale price of the shares that are the subject of the deemed transfer notice. If agreement cannot be reached, then pursuant to Article 18.5 the Board is required to instruct an Independent Expert to determine the sale price of the shares in accordance with the methodology prescribed in Article 18.6.

70. Article 18.10 stipulates that a transfer notice is irrevocable: it cannot be withdrawn except with the consent in writing of the Board and the Investor Director. Article 18.11 provides that the Company shall be the agent of the seller for the purpose of sale of the shares.

71. Ms Ajayi alleges that, when she became a "*Leaver*", Ebury failed to carry out the steps stipulated in Article 18. In particular, it is alleged that:

> "In breach of Article 18.5 the Board (to whom the running of the business of the Defendant was delegated) failed to give any instructions to the Independent Expert and consequently no price was fixed. The Defendant (through its Board of Directors) also failed to take any other steps to seek to agree or fix a price or to facilitate the sale of the Claimant's shares."

72. If Ebury had complied with its obligations under the Articles of Association, Ms Ajayi claims that she would have been able to sell her shares in or around January 2016. Alternatively, she alleges that she would have been able to sell her shares in May or August 2017 as part of the offers made by Finbart BV and Vintage Investment Partners.

73. Ebury's main responses are that:

    i) Ebury was not in breach of Article 18.5 because, pursuant to Article 20, the share valuation provisions in Article 18 apply only to "*Good Leavers*" whereas Ms Ajayi was a "*Bad Leaver*"; and

    ii) alternatively, Ms Ajayi has suffered no loss as the result of any breach on Ebury's part, because she continues to retain her 3,000 Ebury shares and they have appreciated in value since the dates on which Ms Ajayi says she would have sold them.

(1) Was Ms Ajayi a "Good Leaver"?

74. In Ebury's Articles of Association, a "*Good Leaver*" is defined as:

> "A holder of B Ordinary Shares who… (a) is an employee or consultant of any Group Company and ceases to be an

> employee or consultant of the Group Company and who is not a Bad Leaver…".

75. A "*Bad Leaver*" is defined as someone falling within any one of the six categories set out in (a) to (f) of the definition in Article 2.1. Ebury relied in particular on (e), which provides that the term "*Bad Leaver*" includes a holder of B Ordinary Shares who:

> "is a consultant of any Group Company who terminates his consultancy on or before the third anniversary of the commencement date of his consultancy with the Group."

76. Ebury says Ms Ajayi falls within this provision because she was a consultant and her engagement was terminated before the third anniversary of its commencement.

77. On Ebury's case, Ms Ajayi's engagement with Ebury commenced in March 2013 and ended in or around December 2015 when her consultancy agreement expired. There is some discrepancy in the documents as to whether the agreement (if entered into in the first place) expired on 31 December 2015, 1 January 2016 or 31 January 2016. For the present purposes, though, this does not matter. In my view the words *"a consultant… who terminates his consultancy on or before the third anniversary of the commencement date of his consultancy"* do not include cases where a consultancy agreement comes to an end by the effluxion of time, but only cases where the consultant him/herself brings the agreement to an end.

78. That conclusion follows, first, from the language used: "*a consultant of any Group Company <u>who terminates</u> his consultancy*". In my view, this wording naturally refers to some action taken by the consultant to bring the agreement to an end before its natural expiry. Indeed, it would be an unnatural use of language to describe the termination of an agreement on the expiry of a prescribed time-period as termination "*by*" either of the parties.

79. The conclusion is strengthened in my view by considering sub-clause (e) in the context of sub-clauses (a) to (f) as a whole. Sub-clauses (a), (c), (d) and (f) concern cases where the employee/consultant is properly summarily dismissed or their employment/consultancy is otherwise validly terminated by the company. Sub-clauses (b) and (e) concern cases where the consultant/employee terminates the agreement: being either an employee who resigns (sub-clause (b)) or a consultant who terminates his agreement (sub-clause (e)). There is a certain logic in treating a person as a Bad Leaver, and thereby significantly limiting the benefit he/she can obtain from his/her share options, in those circumstances, each of which involves either an engagement coming to a premature end or the bringing to an end of an engagement of indefinite duration. It is difficult to see how that logic can extend to a person whose engagement was from the outset one for less than 3 years but who was nonetheless granted share options.

80. On the contrary, the consequence of Ebury's approach to this issue – which would mean for example that a person engaged as a consultant for a 2-year fixed term and granted share options would always be a *"Bad Leaver"* – would be absurd since it would undermine the whole point of granting the options.

81. Ebury in written closing submission sought to advance an alternative argument, namely that on Ms Ajayi's own case she had been an employee, not a consultant, and she was therefore a *"Bad Leaver"* because her employment came to an end less than three years before its commencement, relying *inter alia* on Ms Ajayi having stated an employment commencement date in March 2013 in her Employment Tribunal claim against Ebury. Ms Ajayi stated in her witness statement that she had worked for Ebury as its finance director from May 2011 to December 2015, i.e. a period of more than four years, albeit (she said) the period from May 2011 to February 2013 was unremunerated. Ebury did not advance in its statements of case any alternative case to the effect that Ms Ajayi was a *"Bad Leaver"* by reason of having been an employee who was summarily dismissed, resigned or whose employment was terminated on notice by Ebury within sub-clauses (a) to (c) respectively of the definition of *"Bad Leaver"*. The case set out in Ebury's written opening at trial was squarely based solely on the contention that she was a *Bad Leaver* by reason of having been a consultant whose engagement ended less than 3 years from its commencement. I do not consider that it would be fair to permit Ebury now to advance an unpleaded case based on Ms Ajayi's status as an employee.

82. For these reasons, I consider that Ms Ajayi was a "*Good Leaver*" within the meaning of Ebury's Articles of Association.

83. On that basis, it is common ground that Ebury acted in breach of its Articles of Association by not initiating the steps required by Article 18, including by instructing an independent expert to determine the value of Ms Ajayi's shares.

(2) Did Ms Ajayi suffer any loss?

84. Ms Ajayi contends, first, that as a result of Ebury's failure to comply with the valuation procedure, she was legally precluded from selling her shares by reason of the irrevocable transfer notice deemed by Article 20.1 to have been served when she left the company.

85. Upon the termination of Ms Ajayi's engagement with Ebury, a transfer notice is deemed to have been given pursuant to Article 20. Since Ms Ajayi was a "*Good Leaver*", this had the consequence of initiating the share valuation procedure set out in Article 18, which did not occur.

86. However, that does not mean that Ms Ajayi is precluded from selling her shares. The effect of the transfer notice, under Article 18.11, was to constitute the company Ms Ajayi's agent for the sale of the shares at the transfer price to be arrived at pursuant to the procedure set out in Article 18. The transfer notice did not deprive Ms Ajayi of title to the shares, nor remove her right to sell them. She remained a shareholder, and is entitled to serve notice under Article 18.1 to start the transfer procedure afresh.

87. Ms Ajayi also alleges that if Ebury had observed the provisions in its Articles, then she would have sold her 3,000 shares in January 2016 or, alternatively, in May or August 2017 (when an investor bought a significant number of shares in the company). Ms Ajayi also gave some indications at trial that she considered that she could have sold her shares in an investment/share sale round that occurred on 3 November 2015.

88. However, there are several difficulties with this contention.

89. First, the share transfer provisions in the Articles, in particular in Articles 18 and 20, do not guarantee or promise that any employee or other shareholders' shares will be sold. They are, rather, in the nature of pre-emption provisions. It would therefore be incorrect in my view to regard them as imposing positive duties on the company in favour of the shareholder to bring about a sale, and equally incorrect to regard the absence of a sale as a loss arising in the ordinary course of things from a failure to follow the procedures set out in Article 18.

90. Secondly, it was common ground between the parties' experts that the share price for a minority holding in Ebury's shares throughout the period in which Ms Ajayi says she would have sold her shares was £78.05.

91. In the closing submissions filed on behalf of Ms Ajayi, it was suggested that Mrs Ajayi was most likely to have been able to sell her shares as part of an investment round on or about 8 August 2017, and that the experts ought to be asked to value Ebury's shares as at that date.

92. However, both experts have already expressed their view as to Ebury's share price as at August 2017. Ebury's expert, Mr Hodgen, said in his report:

> "In my opinion it is necessary to recognise that the price paid in the Market Value share transactions between 3 November 2015 to 9 August 2017 appears to have been unchanged at £78.05"

93. The claimant's expert, Mr Cook, agreed with that assessment. In his report, he noted that:

> "The share price for transactions in minority holdings reported remained at £78.05 throughout the period November 2015 to October 2017."

94. The fact that the relevant share price as at August 2017 was £78.05 also seems to have been stated in Ms Ajayi's Re-Amended Particulars of Claim § 39:

> "Without prejudice to the Claimant's primary claim that she would have sold her shares in early 2016 as a Leaver, the Defendant was accordingly aware by September 2016 that the Claimant wished to sell her shares. In May and August 2017, by respectively Finbart BV and Vintage Investment Partners, offers were made by outside third parties to purchase Leavers shares. The Claimant will seek disclosure in relation to any Leavers who were able to sell their shares on either occasion. The Claimant was not given the unencumbered opportunity to sell her shares on either occasion. In the alternative to paragraph 20 above, had the Defendant acted in accordance with the Articles, the Claimant would have sold her shares at the same price of £78.05 on one of those occasions." (emphasis added)

95. Accordingly, I am not persuaded that it is necessary for there to be a revaluation of Ebury's shares in respect of their value as at August 2017.

96. It was also common ground between the experts that the current value of the shares, 3,000 of which Ms Ajayi continues to hold, is well in excess of £78.05. Pursuant to Moulder J's order dated 21 December 2018, 30 January 2019 was nominated as the date for the current valuation of the shares. According to Mr Cook, Ms Ajayi's expert, the value per share at that date was £268.75. According to Ebury's expert, Mr Hodgen, the share price as at 31 January 2019 was £113.45.

97. For the present purposes, the difference between these valuations is immaterial. On either view, the value of Ms Ajayi's 3,000 shares has appreciated since the period when she claims she would have sold her shares, and it is currently far in excess of the share price of £78.05 as it stood then. On that basis, I am not satisfied that Ms Ajayi has proven any loss in respect of which she may presently claim substantial damages.

98. For completeness, I should mention that Ebury referred to grounds on which Ms Ajayi could not in fact have participated in the investment/share sale rounds in November 2015 and August 2017. However, in the light of my conclusion above it is unnecessary to explore that issue.

99. During trial Ms Ajayi gave some indications that she considered that she could not in practice realise her shareholding and/or that Ebury would not co-operate in facilitating a sale. In addition, following the hearing on 9 September 2019 I received from Ms Ajayi an email on 4 November 2019 (copied to counsel to Ebury) indicating that according to an article in the *"Financial Times"* Ebury has sold 51% of its shares to Santander Bank for £350m, including £280m of shares bought from existing shareholders, in a transaction of which Ms Ajayi was not informed. I refrained from inviting Ebury to comment on this matter, because in my view it does not relate to an issue arising for determination in the present proceedings. Ms Ajayi advances no claim in this case to the effect that Ebury has wrongly inhibited or failed to facilitate a sale of Ms Ajayi's shares, other than the specific allegation of breach of Article 18 which I have addressed above. Any such claim would have to be advanced in other proceedings.

100. Ms Ajayi sent a further email on 26 November 2019, copied to counsel for Ebury, stating that on 14 November 2019 Companies House published Ebury's Statement of Allotment of Shares (SH01) showing that Ebury's current share price was £272.22 as at 3 October 2019 with all classes of shares having the same value. Ms Ajayi said this made the share price of £113.45 out of date and redundant. However, as I explain above, the salient point in the context of the present claim is that there remains no reason to believe that Ms Ajayi's 3,000 shares are worth any less than the share price of £78.05 as it stood at the time when Ms Ajayi claims she would have sold her shares but for Ebury's breach.

101. In her documents submitted on 13 December 2019 and 10 January 2020, Ms Ajayi has submitted that part of her case is that Ebury refused to sell her shares in 2017 unless she *"stopped causing trouble"*, instead selling the shares of another employee who was leaving Ebury. Ms Ajayi says her case is that the 3,000 shares she holds have no value in her hands because she is unable to transfer them: there is no ready

market for the shares save to the extent that Ebury includes them in one of its investment rounds, and it has failed to do so, in breach of the Articles of Association.

102. That is not, however, the case Ms Ajayi has advanced in this claim. Paragraph 39 of Ms Ajayi's Re-Amended Particulars of Claim, quoted in § 94 above, alleged that in May and August 2017 Ms Ajayi was not given *"the unencumbered opportunity to sell her shares on either occasion"*. The reference to an *"unencumbered"* opportunity to sell refers to Ms Ajayi's case that because an irrevocable transfer notice was deemed to have been served in relation to her shares on 31 December 2015, the shares were taken out of her control (see §§ 84-86 above). In any event, any failure to permit or bring about the sale of Ms Ajayi's shares in 2017 caused Ms Ajayi loss only if the sale she could have made in 2017 would have been at a higher price than the current value of her shares. Ms Ajayi did not advance in her statements of case any case that Ebury is now unfairly prejudicing her or breaching its Articles of Association by refusing or failing to facilitate the sale of her shares, or that her shares have thereby been rendered worthless. On the contrary, Ms Ajayi's expert's evidence was that her shares are now worth more than they were in 2017, and it made no suggestion that the shares are nonetheless practically worthless (whether by reason of any breach by Ebury, or at all). It would be unfair to ask Ebury to meet, in this action, a new and unpleaded case to the effect that it is unlawfully preventing Ms Ajayi from realising the present value of her shares and/or has rendered them worthless.

103. For these reasons, although I find that Ebury was in breach of the provisions of its Articles of Association by failing to take the steps set out in Article 18 following a deemed transfer notice, I am not satisfied that Ms Ajayi has suffered any loss as a consequence.

(G) THE COUNTERCLAIM

104. As noted earlier, the employment tribunal proceedings between the parties were compromised pursuant to a COT3 agreement dated 17 August 2016.

105. Clause 1 of the COT3 agreement provides that:

> "The Respondent [i.e. Ebury], without admission of liability, agrees to pay the Claimant [i.e. Ms Ajayi] the sum of £118,000 (one hundred and eighteen thousand pounds) ("the Payment") within 14 days of receipt of this Agreement signed by the Claimant"

106. Pursuant to clause 2, Ms Ajayi agreed to accept this payment in full and final settlement of the claim before the Employment Tribunal and each and every claim "*for which a conciliation officer has jurisdiction*". Clause 3 contained an express carve-out for Ms Ajayi's claim in respect of the shares in Ebury. It provides that:

> "…the Claimant shall not be prohibited from pursuing a claim in respect of shares the Claimant claims the Claimant is owed in Ebury Partners Limited…"

107. Clause 6 of the COT3 agreement is the confidentiality clause. It provides that:

> "The parties confirm that they will keep the fact and terms of this settlement confidential save as to their legal or professional advisers or as required by law. The Respondent may also disclose the existence and terms of this Agreement to its senior employees (where necessary) provided that they agree to keep the information confidential."

108. The consequence of failing to comply with clause 6 is provided in clause 7. Materially, clause 7 provides as follows:

> "The Claimant undertakes that, if, the Claimant:
>
> 7.1 …
>
> 7.2 causes or permits information concerning the terms of this Agreement or the negotiations and discussions concerning the same or the circumstances concerning the termination of the Claimant's employment or engagement to enter the public domain (save where the disclosure of the information is ordered by a court of competent jurisdiction or where such disclosure is necessary or appropriate to:
>
> 7.2.1 the Claimant's respective professional advisers; or
>
> 7.2.2 any statutory, regulatory or governmental body; or
>
> 7.2.3 the Claimant's spouse and/or immediate family; or
>
> 7.3 …
>
> the Claimant will pay to the Respondent on demand a sum equivalent to the Payment in full [i.e. £118,000] as liquidated damages…."

109. Ebury's counterclaim against Ms Ajayi is based on the fact that, in her unamended Particulars of Claim dated 3 April 2017, she referred to the COT3 agreement. Paragraph 25 of that document said:

> "25. It is anticipated that the defendant will allege that the claimant has compromised the claim under the terms of a COT3 signed by the claimant on 17/08/2016 for the unfair dismissal brought against the defendant in the Employment Tribunal. The COT3 paragraph 2 states – "… each and every claim relating to the claimant's employment or engagement with the Respondent or its termination… for which a conciliation officer has jurisdiction…". The claimant stresses that the Employer (sic) Tribunal conciliation officer has no jurisdiction with regards to a claim of this nature.
>
> 26 …

> 27 The claimant asserts that the wordings of a COT3 should leave no doubt as to what the parties are contracting and in this case, the COT3 was not sufficiently clear to support the conclusion that both parties intended to exclude this claim."

110. Subsequently, the Particulars of Claim were amended so as to redact all references to COT3 Agreement. It appears that the redacted version was filed through HM Courts & Tribunals Public Search and Office Copies ("***CE File***") on 22 October 2018. The same day, all previous versions of the Particulars of Claim were marked confidential on the CE File.

111. Nevertheless, Ebury alleges that by referring to the COT3 agreement in her original Particulars of Claim, Ms Ajayi breached her obligation to keep the fact and terms of that agreement confidential. In consequence, it claims liquidated damages of £118,000.

112. Ms Ajayi's main responses to the Counterclaim are:

i) that the original particulars of claim never entered the public domain;

ii) that, by referring to the COT3 agreement in pre-action correspondence, Ebury's solicitors had waived its confidentiality; and

iii) Ms Ajayi's reference to the COT3 Agreement in the unamended Particulars of Claim did not constitute a breach of confidentiality since it was reasonably necessary for her to do so in order to protect her legitimate interests.

(1) Did the COT3 Agreement enter the public domain?

113. Ms Ajayi sought to support this contention by evidence that, even before the original Particulars were replaced by the redacted version, they did not appear on a public search of the CE File. In that connection, my attention was drawn to a screenshot of the CE File entry for these proceedings which appears to have been taken on 8 April 2019, indicating that the proceedings were issued on 3 April 2017 and that the CE File was last updated on 6 April 2018. The message "*No records were found*" appeared under the heading "*Case Event Log*".

114. However, CPR 5.4C(1) provides that "*the general rule is that a person who is not a party to proceedings may obtain from the court records a copy of (a) a statement of case…*". Accordingly, any member of the public would have been entitled to obtain a copy of the original Particulars of Claim from the Court's records. That remained the position from 3 April 2017 (when the Particulars of Claim was filed) until 22 October 2018 when they were marked as confidential. In view of this, it is difficult to see how Ms Ajayi can be said to have complied with her obligation to keep the fact and terms of the settlement agreement confidential.

115. Ms Ajayi also submitted that pursuant to CPR 5.4C(3)(c) and (d), a non-party can obtain a copy of a statement of case only if the case has been listed for a hearing or judgment had been entered on the claim.

116. CPR 5.4(3) provides that:

> "A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if —
>
> (a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;
>
> (b) where there is more than one defendant, either—
>
> (i) all the defendants have filed an acknowledgment of service or a defence;
>
> (ii) at least one defendant has filed an acknowledgment of service or a defence, and the court gives permission;
>
> (c) the claim has been listed for a hearing; or
>
> (d) judgment has been entered in the claim."

117. The word '*or'* that follows sub-clause (c) makes clear that the four conditions listed in sub-clauses (a) to (d) of CPR 5.4C(3) are alternative, not cumulative, requirements. It was therefore sufficient that Ebury, the only defendant to the proceedings, had filed its defence.

(2) Did Ebury's solicitors waive confidentiality?

118. Ebury's solicitors, EMW, in a letter to Ms Ajayi's solicitors dated 18 November 2016 said:

> "Your client is not entitled to bring the claim that she alleges. On 17 August 2016, your client reached a settlement with Ebury Partners UK Limited of a claim against the company (i.e. Ebury) in the Employment Tribunal…
>
> …
>
> Therefore, your client is contractually prevented from bringing the claim stated in your most recent letter"

119. I do not consider that the solicitors thereby waived confidentiality in the COT3 agreement. EMW's letter was addressed solely to the solicitors acting on behalf of Mrs Ajayi, the counterparty to the COT3 agreement, and did not involve the disclosure of the agreement to any third party.

(3) Does Ms Ajayi have a defence?

120. The general exceptions to duties of confidentiality were considered, in the banker-customer context, in the well-known case *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461. The Court of Appeal held that a duty of confidentiality was an implied term of the contract between a banker and its customer,

but that the duty was subject to exceptions. These exceptions included one variously expressed as follows:

> "… (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer. … A simple instance of the third class is where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft." (p473 per Bankes LJ)
>
> "I think it is clear that the bank may disclose the customer's account and affairs to an extent reasonable and proper for its own protection, as in collecting or suing for an overdraft; …" (p481 per Scrutton LJ)
>
> "… the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank have the right to disclose such information when, and to the extent to which it is reasonably necessary for the protection of the bank's interests, either as against their customer or as against third parties in respect of transactions of the bank for or with their customer …" (p486 per Atkin LJ)

121. Scrutton LJ indicated that exceptions might be implied even if the duty of confidentiality were express rather than implied (the latter being the basis on which the case proceeded):

> "It might be possible to rest the duty on the express words in the bank's pass book: "The officers of the bank are bound to secrecy as regards the affairs of its customers," though even then exceptions must be introduced by implication." (p480)

122. These principles have been applied in the context of the confidentiality of arbitrations, where a well-accepted exception applies in circumstances where disclosure is reasonably necessary to protect the legitimate interests of a party to the arbitration. Colman J said in *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243, 249, after citing from *Tournier*:

> "Implicit in all these formulations of the scope of the duty of confidence is that the bank should be able to disclose the information if to withhold it would or might prejudice the bank in the establishment or protection of its own legal rights vis-à-vis the customer or third parties. The essence of the matter is that it might need to disclose the information either as the foundation of a defence to a claim by a third party, or as the basis for a cause of action against a third party.
>
> In my judgment a similar qualification must be implied as a matter of business efficacy in the duty of confidence arising under an agreement to arbitrate. If it is reasonably necessary for the establishment or protection of an arbitrating party's

> legal rights vis-à-vis a third party, in the sense which I have described, that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it would not be a breach of the duty of confidence."

123. Colman J applied the same principle in his later decision in *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272, holding there that the own interests exception did not justify disclosure of an arbitration award and reasons to members of the following market because it was not necessary but merely helpful:

> "Although in this case the disclosure of the award and reasons may have a persuasive effect on the following market, their disclosure would not be for the purpose of founding the basis of a cause of action against the reinsurers. The arbitrators' determination of the issue as between the reassured and the leading reinsurer, not being binding on the following reinsurers, would be wholly irrelevant to the founding of any cause of action on the part of the reassured. It would have no greater relevance than, for example, counsel's opinion on the issues common to all reinsurers. The cause of action against the other reinsurers could be perfectly comprehensively formulated and established without reference to the award.
>
> The mere fact that an arbitration award and reasons may have a commercially-persuasive impact on third parties with whom the reassured has contracted and against whom the reassured has a claim identical to that the subject of the award does not, in my judgment, bring the award within any exception to the general rule that it is to be treated by both the parties to it as confidential. The scope of the qualifications to the duty of confidence is implied as a matter of business efficacy. If one starts from the underlying assumption that the parties to an arbitration agreement impliedly agree that the award and reasons are to be kept as confidential as possible and only disclosed where that is unavoidably necessary for the protection of the rights of the parties, it follows that as a matter of business efficacy the scope of the qualification cannot possibly extend to purposes which are merely helpful, as distinct from necessary, for the protection of such rights. If the scope of the qualification extended to disclosure that was helpful as distinct from necessary, an arbitration award would be divested of its confidential status in what would potentially be a very wide area of commercial activity."

124. Although Colman J in the passage quoted above uses the words *"unavoidably necessary",* I do not regard that formulation as glossing the test of reasonable necessity stated by Scrutton and Atkin LJJ in *Tournier* (the approach in which Colman J was applying by analogy) and by Colman J himself in *Hassneh.* Nor was it, in any event, necessary for any such gloss to be applied for the purpose of the decision in *Insurance Co:* disclosure to the following market in that case would have

been commercially helpful but not reasonably necessary for the protection of the lead insurer's interests: as Colman J pointed out, the arbitration award and reasons did not bind the following market and could be regarded as having no greater relevant to it than an opinion of counsel.

125. I also note that the editors of Russell on Arbitration (24th edition, 2015) state at § 5-221 that the exception is available when "*it is reasonably necessary to establish or protect a party's legal rights as against a third party by founding a cause of action or a defence to a claim"*.

126. In *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314, Potter LJ (with whom Brooke LJ and Beldam LJ agreed) identified the implied term of confidentiality in arbitration as a term implied as a matter of law, as a necessary incident of a definable category of contractual relationship (p326). He identified that, in that context, the court would give leave for disclosure of arbitration materials when reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against, or defend a claim or counterclaim made by, that third party. He added in that context:

> "… I do not think it is helpful or desirable to seek to confine the exception more narrowly than one of 'reasonable necessity'. While I would indorse the observations of Colman J in the Insurance Co case [1995] 1 Lloyd's Rep 272 at 275 that it is not enough that an award or reasons might have a commercially persuasive impact on the third party to whom they are disclosed, nor that their disclosure would be 'merely helpful, as distinct from necessary, for the protection of such rights', I would not detach the word 'reasonably' from the word 'necessary'…. When the concept of 'reasonable necessity' comes into play in relation to the enforcement or protection of a party's legal rights, it seems to me to require a degree of flexibility in the court's approach. For instance, in reaching its decision, the court should not require the parties seeking disclosure to prove necessity regardless of difficulty or expense. It should approach the matter in the round, taking account of the nature and purpose of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is directed and the practicality and expense of obtaining such evidence or information elsewhere." (p327)

127. A similar approach was taken in *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184, though the court added the following warning:

> "106. As I have said above, this is in reality a substantive rule of arbitration law reached through the device of an implied term. That approach has led to difficulties of formulation and reliance (perhaps, over-reliance) on the banking principles in Tournier.

> 107. In my judgment the content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue. The limits of that obligation are still in the process of development on a case-by-case basis. On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure."

128. This warning reflected the point made by the Privy Council in in *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich (Bermuda)* ([2003] UKPC 11 quoted in part in *Emmott* § 92) that:

> "20. The present case involves the construction of an express confidentiality agreement and whether the later use of the award to support an issue estoppel comes within the scope of enforcement. For this reason more general statements concerning the privacy of arbitration proceedings and the duty of one party to respect the confidentiality of the other are of less assistance and relevance. The Ali Shipping case, like the present case, concerned the use in one arbitration of material obtained in an earlier arbitration with a view to supporting a plea of issue estoppel in the later arbitration. The parties were not however the same and the decision of the Court of Appeal to grant an injunction restraining the use of the material was based upon the view that the plea was clearly unsustainable. However Potter LJ, who delivered the leading judgment, having followed Dolling-Baker v Merrett (sup) affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term (p 326) and then to formulate exceptions to which it would be subject (pp 326-7). Their Lordships have reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation. But when it comes to the award, the same logic cannot be applied. An award may have to be referred to for accounting purposes or for the purpose of legal proceedings (as Aegis referred to it for the purposes of the present injunction

> proceedings) or for the purposes of enforcing the rights which the award confers (as European Re seek to do in the Rowe arbitration). Generalisations and the formulation of detailed implied terms are not appropriate. … It is interesting to note that the reasoning in the above referred to passages of the judgment of Potter LJ seem to have been strongly influenced by the description of the duty of confidentiality a banker owes to his customer given in Tournier v National Provincial and Union Bank of England [1924] 1 KB 461 both in the implied term and the exceptions to the duty. The Tournier case was not cited or expressly referred to in Ali Shipping. But the use of parallel reasoning in both cases shows that the court in Ali Shipping was not considering what rights an award gave rise to nor any question of what is involved in the enforcement of an award."

129. In the present case, the agreement recorded in the COT 3 form included an express confidentiality agreement, and express exceptions relating to disclosure to the parties' legal or professional advisers, disclosure required by law, and disclosure by Ebury to its senior employees where necessary provided that they agreed to keep the information confidential. The undertakings in clause 7 also in effect permitted Ms Ajayi to make any necessary or appropriate disclosure to her spouse and/or immediate family, and to any statutory, regulatory or governmental body.

130. Ebury submits that in these circumstances, there is no need for the court to define the boundaries of the duty of confidence, and the cases relating to arbitration materials are not applicable.

131. I would accept that where the parties have express agreed terms of confidentiality, including express exceptions, the court should proceed with caution before finding implied further exceptions. However, a term may be implied provided that it passes the ordinary tests for implication of terms, in particular that (1) it is reasonable and equitable; (2) it is necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it is so obvious that 'it goes without saying'; (4) it is capable of clear expression; and (5) it does not contradict any express term of the contract (*Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 §§ 18 and 21). As noted earlier, Scrutton LJ contemplated in *Tournier* that exceptions might be implied even where there is an express agreement for confidentiality. By extension, the same can be true where such an agreement contains limited exceptions, provided the conditions for implication of a term can be satisfied.

132. In the present case, the express exceptions in the COT 3 agreement did not extend to reliance on the agreement in the context of legal proceedings between the parties to which the agreement was relevant, save to the extent that such reliance might be regarded as disclosure "*required by law*" or to a statutory, regulatory or governmental body. However, it is obvious that either party might need to refer to the agreement in the context of such proceedings. For example, had Ebury wished to rely on the agreement as a defence to the present claim (as its correspondence had suggested), then it would have been obviously necessary for Ebury in its Defence to refer to the agreement and its terms. Equally, reference to the agreement would have been necessary in proceedings to enforce the agreement to pay in clause 1, the undertaking

given by Ms Ajayi in clause 4 to indemnify Ebury against specified matters, the promise by Ebury to pay damages in certain events in clause 8, or Ebury's obligation in clause 10 to provide a reference. In my judgment, a term is to be implied into the agreement that either party is permitted to refer to the agreement and/or its terms where to do so is reasonably necessary in legal proceedings brought by or against the other party to the agreement. That term is necessary, obvious, capable of clear expression, and does not contradict the express terms of the agreement.

133. Ms Ajayi's evidence was that she considered it necessary to address the COT3 Agreement in her Particulars of Claim in order to pre-empt a potential application by Ebury to strike out her claim on the basis of that agreement. The relevant context is as follows.

134. In pre-action correspondence, Ebury's solicitors (EMW) asserted repeatedly that Ms Ajayi's claim was precluded by the settlement recorded in the COT3 agreement. In their letter of 18 November 2016, the first substantive point EMW made in response to Ms Ajayi's claim was that she was "*contractually prevented from bringing the claim*" by virtue of the COT3 agreement.

135. EMW repeated this position in a letter dated 17 March 2017. In response to that letter, Ms Ajayi pointed out that the COT3 agreement was inapplicable to her breach of contract claim as "*the ET conciliation officer had and has no jurisdiction over a claim of this nature*".

136. Nevertheless, EMW maintained its position in a letter dated 23 March 2017. In that letter, EMW threatened to strike out Ms Ajayi's claim by reference to the COT3 agreement. It was said that:

> "The fact that the COT3 agreement provides a remedy does not preclude a strike out application. Indeed it reinforces a strike out application…"

137. That was the context in which Ms Ajayi's original Particulars of Claim were drafted.

138. I would accept that, as a matter of pleading convention, it was not strictly necessary for Ms Ajayi to anticipate Ebury's potential objection in her Particulars of Claim. The point could have been held over for a Reply. However, Potter LJ's statement in *Ali Shipping* suggests that the test of reasonable necessity carries with an element of flexibility that allows the court to take into account all the relevant circumstances. In my view the same approach should be taken in the present context: there is no reason to take a more rigid approach to the confidentiality agreement in the present case than to the confidentiality of an arbitration. Ms Ajayi's evidence was that she was as a litigant in person at the time when her Particulars of Claim were drafted. Although she had written to EMW Solicitors setting out the reasons why she believed that there were no grounds for striking out her claim by reference to the COT3 agreement, she said in evidence that she believed nonetheless that EMW might attempt to do so. The correspondence from Ebury's solicitors amply justified that view. In these circumstances, I consider that it was reasonably necessary for Ms Ajayi to refer to the COT3 agreement in her Particulars of Claim in order to attempt to prevent her claim from being liable to be struck out.

(H) CONCLUSIONS

139. For the reasons stated above:

i) Ms Ajayi's Salary Sacrifice Claim fails;

ii) as regards the AoA Claim, Ebury was in breach of the share valuation provisions in its Articles of Association, but Ms Ajayi has not established that any loss was caused by that breach; and

iii) Ebury's Counterclaim fails.