Neutral Citation Number: [2016] EWCA Civ 407

Case No: A2/2014/3664

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, QUEEN'S BENCH DIVISION
HHJ RICHARD SEYMOUR QC
HQ2013XZ04837

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 28th April 2016

Before :

LORD JUSTICE MOORE-BICK
VICE PRESIDENT OF THE COURT OF APPEAL
LORD JUSTICE PATTEN
and
LADY JUSTICE GLOSTER

Between :

ELLISTON	**Claimant/ Respondent**
- and -	
GLENCORE SERVICES (UK) LTD	**Defendant/ Appellant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr David Craig QC (instructed by **Linklaters LLP**) for the **Appellant**
Mr Akhlaq Choudhury QC (instructed by **GRM LAW**) for the **Respondent**

Hearing dates: Wednesday 20 January 2016
Thursday 21 January 2016

Judgment
As Approved by the Court

Lady Justice Gloster:

Introduction

1. This is an appeal against an order of HHJ Richard Seymour QC (sitting as a judge of the High Court) dated 24 October 2014, in which he gave judgment in favour of the respondent, Richard Paul Elliston ("the respondent"), in the sum of £418,774 against the appellant, previously known as Xstrata Services (UK) Limited ("the appellant"). The issue in the appeal is whether the judge was correct to conclude that, in the circumstances, the appellant was in breach of contract in not paying the respondent a sum, defined under the latter's contract of employment as "the Prescribed Sum" ("the Prescribed Sum").

2. On the appeal, Mr David Craig QC appeared as counsel for the appellant and Mr Akhlaq Choudhury QC appeared as counsel for the respondent. Both counsel also appeared in the court below.

Factual background

3. The respondent was employed by the appellant as its company secretary from December 2003 until 2 August 2013. He was at all material times a qualified solicitor and, prior to his employment by the appellant, had been employed by Morgan Grenfell, and subsequently Deutsche Bank, from 1990 onwards.

4. Under the terms of his written contract of employment with the appellant ("the service agreement") he was entitled to payment of the Prescribed Sum in the event of termination of his employment after a Change of Control as therein defined.

5. The respondent was dismissed on notice after the merger between Glencore International plc ("Glencore") and Xstrata plc ("Xstrata") (of which the respondent had previously been a subsidiary), which obtained final regulatory and anti-trust approvals in May 2013. It was not in dispute that the merger involved a Change of Control.

6. What was in dispute was whether the respondent was, in the events which happened, entitled to payment of the Prescribed Sum. The respondent's claim was that the appellant was in breach of contract in not paying him the Prescribed Sum, after the termination of his employment on 2 August 2013 in the amount of £418,774.

7. The appellant's defence to that claim was that it was an express condition of an unsolicited, voluntary and gratuitous bonus award of £487,925 ("the Transaction Bonus") which had been made to the respondent in December 2012 (by letter dated 4 December 2012 but received by the respondent on 7 December 2012), that he would not be entitled to, and would agree to forego, the payment of the Prescribed Sum ("the condition").

8. The letter to the respondent dated 4 December 2012 sent by Mr Michael Davies, Chief Executive Officer of Xstrata, was in the following terms:

> "Dear Richard,

> The past year has been without doubt one of the most challenging for employees in Xstrata's history. It has also been a very unsettling time. The task of achieving a merger between Xstrata and Glencore has brought with it many hurdles along the way and has been a real test of our character to rise up and meet such obstacles.
>
> I would like to thank you for the contribution you have made to get Xstrata to this point of the merger and am pleased to inform you that you have been awarded a transaction bonus of £487,925 in recognition of this.
>
> Sincerely,
>
> ML Davis"

Other employees of the appellant and Xstrata were sent letters in similar terms.

9. The appellant alleged at trial that the condition was first imposed orally by Mr Dominic O'Brien (at all relevant times Xstrata's General Manager Human Resources and Legal, acting on behalf of the respondent) at a meeting with the respondent on 10 December 2012, after the letter dated 4 December had been received and four days before the Transaction Bonus was paid on 14 December 2012. The appellant further contended that the respondent accepted the payment of the Transaction Bonus on that basis and that, accordingly, he could not then "double-dip" and also be paid the Prescribed Sum, as he sought to do by his claim.

10. There was no dispute before the court below, or indeed in this court, that the respondent had no contractual entitlement to the Transaction Bonus although such bonuses had been paid in the past, that it was an award made wholly for past services and that the respondent gave no consideration for it. It was a gratuitous promise, described by the respondent himself as a "voluntary payment". It was also common ground that it followed that the appellant was entitled to introduce such terms as it wanted in respect of the payment of that bonus (i.e. to amend the terms on which the payment was to be made).

11. The critical issues at trial were:

    i) whether the appellant had introduced such a term by making it clear during the meeting between Mr O'Brien and the respondent, that the Transaction Bonus was being paid in lieu of the Prescribed Sum, such that it was a condition of payment of the Transaction Bonus that the respondent forego his entitlement to the Prescribed Sum; in particular, the issue arose as to whether the respondent was told by Mr O'Brien merely that the appellant "preferred" that people did not "double dip" (as per the respondent's pleaded case), or whether he was told by Mr O'Brien expressly that the Transaction Bonus was being paid in substitution for the Prescribed Sum (as the appellant contended);

    ii) a subsidiary issue to the previous issue was what was the date at which the meeting between the respondent and Mr O'Brien took place, and in particular whether the meeting was (as the appellant asserted) before or (as the

respondent asserted) after payment of the Transaction Bonus on 14 December 2012; the respondent's case was that he had been told only after payment had been made on 14 December 2012 that payment was in lieu of any entitlement to the Prescribed Sum and that conditions could not be imposed on the Transaction Bonus retrospectively; the appellant's case was that the respondent had been told prior to payment on 14 December 2012;

iii) whatever words actually were used by Mr O'Brien, what would a reasonable individual in the respondent's position with all the background knowledge available to the parties at the time, have understood by what he was told by Mr O'Brien.

12. So far as the second issue was concerned, during the course of cross-examination at trial, the respondent ultimately accepted that his conversation with Mr O'Brien had indeed taken place before he was paid the Transaction Bonus, and not after it.

13. Various issues of construction in relation to the terms of the employment contract were also raised by the appellant. The judge found against the appellant on these issues and the latter did not pursue these arguments on appeal.

The judgment

14. The hearing took place on 14, 15 and 16 October 2014 and the judge gave judgment on 24 October 2014. Despite the judgment purportedly bearing a neutral citation reference, unfortunately it does not appear to be available on BAILII.

15. In relation to the appellant's defence that the respondent had agreed to forego payment of the Prescribed Sum by acceptance of the Transaction Bonus, which the judge referred to as the "Variation Defence", the judge summarised the defence and his views of it as follows, at paragraphs 13 to 16 and 25[1]:

> "13. The principal line of defence expounded in the Amended Defence, which I shall call in this judgment "the Variation Defence", was pleaded in paragraphs 17 to 19, inclusive, of the Amended Defence:-
>
> > "17. At a meeting between the Claimant and Mr. O'Brien on 10 December 2012, Mr. O'Brien, inter alia informed the Claimant that he was going to be awarded a bonus (i.e. the Transaction Bonus [which I have called the December Bonus]) in the light of the proposed merger between Xstrata and Glencore. Mr. O'Brien further informed the Claimant that this bonus would be in substitution for the Claimant's entitlement to a Prescribed Sum under his contract of employment, and that it would have been inappropriate for employees to "double-dip" by receiving a Transaction Bonus and a Prescribed Sum payment.

[1] All text in Bold font is my emphasis.

18. It was, accordingly, an express term of the award of the Transaction Bonus that it was in substitution for the Prescribed Sum payment under the Claimant's Employment Agreement, and accordingly that the Claimant had to forego [sic] any entitlement (and/or any claim) that he might have to the payment of a Prescribed Sum pursuant to his Employment Agreement.

19. The Claimant did not demur from this, and he clearly understood that it was a condition of the payment of the Transaction Bonus that he would not be entitled to, and would effectively forego [sic] any entitlement that he might otherwise have to, a Prescribed Sum payment pursuant to the Employment Agreement."

14. The legal consequences of what was alleged in these paragraphs were characterised variously in paragraph 23 of the Amended Defence:-

"Accordingly, the Defendant avers that:

(1) it was an express term of the award to the Claimant of the Transaction Bonus that the Claimant would forego [sic] any entitlement to and/or claim to a Prescribed Sum payment, alternatively it was a condition precedent of the award of the Transaction Bonus that he did so; alternatively,

(2) there was a collateral contract between the Claimant and the Defendant pursuant to which in consideration for the payment to him of a Transaction Bonus, the Claimant agreed to forego [sic] any entitlement that he might have to a Prescribed Sum payment pursuant to the terms of his Employment Agreement; and/or (in either case),

(3) the Claimant agreed, inter alia by his conduct in accepting the Transaction Bonus payment, to a variation to the Employment Agreement, pursuant to which he gave up any entitlement that he had to a Prescribed Sum payment in consideration for receiving the Transaction Bonus."

15. Perhaps the most conventional way of analysing what seemed to be the Variation Defence was that, in consideration of the payment of the December Bonus, Mr. Elliston agreed that the Service Agreement should be varied to the effect that clauses 9.4, 9.5 and 9.6 of the Service Agreement be deleted. **But however analysed, it was difficult to see how the pleaded legal consequences could flow, as a matter of law, from the alleged facts set out at paragraph 17 and paragraph 19 of the Amended Defence**. It was not alleged that at the meeting on 10 December 2012 Mr. O'Brien offered that Xstrata would make payment of the December Bonus if

Mr. Elliston agreed to the deletion of clauses 9.4, 9.5 and 9.6 of the Service Agreement. It was not alleged that Mr. O'Brien made any offer at all to Mr. Elliston. **All that was pleaded as having been said was that Mr. O'Brien "informed the Claimant that this bonus would be in substitution for the Claimant's entitlement to a Prescribed Sum under his contract of employment". Mr. O'Brien could "inform" Mr. Elliston of whatever he liked, but unless such information took the form of an offer to vary the Service Agreement in terms to which Mr. Elliston agreed, the giving of the "information" was a futile waste of time**. It was also pleaded that Mr. O'Brien said to Mr. Elliston at their meeting on 10 December 2012 that "it would have been inappropriate for employees to "double-dip" by receiving a Transaction Bonus and a Prescribed Sum payment". **No doubt Mr. O'Brien is entitled to his opinions. However, whatever Mr. O'Brien thought about the morality of Mr. Elliston seeking to rely upon the provisions of clause 9.4, 9.5 and 9.6 of the Service Agreement, Mr. Elliston was entitled to rely upon them as a matter of contract unless the Service Agreement had been varied so as to delete those clauses**. It was specifically not alleged in paragraph 19 of the Amended Defence that Mr. Elliston actually agreed to any thoughts expressed by Mr. O'Brien. **Rather what was contended was that he "did not demur from this". In other words, he remained silent. The proposition that acceptance cannot be inferred from silence in a contractual context is so trite as a matter of English law that it is almost embarrassing to have to mention it.**

16. **Notwithstanding what seemed to me to be the manifest deficiencies in the pleaded case of Xstrata as to the Variation Defence, I was not invited to strike it out, and so, de bene esse**, I heard the evidence which was said to be relevant to the pleas in paragraphs 17 to 19, inclusive, of the Amended Defence. I shall come to that evidence later in this judgment.

The Variation Defence

25. I have already commented upon the pleaded case of Xstrata as to the Variation Defence. **Unless that case was improved by the evidence of Mr. O'Brien, it was bound to fail. However, if the Variation Defence was, on the face of it, improved by the evidence of Mr. O'Brien, there existed the problems that what he said differed from the pleaded case**, which had presumably been based on information provided by him, and from the obvious conclusion to be drawn from the attempt in the letter dated 29 April 2013 which Mr. O'Brien wrote to Mr. Elliston to obtain from Mr. Elliston agreement to waive his entitlement to the "Prescribed Sum". The terms in

> which the waiver was sought indicated that this was the first occasion upon which the question of wanting a waiver had arisen. While it may be, as was suggested by Mr. David Craig, who appeared at the trial on behalf of Xstrata, that the question of waiver was raised, as it were to make assurance doubly sure, it was strange, if actually Mr. Elliston was considered already to have agreed not to claim the "Prescribed Sum", that that was not asserted in terms in the letter."

16. The judge then quoted extensively from paragraphs of Mr O'Brien's witness statement and from that of the appellant. Then at paragraph 30 he said:

> "30. The Variation Defence stood or fell on Xstrata's pleaded case as improved by the evidence of Mr. O'Brien. I am afraid that I felt unable to accept the evidence of Mr. O'Brien, insofar as it differed from that of Mr. Elliston as to the substance of the conversation on 10 or 11 December 2012 – the precise date was not important. **I was impressed by the way Mr. Elliston gave his evidence, which was measured and careful, despite a forceful cross-examination from Mr. Craig. I have already indicated that the pleaded case of Xstrata, insofar as Mr. O'Brien's evidence seemed to be an improvement upon it, actually cast doubt on the accuracy of the evidence of Mr. O'Brien**. I have also pointed out that what was written in Mr. O'Brien's letter to Mr. Elliston dated 29 April 2013, in the passage adverting to the waiver of any right to the "Prescribed Sum", did not support the case advanced on behalf of Xstrata at trial. However, these features were not the only material put before me at the trial which led to my conclusion that the evidence of Mr. Elliston as to the substance of his conversation with Mr. O'Brien should be accepted, and the evidence of Mr. O'Brien be rejected."

17. The judge then analysed at considerable length the further evidence in relation to the matter, including the appellant's communications with other employees, none of whom had sought to claim for the Prescribed Sum and none of whom gave evidence. For the purposes of this appeal it is necessary to quote the following paragraphs of the judgment:

> "67. It is to be noted that Mr. O'Brien said in terms to Mr. Sawyer, according to that account, that a written waiver was not required. At paragraph 17 of his witness statement Mr. O'Brien said, in relation to his conversation with Mr. Elliston, that, "I did not ask the Claimant for a specific acknowledgement or consent", but with Mr. Sawyer, it appeared, he had gone further and told him specifically that no waiver was required. However, the critical phrase in Mr. O'Brien's e-mail of 1 March 2013 was, "we expected people to respect the no double-dip principle". That is, essentially, exactly what Mr. Elliston contended Mr. O'Brien had said to him, and seems to have been what Mr. Wilkins contended Mr.

O'Brien had said to him. In other words, it was not a condition of payment of a "Transaction Bonus" that the recipient agree to forgo any entitlement to a "Prescribed Sum". Rather Xstrata expected recipients to do the decent thing and not claim. Another part of Mr. O'Brien's e-mail of 1 March 2013 which resonated with the evidence of Mr. Elliston as to what he was told by Mr. O'Brien was the reference to "in no case have to fight G for their PS". That appeared to be the same point as not having to "waste money on legal fees".

68. It was common ground between Mr. O'Brien and Mr. Elliston that, in the conversation between them on 10 or 11 December 2012, Mr. O'Brien had used the expression "double dip". That, apparently colloquial, expression seemed to have no very definite meaning, but the concept underlying it appeared to be that something was being claimed twice. If the conversation between Mr. O'Brien and Mr. Elliston had been to the effect asserted by Mr. Elliston, what he was told was that he was getting the December Bonus, something he already knew, and, in the circumstances, the honourable thing was not also to claim a "Prescribed Sum" – that would be double dipping. If the conversation had been to the effect which Mr. O'Brien claimed at the trial the concept of double dipping was irrelevant. In consideration of receiving the December Bonus Mr. Elliston had agreed to forgo any right to a "Prescribed Sum". Consequently double dipping was no longer possible. This consideration also supported the account of Mr. Elliston and did not support the account given at the trial by Mr. O'Brien.

69. Another aspect of the evidence of Mr. O'Brien in his witness statement that appeared odd was his contention in paragraph 19 that, "Following my discussion with the Claimant on 10 December 2012, I understood that a letter would be delivered to the Claimant and other recipients of the Transaction Bonus confirming payment". It was unclear from that sentence exactly what Mr. O'Brien meant. He was asked about it in cross-examination, and then said that actually it was a letter in the terms of the letter dated 4 December 2012 from Mr. Davis to Mr. Elliston to which he intended to refer. It followed that Mr. O'Brien was unaware, when he spoke to Mr. Elliston, or any of the other people he says he spoke to in London on or about 10 December 2012, that his interlocutor had already received the letter. That seems unlikely, not least because one would have expected that it would have become clear to Mr. O'Brien as soon as he raised the possibility of a "Transaction Bonus" with someone to whom he spoke, that that person already knew about it. I am afraid that I had a concern that, by the sentence which I have quoted, Mr. O'Brien was trying to create the impression, incorrectly, that the terms of

offer of a "Transaction Bonus" were fixed by him with all relevant persons in conversation before any letter of notification arrived.

70. A further matter which, in my judgment, supported Mr. Elliston's account, albeit a rather secondary consideration, was that Mr. Elliston made no attendance note of his meeting with Mr. O'Brien on 10 or 11 December 2012. As matters developed subsequently concerning whether or not Mr. Elliston had agreed not to claim a "Prescribed Sum", Mr. Elliston did make quite detailed attendance notes. That was not surprising, given that he is a qualified solicitor. If he had a conversation with someone which was relevant to his entitlement, or not, to a "Prescribed Sum", he made a note of it, starting with a note he made of conversations with Mr. John Burton, at that time company secretary of Glencore International plc, on 5 February 2013. The absence of an attendance note of the conversation with Mr. O'Brien on 10 or 11 December 2012 is at least suggestive of nothing which Mr. Elliston considered to be of significance having been said by Mr. O'Brien on that occasion.

71. The considerations which I have identified led me to my conclusion that I should accept the evidence of Mr. Elliston as to the substance of his conversation with Mr. O'Brien on 10 or 11 December 2012 in preference to the evidence of Mr. O'Brien given at the trial.

……

80. Mr. Craig went on, in his written closing submissions:-

"47. Note also C's telling comments about conditions being imposed by Mr. O'Brien at that meeting (when giving a lengthy answer not addressing the question that he had in fact been asked. Transcript Day 1, p.113 line 21 to p.114 line 16. …

48. See also Transcript Day 1, p.125"

81. If I had been persuaded on the evidence that Mr. Elliston could only have known by the time of his meeting with Mr. Burton on 5 February 2013 of the notion that the December Bonus was supposed to be in lieu of a "Prescribed Sum" because Mr. O'Brien had so informed him at their meeting on 10 or 11 December 2012, then obviously that would have affected my conclusion as to whose evidence as to that meeting to accept. However, the position was far less clear. Although Mr. Elliston wavered somewhat in the course of his cross-examination, he seemed to me really to be saying that his information as to the December Bonus being in lieu of a "Prescribed Sum" came from Mr. Wall at their conversation on 8 January 2013. I have to say that, on the basis that Mr. Elliston

did speak to Mr. Wall about the December Bonus on 8 January 2013, it seemed improbable that Mr. Elliston did not seek some information from Mr. Wall, and that Mr. Wall did not impart some information. The idea that there was a conversation about the December Bonus, but that nothing of substance was said, is challenging. What was the point of the conversation?

82. Mr. Wall was himself called to give evidence at the trial on behalf of Xstrata. He made a witness statement dated 6 August 2014. He did not deal in that witness statement with a conversation with Mr. Elliston on 8 January 2013. When cross-examined about it he said he did not recall it. However, he did not contend that there had not been such a conversation. What Mr. Wall did say, at paragraph 6 of his witness statement, was:-

"I believe it was understood by all involved that those individuals who had the benefit of Prescribed Sum provisions in their contracts of employment would not be entitled to receive the Prescribed Sum in addition to the Transaction Bonus. Indeed I could not say in good conscience that the payment of the Transaction Bonus was anything other than a direct early payment in lieu of the Prescribed Sum and regardless of whether employment was terminated. In my view there was no ambiguity about this whatsoever. I had several informal discussions with the Claimant and others, including Andrew Latham, Mark Sawyer, Martin Fewings and James Kelly, where we discussed our Prescribed Sum entitlements and the Transaction Bonus. Both the Claimant and I sat in offices adjacent to Trevor Reid and Mick Davis and therefore I believe that the Claimant would have been aware of the various discussions taking place."

83. **I have to say that I was not impressed by Mr. Wall as a witness**. He remained employed by Glencore plc, and so had not been entitled to a "Prescribed Sum" on any view. It seemed to me that the criticism of him by Mr. Choudhury in his closing submissions, Transcript, Day 3, page 87 line 24 to page 88 line 1, that he "was willing to say pretty much anything, however far away from the truth, in order to support his employer", was fair. For example, Mr. Wall volunteered nothing in his witness statement by way of explanation of his e-mail of 1 March 2013 which I have quoted, and was evasive, as it seemed to me, when cross-examined about it. However, the fact of the matter is that Mr. Wall asserted that there had been informal discussions between the executives in the London office about the "Transaction Bonuses", to which he contended Mr. Elliston was a party. At one point in his cross-examination Mr. Elliston appeared also to be asserting that. The fact of such discussions was relied upon by Mr. Craig in his closing submissions.

84. **I am inclined to find that Mr. Elliston actually found out about the December Bonus being supposed to be in lieu of a "Prescribed Sum" from Mr. Wall in the conversation of which Mr. Elliston spoke on 8 January 2013**. However, it was plain from the various e-mails of Mr. Wilkins, Mr. Sawyer, and others which I have quoted, that the various recipients of a "Transaction Bonus" were in contact, at least by 1 March 2013, about the question of any linkage between the "Transaction Bonus" and a "Prescribed Sum", and so it seems entirely credible that, in a small office, such discussions took place. Nonetheless, all I need actually be concerned with is whether I am satisfied that, as submitted by Mr. Craig, the only possible source of Mr. Elliston's information could have been Mr. O'Brien at their meeting on 10 or 11 December 2012. I am not satisfied of that.

85. I recognise that, over time, Mr. Elliston has given different dates as the date upon which he became aware of the contention that the December Bonus was supposed to be in lieu of a "Prescribed Sum". I also recognise that Mr. Elliston has advanced different dates at different times as to when exactly his meeting with Mr. O'Brien took place. Actually the date of the meeting with Mr. O'Brien was not important unless it was after the payment of the December Bonus, and only one version of Mr. Elliston's account, that in the Reply, contended for that. As to the date upon which Mr. Elliston became aware of the contention that the December Bonus was intended to be in lieu of a "Prescribed Sum", for the reasons which I have explained, **I am inclined to find that it was on 8 January 2013. It seems to me that that finding is supported by Mr. Elliston's attendance note of his meeting on 5 February 2013, with the reference to "learned of this at a much later date"**. It should be remembered that the attendance note was prepared by Mr. Elliston for his own use, albeit he may have contemplated that he might seek to rely on it to support a claim at a later date. Mr. Elliston must have contemplated that it was open to him, in preparing the attendance note, to omit anything which he may have said to Mr. Burton which he, Mr. Elliston, knew to be untrue. Consequently, it seems to me to be realistic to proceed on the basis that what Mr. Elliston recorded himself as having said to Mr. Burton was not merely what he did in fact say, but also was believed by him to be true at the time he made the relevant statements to Mr. Burton. If he had lied to Mr. Burton he would scarcely have recorded such lie in his own attendance note.

86. Realistically Mr. Craig did contemplate, in preparing his written closing submissions, that I might reach the conclusions as to the conversation between Mr. Elliston and Mr. O'Brien on 10 or 11 December 2012 which I have reached. On that

> hypothesis Mr. Craig submitted that, taken in the context in which it was said, Mr. O'Brien's comments, which I find he made, that "we prefer people don't double-dip or waste money on legal fees" modified the terms upon which the December Bonus had been offered, to the effect that Mr. Elliston could only take the December Bonus if he gave up any entitlement to a "Prescribed Sum", and Mr. Elliston accepted that offer.
>
> 87. I have already explained why I do not accept that the use of the words which I have found proved amounted to any modification to the award of the December Bonus.
>
> 88. If I had been persuaded that there was an attempt at a modification of the terms of the award, a number of questions would have arisen. One is whether, the award having been notified by the letter dated 4 December 2012, the terms of the award could later be modified. As the December Bonus was not a contractual bonus, at common law, at any rate, Xstrata could have changed its mind and not paid it. If it wanted to modify the basis upon which the award was made, the appropriate mechanism would seem to have been to withdraw it and re-award it on the new terms. If Xstrata wished to alter the character of the award from a non-contractual bonus to a contract requiring consideration in the form of a promise not to seek to enforce the provisions of clauses 9.4, 9.5 and 9.6 of the Service Agreement, what was required was at least a threat not to make the award unless agreement was forthcoming, but on my findings there was no such threat.
>
> 89. A further problem, if one was to find a contract to vary the Service Agreement in consideration of the payment of the December Bonus, having found an offer, would have been to find an acceptance. Mr. Craig contended for an acceptance by conduct."

18. Having quoted from *Khatri v Cooperatieve Raffeisen-Boerenleenbank BA* [2010] IRLR 715, the judge said:

> "91.What emerges from that passage, in my judgment, is that, to be effective as an acceptance arising from conduct, the conduct relied upon must be unequivocally referable to the relevant offer.
>
> 92. In the present case the award of the December Bonus was never withdrawn, or, on my findings, threatened with being withdrawn. Those features are important because what was relied upon as amounting to acceptance by conduct of an offer to make payment of the December Bonus in consideration of Mr. Elliston giving up his right to enforce clauses 9.4, 9.5 and 9.6 of the Service Agreement was what happened after the amount of the December Bonus was paid into Mr. Elliston's

> bank account on 14 December 2012. By the time of his closing submissions, although it has to be said that there was less clarity about it earlier in the trial, Mr. Craig did not contend that mere acceptance of the money into Mr. Elliston's bank account amounted to conduct of such a nature as to accept the offer for which he contended. That was plainly sensible. The holder of a bank account is in no position to refuse to accept an electronic payment into that account, at least unless he knows when it is coming. What Mr. Craig did rely upon was, first, not returning the money and, second, spending it. Mr. Choudhury submitted that those matters were equivocal, as they were equally capable of being referable to the original award of the December Bonus. Mr. Craig appeared to counter that that could not be so, because by the date of payment into the account only the offer to make payment of the December Bonus on terms that Mr. Elliston forgo the benefit of clauses 9.4, 9.5 and 9.6 of the Service Agreement, and not also an alternative, untrammelled award of the December Bonus, was available. However, that was not so. As I have said, the December Bonus was never withdrawn and no threat to withdraw it was ever made. **Taking the promised money and spending it was capable of being referable entirely to the award in the letter dated 4 December 2012, even if there had later been an attempt to vary the Service Agreement**."

19. Accordingly, for those reasons, the judge held that the respondent was entitled to payment of the Prescribed Sum and gave judgment in the agreed amount in his favour.

20. The judge refused permission to appeal merely stating that "an appeal would have no real prospect of success." I gave permission to appeal on the papers on 23 January 2015.

The appellant's case on the appeal

21. Although, in due course, I shall have to rehearse them in greater detail, the appellant's principal arguments on the appeal were that the judge had erred both in law and/or in fact in:

    i) making findings of fact for which there was no evidence and/or which were contrary to the evidence;

    ii) taking into account irrelevant matters;

    iii) failing to take into account relevant matters;

    iv) deciding the case on a fundamental misunderstanding of the appellant's defence, which wrongly infected his approach to the evidence;

    v) failing to give any, or any proper, reasons for the dismissal of the appellant's alternative case.

The respondent's case on the appeal

22. The respondent's principal arguments were that:

i) The appeal raised no issues of law and was no more than an appeal against the findings of fact made by the judge.

ii) On the critical issue of fact, namely what was said to the respondent by Mr O'Brien at the meeting on 10 December 2012, the judge found squarely in favour of the respondent: see paragraphs 30 and 71 of the judgment. The judge did so having carefully considered the credibility of the witnesses and the criticisms made of the respondent's evidence by counsel. In such circumstances, this was not a case where a Court of Appeal could conclude that the judge was "plainly wrong" or where it could permissibly come to a different conclusion based merely on a reading of the recorded evidence.

iii) The applicable principles in respect of such appeals, which have been recently restated by the Supreme Court were as follows:

a) an Appellate Court should not interfere with a trial judge's conclusions on primary facts unless it were satisfied that he was plainly wrong: *Carlyle v RBS Plc* [2015] UKSC 13 at paragraph 21; *McGraddie v McGraddie* [2013] UKSC 58 at paragraph 2;

b) it would only be on the rarest of occasions that an Appellate Court would be justified in finding that a judge had formed a wrong opinion on the facts given the privileged position he was in to assess credibility of witnesses' evidence and given his expertise in that task: *Carlyle* at paragraph 22; *Thomson v Kvaerner Govan Ltd* [2003] UKHL 33;

c) there were strong policy reasons for such an approach: see per Lord Wilson JSC in *In Re B (A child)* [2013] UKSC 33 at paragraphs 52 and 53;

d) even if a judge did not set out a particular item of evidence in his judgment he would be presumed to have taken the whole of the evidence into account: *Thomas v Thomas* [1947] AC 484, 492, per Lord Simonds;

e) none of the appellant's Grounds of Appeal came close to reaching the high threshold necessary for a successful challenge on the facts; and

f) in any event, the judge was right on the entirety of the evidence to reach the conclusion which he did.

Discussion and determination

Approach by an appellate court to reversing findings of fact by the trial judge

23. It is axiomatic that this court only very rarely reverses a trial judge's findings of primary fact, and then only if it is satisfied that the trial judge was plainly wrong. The authorities cited by Mr Choudhury, if authority is needed for the proposition, make

that manifestly clear. The question, however, is whether, in the light of the arguments presented to us on each side, we can be so satisfied in this case.

24. I make the further point that it is all too easy for an appellate court to criticise individual sentences or infelicities of language or reasoning of a trial judge, notwithstanding that at the end of the day his judgment on the entirety of the evidence may well have been correct. A judgment should be looked at in the round, particularly where the outcome depends on the judge's assessment of the credibility of the respective witnesses. It should not be picked over or construed as though it were a piece of legislation or a complex commercial contract. Nor should a judge be criticised for not mentioning every item of evidence.

25. It is with these salutary warnings in mind that I approach the arguments presented by Mr Craig on behalf the appellant and those presented by Mr Choudhury in response.

The critical issues which the judge had to decide

26. The critical issues which the judge had to decide were:

    i) the factual question as to what Mr O'Brien had actually said at the meeting on 10 December 2012; and

    ii) the legal, or at least evaluative, question as to how Mr O'Brien's words would have been understood by a reasonable person having all the background knowledge which would reasonably have been available to both parties in the situation in which they were at the time of the contract.

27. I turn therefore to consider the appellant's arguments that the judge's findings in relation to the first issue were plainly wrong.

The appellant's argument that the judge misunderstood the appellant's case

28. Mr Craig's first argument was that the judge had misunderstood the appellant's case and that this had wrongly affected (indeed Mr Craig argued that it "infected") his approach to the evidence of Mr O'Brien. Mr Craig submitted that the judge had effectively decided against the respondent's case on a pleading point – or, at the least, was hostile towards it - before he came to consider the evidence.

29. At paragraph 15 of the judgment, which I have quoted above, the judge addressed the appellant's pleaded case. I agree with Mr Craig that the judge's approach to the pleading was not merely over-technical but was also wrong. First of all the judge seemed to envisage that what was required was an express oral agreement between the parties that the service agreement "should be varied to the effect that clauses 9.4, 9.5 and 9.6 of the [service agreement] be deleted" and that the absence of such an allegation of express agreement was fatal to the appellant's case. That, in my judgment, was an overly technical approach. All that was required was an agreement to the effect that, if the respondent accepted the Transaction Bonus, he accepted that he could not claim the Prescribed Sum under the service agreement in the event of termination of his contract after the Xstrata merger with Glencore. That depended, in the first instance, as to whether Mr O'Brien made it clear at the meeting on 10

December that payment of the Transaction Bonus was subject to the condition; and, in the second, whether the respondent accepted the condition.

30. Second, the judge stated:

    i) that it was no part of the appellant's pleaded case that an offer was made to the respondent by Mr O'Brien when he spoke to him; and

    ii) that the appellant's pleaded case was that the respondent had accepted the variation by silence.

31. I agree with Mr Craig's submissions that both of these statements were wrong and indeed reflected a fundamental misunderstanding by the judge of the appellant's case. As Mr Craig submitted, the appellant's pleaded case in respect of "offer" and "acceptance" was clear:

    i) the respondent had no contractual entitlement to the payment of a Transaction Bonus; it was a gratuitous promise for which the respondent gave no consideration; see Amended Defence at paragraphs 6 and 22;

    ii) before payment, the appellant (by Mr O'Brien) imposed a condition on the payment of the Transaction Bonus, as it was entitled to do, that it was being paid in substitution for the Prescribed Sum and that, accordingly, the respondent would, if he accepted payment of the Transaction Bonus, have agreed to forego any entitlement to payment of the Prescribed Sum: see Amended Defence paragraphs 17-23; it was expressly pleaded that this varied the earlier gratuitous promise, consideration for which was given by the respondent foregoing his right to the Prescribed Sum, whether on the basis that it was a condition of that promise (i.e. it formed part of the offer) or on the basis that there was a collateral contract (i.e. the offer was to take the Transaction Bonus on the basis that it was in lieu of the Prescribed Sum and the respondent gave consideration by foregoing the Prescribed Sum); and

    iii) the respondent accepted the offer of the Transaction Bonus on such terms by his conduct in accepting payment.

32. In my judgment, paragraph 23 of the Amended Defence made this clear.

33. As Mr Craig submitted, and as I accept, the pleaded case was not, therefore, that the respondent had accepted the terms of the offer by his "silence". Paragraphs 15 to 17 of the Amended Defence, to which the judge referred in support of his conclusion that the pleaded case was that there was acceptance by silence, simply set out the factual description of what happened at the meeting between Mr O'Brien and the respondent. The legal case on variation and acceptance was set out at paragraph 23. I thus disagree with the judge's statement in paragraph 15 that:

> "But however analysed, it was difficult to see how the pleaded legal consequences could flow, as a matter of law from the alleged facts set out at paragraph 17 and paragraph 19 of the Amended Defence."

The pleaded legal consequences clearly could so flow.

34. Further, the judge's reference in paragraph 15 to the word "informed", and his belittling remarks that:

> "Mr O'Brien could "*inform*" Mr Elliston of whatever he liked, but unless such information took the form of an offer to vary the Service Agreement in terms to which Mr Elliston agreed, the giving of the "*information*" was a futile waste of time"

again display a misunderstanding on his part of the appellant's defence. As a matter of law, if the respondent had been told (i.e. "informed") that the gratuitous Transaction Bonus "would be in substitution for the Claimant's entitlement to a Prescribed Sum", then it would follow that the respondent could not accept the Transaction Bonus on any other basis.

35. Despite Mr Choudhury's arguments to the contrary, I agree with Mr Craig that the effect of the judge's misunderstanding of the appellant's case was significant because it appears, wrongly, to have affected the objectivity of the judge's approach not only to Mr O'Brien's evidence, which was critical, but also to the entirety of the appellant's case at trial. Apart from the passages in paragraph 15 which I have already cited, that is clear from inter alia passages in the remainder of paragraph 15, and paragraphs 16, 25 and 30 of the judgment which I have emphasised in the citation of the relevant paragraphs above.

36. I have difficulty both with the judge's view as to the inadequacies of the appellant's pleaded case and his view that because, as he saw it, Mr O'Brien's evidence "improved" the appellant's pleaded case, that necessarily undermined his credibility. First, as I have attempted to demonstrate, the judge wrongly analysed the appellant's pleaded case; and second, in my view, he was wrong to suggest that Mr O'Brien's evidence had "improved" that case: on the contrary, Mr O'Brien's evidence was entirely consistent with it. This court has had the benefit of the transcripts of the evidence given below. It is clear from the transcript of his evidence that Mr O'Brien's evidence was entirely consistent with what had been pleaded; namely that he had told the respondent during the meeting on 10 December 2012 that the Transaction Bonus was being paid in lieu of the Prescribed Sum and he would, therefore, not have any entitlement to the Prescribed Sum. Nor did the judge explain how Mr O'Brien's evidence was said to be an "improvement" on the pleaded case, other than to say that it was a bit more "definite".

37. These criticisms, taken on their own, would not in my judgment have led me to reverse the judge's finding as to what was said at the meeting on 10 December 2012. However there are various other aspects of the judgment which Mr Craig criticised, and it is to those which I now turn.

The evidence relating to the date at which the respondent first knew that the appellant was asserting that the Transaction Bonus was being paid or had been paid in lieu of the Prescribed Sum

38. Mr Craig's argument under this head was that the judge had made three critical and obvious mistakes in relation to the evidence as to the date at which the respondent first knew that the Transaction Bonus was being paid in lieu of the Prescribed Sum:

i) the first mistake was that the judge failed to take into account what, according to Mr Craig, was the respondent's effective admission in cross-examination that Mr O'Brien had imposed the condition at the meeting on 10 December 2012;

ii) the second mistake was that the judge failed to take into account, or give due weight to, the fact that the respondent admitted, in his meeting with Mr Burton, Glencore's company secretary, on 5 February 2013, that he *knew* that the Transaction Bonus was being paid in substitution for the Prescribed Sum;

iii) the third mistake was that, contrary to the evidence, the judge failed to find that the *only* conversation in which the respondent could have been so informed was that which he had had with Mr O'Brien on 10 December 2012; in this context, the judge had been wrong to find that the respondent had in fact first been told of the condition by Mr Wall on 8 January 2013, when there was no evidence whatsoever to support such a finding.

39. Mr Craig also criticised the judge for failing, in assessing the respondent's credibility, to give any adequate weight to the fact that he had changed his story on frequent occasions as to the date on which he first learnt that the Transaction Bonus was said to be subject to the condition that it was being paid in substitution for the Prescribed Sum.

40. It is necessary to set out the pleaded position and the evidence in some detail to determine whether Mr Craig's points are well made.

41. In his reply, where he responded for the first time to the appellant's allegation that the condition had been imposed on payment of the Transaction Bonus, the respondent's primary pleaded case was that the meeting with Mr O'Brien had taken place *after* transfer of the Transaction Bonus into his bank account and that no conditions could be attached to such payment retrospectively; his secondary pleaded case was that, if the meeting had taken place before 14 December (which he denied), the words which he admitted had been said by Mr O'Brien ("we prefer that people don't double-dip") were "far too vague and/or unclear" to amount to the imposition of any condition. He further pleaded: "No more was said on the issue of the Transaction Bonus."

42. However, in paragraphs 26 and 30 of his witness statement the respondent made it clear that actually much more had been said in the conversation with Mr O'Brien. There he said:

i) that he told Mr O'Brien that he was surprised/delighted to be paid a Transaction Bonus;

ii) that Mr O'Brien said not merely "we prefer that people don't double-dip" but additionally said "or waste money on legal fees"; and

iii) that he asked Mr O'Brien whether it was normal practice for Xstrata to pay Transaction Bonuses in addition to the annual bonus; that Mr O'Brien had replied that it was not uncommon; that the respondent pointed out that had never received such a bonus before; and that Mr O'Brien replied that "it would

normally be paid to employees who had played a key part in the acquisition, for example, by business development executives".

43. It is necessary to quote paragraph 26 in full. It read as follows:

> "26. Following the discussion about the promised Consultancy Agreement with Mr O'Brien, I said I was surprised/delighted to be paid a Transaction Bonus, at which point Mr O'Brien said "we prefer that people don't double-dip or waste money on legal fees". I was confused by this statement for the reasons that:-
>
> (a) the Transaction Bonus letter that I had already received prior to any meeting with Mr O'Brien, was clear and explicit;
>
> (b) the Transaction Bonus amount was equal to the MIA (which I knew had been turned down by shareholders) and my immediate thought was that this was paid in lieu of the MIA Initial Retention Bonus contrary to shareholders' wishes;
>
> (c) the amount of the Transaction Bonus was neither the same amount as the Prescribed Sum would be if it became payable in 2012 or 2013.
>
> I decided, in that moment, simply to change the subject to other matters, for example to the status of the competition authority approvals and the likely completion dates."

44. "MIA" was a reference to previous proposals for "management incentive arrangements" which had been offered in successive formal letters dated 28 March, 28 June 17 and 29 September 2012 to the respondent and other employees. They involved payment inter-alia of an "Initial Retention Bonus" which, in the case of the respondent, was the sum of £487,925 - i.e. precisely the same amount as the subsequent Transaction Bonus. All the arrangements had been subject to an express requirement that employees should forego their entitlement to the Prescribed Sum for a period of two years. The first letter (to which the others also expressly or by implication referred) had stated that:

> "In order to ensure you do not unfairly double-recover and receive both the Prescribed Sum and the retention arrangements in respect of the same period in the same circumstances, it is a condition of the retention arrangements set out in this letter that the right in your existing employment contract to claim the Prescribed Sum is suspended for the two-year period from the Effective Date so that in that period you'll have no right to receive the Prescribed Sum irrespective of the circumstances of the termination of your employment. "

Each letter was required to be signed by the respondent or other recipient, in which he acknowledged and agreed that:

> "it is a condition of payment of the Retention Arrangements that I will have no entitlement to the Prescribed Sum for the period of two years following the Effective Date save as set out in the letter".

The subsequent letters, which amended the previous arrangements, also contained such acknowledgement. They also contained an express statement that they were effectively an amendment to the respondent's contract of employment with Xstrata. The MIA were not approved by the Glencore shareholders and accordingly never came into effect.

The first alleged mistake

45. In relation to the first point, I accept Mr Craig's submission that the transcript shows that, in cross-examination, the respondent effectively admitted that he appreciated that the condition on the receipt of the Transaction Bonus was being imposed by Mr O'Brien at his meeting with him on 10 December 2012. The passage, in which the respondent is being cross-examined on paragraph 26 of his statement, reads as follows:

> "Q. You then reflected on the matter. You said that you were confused at the meeting and you thought you would take it away. What did you think it meant?
>
> A. There were things that were wrong with this, were there not? Let us take one of the things that were wrong. **We were being asked -- told there is some sort of change; something is going to be qualified; something is different for this.** It is a bonus letter, a transaction bonus letter, which has been issued by the Chief Executive, and **someone comes along and tells you this, not in writing.** You wonder why it is that the transaction bonus was written in the way it was. **Why was it not clear about what it was, that there was apparently now a condition attached to it, indeed, a very important one, or an explanation that in receiving the transaction bonus letter you were, effectively, amending your employment contract.** I mean, there are so many things that are wrong with this and you wonder why I am confused. I received a transaction bonus letter which is not the same as a retention bonus, which is the prescribed sum".

46. This seems to me to be an effective - and important - admission by the respondent that he was told that there was a change to the Transaction Bonus letter, that there was a "qualification" to that letter and that a "very important condition" was being attached to it. The "someone coming along" and telling him about this, but not putting it in writing, was self-evidently, in the context of this cross-examination, a reference to Mr O'Brien. It was on any basis a highly material admission.

47. But in my judgment, the judge failed to address this important item of evidence at the relevant points in his judgment where he was making findings in favour of the respondent. Thus, in coming to the conclusion which he did in e.g., paragraphs 68 and

71 of the judgment (to the effect that he preferred the respondent's account of his conversation with Mr O'Brien), he makes no reference to the admission. Likewise, although at paragraph 80 of the judgment, the judge obliquely referred to the passage from the transcript, when citing from Mr Craig's closing submissions, he did not quote the evidence or make any comment about it, let alone make any factual finding.

48. The passage in cross-examination which I have quoted above was not only relevant to the appellant's primary case that Mr O'Brien had expressly imposed a condition on the Transaction Bonus, but also to the appellant's alternative case that, objectively, a reasonable person having the relevant background knowledge would have clearly understood from what he had been told by Mr O'Brien that the condition was being imposed on the Transaction Bonus. But, as I conclude below, nor does the judge address this evidence in the context of that second issue. Accordingly, I am concerned that the judge apparently failed to take into account this evidence at all in reaching his conclusion, or to address its implications, notwithstanding that the passage featured in Mr Craig's written and oral closing submissions. Moreover the judge was clearly well aware of the importance of the issue, as he refers in paragraph 81 of the judgment to the fact that if he had been:

> "persuaded on the evidence that Mr. Elliston could only have known by the time of his meeting with Mr. Burton on 5 February 2013 of the notion that the December Bonus was supposed to be in lieu of a "Prescribed Sum" because Mr. O'Brien had so informed him at their meeting on 10 or 11 December 2012, then obviously that would have affected my conclusion as to whose evidence as to that meeting to accept."

However, contrary to Mr Choudhury's submissions, that passage does not, in my view, demonstrate that the judge addressed, or properly addressed, this important bit of evidence in coming to his conclusions.

49. I address the consequences of this error on the judge's part, and, in particular, whether the failure to deal with the evidence invalidates the judge's conclusion that the respondent was not aware of the condition prior to his receipt of the Transaction Bonus, below, after I have considered the totality of Mr Craig's arguments in relation to the judge's alleged errors in respect of the first issue.

The second alleged mistake

50. As I have summarised above, the second submission made by Mr Craig was that the judge failed, or failed adequately, to take into account a critical passage of the respondent's evidence, and that of Mr Burton, in relation to what the respondent during the course of a discussion with Mr Burton at a lunch on 5 February 2013, accepted he had been told and understood in relation to the fact that the Transaction Bonus was being paid in lieu of the Prescribed Sum.

51. The respondent's primary case was that he had not been told that the Transaction Bonus was being paid in substitution for the Prescribed Sum until *after* the Transaction Bonus had already been paid on 14 December 2012. Thus in summary the respondent's pleaded case was that:

i) the meeting between him and Mr O'Brien took place on 14 December 2012;

ii) the (non-contractual) promise to pay the Transaction Bonus had, by that time, "already been performed by transfer of the Transaction Bonus into the respondent's bank account and no conditions could be attached to it retrospectively".

52. As Mr Craig submitted and as I accept, the respondent's account as to the date of his discussion with Mr O'Brien shifted repeatedly. Thus, at the time of his Reply, the respondent's case was that the discussion was on 14 December 2012, but in any event this was *after* payment of the Transaction Bonus into his bank account. In paragraph 15 of his witness statement he said that, in a conversation with Mr Burton, Glencore's Company Secretary, on 18 April 2013, the respondent told Mr Burton that his conversation with Mr O'Brien had been "about 2½ weeks after the Transaction Bonus had been paid". That would have put the date of the conversation as about 31 December 2012. In paragraph 22 of his witness statement he was rather more equivocal as to whether the conversation with Mr O'Brien had occurred before or after payment had taken place. He stated that the conversation with Mr O'Brien took place on "Thursday or Friday, 13th or 14th December 2012." As I have already said, in cross-examination[2] the respondent ultimately, but very reluctantly, finally accepted that the conversation with Mr O'Brien must have taken place on 10 or 11 December 2012, but in either case *before* the payment was made to, and accepted by, the respondent on 14 December.

53. In paragraph 34 of the respondent's witness statement, he referred to a discussion with Mr Burton on 5 February 2013, where he informed Mr Burton that he (the respondent) had been told that the Transaction Bonus was being paid in lieu of the Prescribed Sum "at a much later date". His evidence was:

> "He [Mr Burton] said that Mr O'Brien had told everyone on receipt of the bonus that this was instead of the Prescribed Sum. He asked me what my view of it was. I told him that, in my case, I had not been told immediately but that this had been suggested at a much later date."

54. The respondent accepted, therefore, that he had been told that the Transaction Bonus was being paid instead of the Prescribed Sum. His position was that he had, however, been told this at "a much later date", i.e. after payment of the Transaction Bonus.

55. That was consistent with Mr Burton's evidence as to the conversation on 5 February 2013, who said in his witness statement:

> "9. I met with the Claimant on 5 February 2013 to discuss matters relating to the Merger, including a possible role for the Claimant within Glencore after the Merger.
> 10. At the meeting I told the Claimant that [Mr O'Brien] had informed me about the payments made to the Claimant and other Xstrata executives in December 2012. I asked the Claimant to confirm that each of the recipients who had a Prescribed Sum entitlement under their contract of employment had been spoken to [by Mr O'Brien] or [Mr Mehra] in order to explain to them

[2] See pages 89-93 of the transcript of day 1 of the trial.

that the Transaction Bonus was not an additional payment but was being paid in substitution of any future entitlement to a Prescribed Sum.
11. The Claimant denied that he had been informed that the payment had been made in substitution of the Prescribed Sum prior to receiving the payment. The Claimant explained that he had been so informed by [Mr O'Brien] after receiving the payment. The Claimant stated that as this conversation had come after receipt of a letter which stated that the Transaction Bonus was paid for his work in relation to the Merger, he did not regard this as legally removing his entitlement to the Prescribed Sum under his contract of employment."

56. In cross-examination Mr Burton described the conversation that he had with the respondent about this issue, in which the respondent accepted that he had been told that the Transaction Bonus was being paid in lieu of the Prescribed Sum, but maintained that this conversation came after payment and was therefore too late to be effective:

> ""Q. Just looking at paragraph 11 of your statement; "the claimant denied that the had been informed that the payment had been made in substitution of the prescribed sum prior to receiving the payment. The claimant explained to me that he had been so informed by Dominic O'Brien after receiving the payment."
>
> In fact, I would suggest that Mr Elliston didn't mention the date of payment or receiving the payment at all. He simply said that he was only told afterwards that he could not claim the prescribed sum. Isn't that a more correct account of the conversation?
>
> Mr Craig: My Lord, I rise because you will have seen from paragraph 35 of the claimant's own evidence that his case is that he said to Mr Burton that he was told this at a much later date. So I don't understand the basis, I mean, that question has clearly been put on a false basis.
>
> MR CHOUDHURY: I apologise if it was unclear. What I am suggesting he didn't mention was the words "prior to him receiving payment".
>
> A. No, actually, my Lord, quite the reverse. I think this is very crucial. This was a lunch between two experienced lawyers…**I have no doubt in my mind he had a very clear purpose. He was making a point in the conversation that he got the letter, he then received payment, then Mr O'Brien spoke to him, seeking to impose conditions**. He did that very clearly and I think for very obvious legal reasons, which your Lordship would appreciate…So I think that it was clear that that was Mr Elliston's case, that he only had the conversation after

> receiving payment, so as to put it beyond doubt in his initial legal case that the conversation subsequent to payment could not impose retrospective conditions on receipt of that payment.
>
> Q: I would suggest there was none of the legal detail that you seek to put on that conversation now, back in February 2013.
>
> A: And may I remind your Lordship that as Mr Elliston said in evidence yesterday, he had already instructed solicitors at this point in relation to this matter, and I think it is highly relevant in terms of exactly what he said to me."

57. As Mr Craig submitted, and as I accept, the only difference between the two accounts of this conversation, was that Mr Burton's evidence was that the respondent had said that *Mr O'Brien* had told him that the Transaction Bonus was being paid in lieu of the Prescribed Sum; whereas the respondent's account did not state unequivocally who had told him this (although even on his evidence it came in the context of what Mr O'Brien had told people).

58. Mr Craig's principal submission was that the judge had wholly failed to consider, or weigh in the balance, Mr Burton's evidence to the effect that the respondent had said that it was Mr O'Brien who had given him the information about the condition. Mr Craig submitted that, whilst in paragraph 85 of the judgment the judge referred to the respondent's attendance note of the meeting on 5 February with Mr Burton, he simply did not address the evidence which supported the appellant's case that the respondent's knowledge had come from Mr O'Brien; viz. the respondent's own admission in cross-examination and Mr Burton's evidence to that effect. Mr Craig submitted that, in the absence of any proper analysis of all the relevant evidence by the judge, one could not characterise paragraph 85 of the judgment as a decision by the judge in effect to prefer the evidence of the respondent to that of Mr Burton. He also submitted that the judge was wrong to rely on the respondent's attendance note of the lunch meeting on 5 February as in any way supporting the respondent's account since (a) the attendance note was self-serving and prepared not only after the lunch meeting but also after the date upon which the respondent had instructed solicitors in relation to his claim; and (b) the attendance note in any event carried the implication that Mr O'Brien had been the person who had communicated the condition to the respondent.

59. I agree with Mr Craig that it is extremely unsatisfactory that the judge did not specifically address the evidence of Mr Burton (and indeed the respondent's admission in cross-examination referred to above) in reaching his conclusion at paragraph 85 that the respondent only became aware "of the contention that the December Bonus was intended to be in lieu of a "Prescribed Sum"" on 8 January 2013. I address the consequences of this, and, in particular, whether the failure invalidates the judge's conclusion that the respondent was not aware of the condition prior to his receipt of the Transaction Bonus, below, after I have considered the totality of Mr Craig's argument in relation to the judge's alleged errors.

The third alleged mistake

60. As I have already stated, the third mistake which Mr Craig submitted that the judge made was to find that the respondent had in fact first been told of the condition by Mr Wall on 8 January 2013, in circumstances where, according to Mr Craig, there was no evidence whatsoever to support such a finding and substantial evidence to support the appellant's case that he had first been told by Mr O'Brien at the meeting on 10 December 2012.

61. I accept that the judge made an error in this respect. There was nothing in the respondent's witness statement to suggest for a moment that the vital information, namely that the Transaction Bonus was said to be subject to the condition - which the respondent himself described "as a very important condition" - had been communicated to him by Mr Wall, let alone that this was the first occasion upon which he had been informed about the condition. Nor did he refer to the reaction which he might have had on receiving this information. In his witness statement the respondent referred to every conversation of substance that he had about the relationship between the Transaction Bonus and the Prescribed Sum. He did not refer to *any* substantive conversation between his discussion with Mr O'Brien on 10 December 2012 and his conversation with Mr Burton on 5 February 2013.

62. Whilst the respondent did refer to a conversation with Mr Wall "on or about 8 January", he did not suggest that anything of substance had been said at that meeting and he did not trouble to make any attendance note of the meeting. Thus he said at paragraph 31 of his witness statement:

> "I met with Ian Wall, the Group Treasurer on two occasions at my initiative to understand more about the Transaction Bonus. The first occasion was on or about 8th January 2013 when I asked him if he knew anything about the circumstances surrounding the Transaction Bonus **and the second occasion was 26th April 2013 when Ian Wall told me that he had suggested the payment of the Transaction Bonus to Mr Reid, as a means of ensuring that the amount of the Prescribed Sum was paid**. I recorded this in a contemporary hand written note."

63. I find it inconceivable that, if this occasion was really the first occasion on which the respondent had discovered that the Transaction Bonus was said "now" to have attached to it what he regarded as "a very important condition" "effectively, amending [his] employment contract"[3], the respondent did not say so in his witness statement, or at least say that this must have been the relevant occasion. Given the condition's importance, it is surprising, to say the least, that he would not have remembered the occasion.

64. Moreover the respondent effectively accepted in cross-examination that there had been no substantive discussion about the relationship between the Transaction Bonus and the Prescribed Sum between his conversation with Mr O'Brien on 10 December 2012 and his conversation with Mr Burton on 5 February 2013. He said:

[3] As per the respondent's statement in cross-examination quoted above.

"Q. Can I ask you please about your later discussions that you had about the relationship between the prescribed sum and the transaction bonus please. To put it neutrally, you spoke to Mr O'Brien in the week commencing 10 December 2012, yes?

A. Oh yes, sorry, yes.

Q. You tell us, I think at paragraph 40 of your witness statement, that the next time you spoke to Mr O'Brien about the transaction bonus and the prescribed sum was on 20 February?

A. Yes.

Q. You tell us that you spoke to Mr Wall in April of 2013?

A. No, I said I spoke to Mr Wall on 8 January 2013.

Q. It is paragraph 31 of your statement.

A. 8 January and 26 April.

Q. It is the 26 April, when you say that he told that you he had suggested that payment of the transaction bonus, he had suggested as a means of ensuring that the amount of the prescribed sum was paid. That was in April?

A. Yes.

Q. As I understand it, after your discussion with Mr O'Brien in the week of 10 December, the next discussion you had about the relationship between the bonus and the prescribed sum, the transaction bonus and the prescribed sum, was with Mr Burton; is that right?

A. Yes, after -- first of all, 8 January and then 5 February.

Q. **You do not tell us anything about the discussion you had on -- Mr Wall said anything of significance to you on 8 January; is that right?**[4]

A. Yes.

[4] Mr Craig told us that the transcript omitted a part of the question here, which was as follows: "You do not tell us anything about the discussion you had on 8 January and you do not say that Mr Wall said anything of significance to you on 8 January 2013. Is that right?". That is clear from the next question and answer – that the next substantive discussion about the Prescribed Sum and the Transaction Bonus was 8 weeks later on 5 February 2013 (i.e. about 8 weeks after 10 December discussion with Mr O'Brien). Contrary to Mr Choudhury's submission, it seems to me clear that such must indeed have been the case and I accept that Mr Craig has remembered his question correctly.

Q. The next substantive discussion you had about the prescribed sum and the transaction bonus was about eight weeks later on 5 February 2013, correct?

A. Yes."

65. I accept Mr Craig's submission that one should read those passages as the respondent clearly accepting that:

    i) nothing of significance was said by Mr Wall on 8 January 2013; and,

    ii) the next substantive discussion which he had had (after his conversation with Mr O'Brien on 10 December 2012) about the Prescribed Sum and the Transaction Bonus was on 5 February 2013, about 8 weeks after the discussion on 10 December 2012 with Mr Burton (i.e. there had been no substantive discussion in the interim).

66. The point was revisited later in the cross-examination when the respondent suggested, *for the first time*, that somebody might have told him that the Transaction Bonus was being paid in substitution for the Prescribed Sum at some point over the few weeks following the discussion with Mr O'Brien on 10 December 2012, which he then said could be the conversation with Mr Wall. But the respondent was then taken back to his account of his conversations with Mr Wall in his witness statement, and, at that stage, he apparently appeared to accept in the light of that statement that he had not had a substantive discussion with Mr Wall in January 2013 (from which it would follow that the respondent must have been told that the Transaction Bonus was being paid in lieu of the Prescribed Sum by Mr O'Brien on 10 December 2012, since he had expressly denied hearing about the condition through rumours in the office or through communications with colleagues):

"Q. Who were you talking about?
A. Whoever it was that conveyed that information to me.
Q. Who do you say that was?
A. Well, I do not know. I do not think I – I am almost certain I did not rush around the office asking everybody, you know, straight after this, but probably in the weeks that followed I did have conversations with various people. I mean, I have not put down conversations which I have had with every single person.
Q. It would be an extremely important conversation in the context of this litigation, if somebody had told you in terms that the transaction bonus had been paid in lieu of the prescribed sum, would it not? This would be a very important conversation?
A. This could be referring to the conversation with Ian Wall.
Q. This suggest could be referring to the conversation with Ian Wall?
A. Yes.
Q. You told us just before that on 8 January nothing really substantial was said. It was on 26 April 2013?
A. Sorry, you have to read the last three lines of that paragraph*.*
Q. Is it now your evidence-
A. What do the last three lines of paragraph 31 say?

Q. Let us read them out:
'The second occasion was on 26 April-"
A. I beg your pardon.
Q. It was on 26 April?
A. I misread that."

67. Subsequently in his cross-examination (see pages 116- 122 of the transcript of 14 October 2014), it is clear that the respondent appreciated (or, as Mr Craig put it to him in cross-examination, "the penny dropped") that his apparent acceptance that he had not had a substantive discussion with Mr Wall in January 2013, but only in April 2013, led to problems with his case as to when he was first informed of the condition and whether that was by Mr O'Brien. So he then attempted to resile from his previous answers.

68. There was nothing in the evidence of Mr Wall upon which the judge could base such a finding of fact. Mr Wall had no recollection of even speaking to the respondent in January 2013. He only recalled a discussion in April 2013. Importantly, whilst it was put to him in cross-examination by Mr Choudhury that "[Mr Wall] would have no information to dispute [the] dates" of the meetings in January and April, it was *not suggested* to Mr Wall in cross-examination either: (a) that he had informed the respondent during the course of the January meeting that the Transaction Bonus was subject to a condition that it was paid in lieu of the Prescribed Sum; or (b) that the respondent said, or Mr Wall appreciated, that was the first time the respondent had been told about the condition; or (c) *that it was at least possible* that such a conversation had taken place. Nor was Mr Wall cross-examined in any way as to what the respondent's reaction to the receipt of that piece of information had been. Indeed there was no cross-examination whatsoever of Mr Wall as to what had allegedly been said by either the respondent or Mr Wall at that meeting.

69. The only possible explanation for the omission on the part of Mr Choudhury, as experienced counsel, to put to Mr Wall in cross-examination either that he had informed the respondent about the condition at the January meeting, or that it *was possible* that he had done so, and that this was the first time the respondent had learnt of the condition, is that Mr Choudhury had no instructions from the respondent to put such a case.

70. In those circumstances, I accept Mr Craig's submission that the judge's finding at paragraphs 84 and 85 of the judgment that:

> "I am inclined to find that Mr Elliston actually found out about the December Bonus being supposed to be in lieu of a 'Prescribed Sum' from Mr Wall in the conversation of which Mr Elliston spoke on 8 January 2013."

is unsustainable. There was, in reality, and contrary to Mr Choudhury's submissions, no evidence to support that finding, and it was contrary to other evidence, namely both that of Mr Burton and the respondent, which the judge failed to take into account in this context. The fact that the judge did not regard Mr Wall as a satisfactory witness (see paragraphs 82 to 83 of the judgment) was irrelevant in relation to this particular issue, since he was not cross-examined about any aspect of the discussion at the

meeting in January 2013, nor was it suggested to him that he was lying when he said in cross-examination that he did not recall the conversation in January. Further, in my judgment the judge wrongly took into account as a relevant consideration (see paragraph 82 of the judgment) the fact that Mr Wall did not deny having a conversation with the respondent on 8 January 2013. But that went nowhere in the absence of any cross-examination of Mr Wall as to what was, or might have been, said at that meeting and in the absence of any proper consideration by the judge of Mr Burton's and the respondent's evidence. The fact that Mr Wall did not remember such a conversation is hardly surprising – even on the respondent's evidence, nothing of substance was said that day.

71. I also accept Mr Craig's submission that, in coming to this conclusion, the judge failed to address Mr Burton's unequivocal evidence that on 5 February 2013 the respondent told him that *Mr O'Brien* had informed him that the Transaction Bonus was being paid instead of the Prescribed Sum, but that this had been at a much later date (the respondent seemingly having in mind at around that time that the discussion was on New Year's Eve, even though he ultimately accepted that it was 10 or 11 December 2012). I agree with Mr Craig that, if the judge was going to reject Mr Burton's evidence on a critical issue in the case, then he needed to explain why, but he failed to do so. He made a passing reference to Mr Burton's evidence (see paragraph 74 of the judgment), but said nothing more about it. He made no findings about the credibility or veracity of Mr Burton's evidence or his demeanour as a witness. In circumstances where there were serious inconsistencies in the respondent's own evidence (including, for example, that earlier in 2013 he had told Mr Burton that Mr O'Brien spoke to him for the first time on New Year's Eve, 2½ weeks after payment was made, and in his pleaded case (and evidence in chief) that the conversation was on 14 December 2012, but nonetheless after payment of the Transaction Bonus had been made), that omission was in my judgment significant.

72. I address the consequences of this mistake, and, in particular, whether the failure invalidates the judge's conclusion that the respondent was not aware of the condition prior to his receipt of the Transaction Bonus, below.

What are the consequences of the judge's errors in relation to the appellant's pleaded case and the evidence?

73. I turn now to consider the consequences of my conclusion that the judge made various errors in relation to his approach to the appellant's pleaded case and in relation to his findings of fact in relation to the first issue.

74. Mr Choudhury submitted that it was immaterial (if indeed it were the case) that the judge had failed specifically to address certain aspects of the evidence, or even that he had made an error in concluding that the respondent had been informed by Mr Wall of the condition in January 2013; the evidence taken as a whole (which was a matter for the judge to assess) was overwhelmingly in favour of the respondent's account, and that it was simply not possible to say that the judge's conclusion that he should prefer the respondent's evidence over that of Mr O'Brien's was "plainly wrong". Mr Choudhury further submitted that the judge's overall conclusion that the respondent had not been told prior to payment of the Transaction Bonus that it was subject to the condition could not be faulted for a number of reasons. These included the following:

i) the judge's decision was firmly based on his assessment of the credibility of the respondent and Mr O'Brien as a result of their respective performances in the witness box;

ii) the judge was clearly impressed by the "measured and careful" way in which the respondent gave evidence; see paragraph 30 of the judgment;

iii) the judge's assessment of Mr O'Brien's credibility (or lack thereof) was not based only on the discrepancy between the pleaded case and his statement; as the judge made plain, it was also based, inter alia, upon the following:

a) the terms of the 29 April 2013 letter, which suggested that no waiver of the Prescribed Sum had previously been obtained; see paragraph 30 of the judgment;

b) Mr O'Brien's evidence as to the state of play concerning a consultancy agreement for the respondent which was discredited in that the consultancy was not a vague thought or "possibility" as suggested by Mr O'Brien but something much more certain; see paragraphs 31-34 of the judgment;

c) the fact that arrangements had been made to pay the Transaction Bonus without any thought of obtaining a prior agreement that recipients would not claim the Prescribed Sum; see paragraphs 35 to 45 of the judgment;

d) the absence of any contemporaneous document whatsoever supporting Mr O'Brien's contention that there was any condition imposed in respect of the bonus; see paragraphs 45 of the judgment;

e) the fact that, contrary to Mr O'Brien's case that he had spoken to other employees in the same terms as he had spoken to the respondent, there was evidence that others had either not been spoken to at all by him or had been spoken to in terms which supported the respondent's account; see paragraphs 49 – 67 of the judgment;

f) Mr O'Brien's email of 1 March 2013 to Mr Reid contained phraseology which resonated with the evidence of the respondent as to what he was told at the December 2012 meeting; see paragraphs 66-67 of the judgment;

g) the fact that the phrase "double-dip" was in fact more consistent with the right to the Prescribed Sum remaining extant (with the expectation that the respondent would do the honourable thing and not claim it), rather than the respondent forgoing that right altogether; see paragraph 68 of the judgment; and

h) Mr O'Brien's attempt to "create the impression, incorrectly, that the terms of the offer of a Transaction Bonus were fixed by him with all relevant persons in conversation before any letter of notification arrived"; see paragraph 69 of the judgment.

75. Despite Mr Choudhury's careful and forceful submissions, I have concluded that this is one of those very rare cases where an appeal court is able to say with confidence that the judge was plainly wrong in the conclusion which he reached in relation to the first issue, namely as to what the respondent was told at the meeting with Mr O'Brien on 10 December. In my judgment, whatever precise words were used by Mr O'Brien, the evidence before the judge overwhelmingly supported a finding that, viewed on any *objective* basis, Mr O'Brien had said enough to make it clear to the respondent that any acceptance of the Transaction Bonus was subject to the condition that the recipient would not also claim the Prescribed Sum in the event that his employment came to an end and the other applicable conditions were satisfied.

76. Contrary to Mr Choudhury's submissions, my reading of the full transcripts of both the evidence and the argument, and the judgment itself, does not suggest that:

> "the judge's decision was firmly based on his assessment of the credibility of the respondent and Mr O'Brien as a result of their respective performances in the witness box".

I am well aware that a trial judge has the indubitable advantage of seeing the witnesses in real-time and judging their demeanour. But where a trial judge has clearly gone wrong in his approach to, and evaluation of, the evidence and an appellate court has the benefit of a full transcript, this so-called advantage can be overstated. In my judgment, the judge's decision was wrongly based, not on legitimate assessments of the credibility of witnesses, but rather on:

i) his initial hostility to, and misunderstanding of, the appellant's pleaded case, which, as I have already held, affected his approach to the appellant's case even before he came to consider the evidence[5];

ii) his failure to appreciate the significance of the admission by the respondent in cross-examination of what he understood by his conversation with Mr O'Brien in relation to the condition[6];

iii) his failure, in the context of the critical issue as to *when* the respondent first learnt of the imposition, or purported imposition of the condition, to take into account, let alone mention, the significant evidence of Mr Burton that the respondent had told him that *Mr O'Brien* had informed him of the condition but only after the respondent had received payment[7];

iv) his speculative finding, unsupported by any evidence, that the respondent had learned of the imposition of the condition in his conversation with Mr Wall in January 2013[8];

v) his failure to take into account the background, or context, leading up to Xstrata's offer of the Transaction Bonus in the letter dated 4 December 2012;

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[5] See paragraphs 31 to37 above.
[6] See paragraphs 45 to 49 above.
[7] See paragraphs 50 to 59 above.
[8] See paragraphs 60 to 72 above.

vi) his naive reliance on the respondent's attendance notes – or absence of an attendance note – in assessing what was said at the meetings with Mr O'Brien and Mr Burton – to support the respondent's credibility;

vii) his failure to have adequate regard to the impact on the respondent's credibility of the fact that he had frequently changed his evidence as to when the meeting with Mr O'Brien took place.

77. I should supplement the last three points which I have not previously addressed.

78. First, the relevant context was the evidence relating to what the respondent and others had repeatedly been told when Xstrata was considering paying the Management Incentive Arrangements (MIA) earlier in 2012 (which arrangements were later voted down by Xstrata shareholders) as set out in the correspondence and his own evidence. This evidence showed:

a) the respondent knew that the amount of the Transaction Bonus in the sum of £487,925 was exactly the same as the amount of the Prescribed Sum for 2012 of £487,925;

b) the respondent knew, because he had been told repeatedly, that the amount of £487,925 was the calculation of the Prescribed Sum;

c) the respondent knew, because he had been told repeatedly in the context of the proposed MIA, that the payment of the first tranche of that proposed bonus of £487,925 was in substitution for the Prescribed Sum of £487,925;

d) that he could not "double recover" (i.e. double dip) by being paid both the first tranche of the MIA proposed bonus of £487,925 and the Prescribed Sum of £487,925; the words "double recover" and "double dip" were essentially the same.

That context was critical. But the judge did not refer to, or consider, any of the previous correspondence sent to the respondent during 2012 at the time when the MIA proposals were being offered to employees. In relation to each proposal, the respondent had been told and had accepted, that the payment of the first tranche of the proposed incentive payments, namely the Initial Retention Bonus of £487,925 was in substitution for the Prescribed Sum of £487,925, and that he could not "double recover" (i.e. double dip) by being paid both. He also knew that the amount of the Transaction Bonus was precisely the same as the previously canvassed Initial Retention Bonus and the Prescribed Sum for 2012 namely amount of £487,925. It was against that background that, necessarily, what Mr O'Brien had said, and what the import of it was, had to be assessed.

79. Second, in my judgment, the judge was naive to place so much reliance on the existence, or accuracy, of an attendance note compiled by the respondent. It was clear that the respondent did not start to make attendance notes until after he had consulted solicitors in early 2013 - the first such attendance note being of the meeting which he had with Mr Burton on 5 February 2013. In such circumstances it was not at all surprising that he had not made an attendance note of his meeting with Mr O'Brien on

10 December 2012. Likewise if the judge was going to attach importance to the absence of any attendance note of that meeting[9], it was inconsistent of him not to do so in relation to what the judge found was the critical meeting with Mr Wall on 8 January 2013 when, according to the judge, the respondent first discovered that the Transaction Bonus was said to be subject to the condition. Furthermore, the logic in the last half of paragraph 85 of the judgment that reliance could be placed on the statement in the respondent's attendance note of the meeting with Mr Burton on 5 February 2013 that he learned of the condition "at a much later date" because:

> "Consequently, it seems to me to be realistic to proceed on the basis that what Mr. Elliston recorded himself as having said to Mr. Burton was not merely what he did in fact say, but also was believed by him to be true at the time he made the relevant statements to Mr. Burton. If he had lied to Mr. Burton he would scarcely have recorded such lie in his own attendance note."

is incomprehensible. Not only had the respondent engaged solicitors by this time but also any attendance note was inevitably likely to be self-serving.

80. Third, although, in paragraph 85 of the judgment, the judge said that he recognised that

> "…… over time, Mr. Elliston has given different dates as the date upon which he became aware of the contention that the December Bonus was supposed to be in lieu of a "Prescribed Sum". I also recognise that Mr. Elliston has advanced different dates at different times as to when exactly his meeting with Mr. O'Brien took place. Actually the date of the meeting with Mr. O'Brien was not important unless it was after the payment of the December Bonus, and only one version of Mr. Elliston's account, that in the Reply, contended for that"

the reality was that whether the date of the meeting with Mr O'Brien occurred before or after payment of the Transaction Bonus was a highly important issue in the case, as was the issue as to the date on which the respondent first learnt that the Transaction Bonus was said to be subject to the condition. The respondent's vacillating evidence about when these dates occurred was clearly a critical matter to be taken into account when assessing his credibility. The judge appears – wrongly in my view – to have placed no importance on these matters which were, on any basis, important factors in assessing his credibility,

81. None of the additional matters relied upon by Mr Choudhury, as set out in paragraphs 74(iii)(a) above – (h) persuaded me that the judge's findings of fact could be supported. Indeed some of the findings were the subject of the appellant's third ground of appeal and detailed submission by Mr Craig. I do not address all the points but, in particular, it can be observed that, contrary to the judge's view:

    i) There was very little, if any evidential value in the email correspondence with other employees, none of whom were called as witnesses. Such

[9] See paragraph 70 of the judgment.

correspondence did not in fact support the respondent's account as the judge suggested in paragraphs 49 – 67 of the judgment. The judge appears to have held that these emails evidenced that Mr O'Brien had not spoken to those individuals about the Transaction Bonus being paid in lieu of the Prescribed Sum. A proper analysis of the emails showed that most of them were about whether Mr O'Brien had told individuals that the Transaction Bonus was being paid in lieu of redundancy payments (notice periods) and not about whether Mr O'Brien had told them that the Transaction Bonus was being paid in lieu of the Prescribed Sum. In particular one of the emails upon which the judge replied was an email from a Mr Kelly whose complaint was wholly irrelevant because he was not entitled to a Prescribed Sum in any event. Moreover, what may have been said to other employees, to the extent that it could be gleaned from the sometimes disgruntled email correspondence, had very little probative value as to what was actually said to the respondent.

ii) The terms of the 29 April 2013 letter, which was a formal letter setting out the terms of respondent's redundancy, was equally consistent with Mr O'Brien's account as with that of the respondent.

iii) The judge did not explain how the difference of emphasis between Mr O'Brien's evidence as to the state of play concerning a consultancy agreement and that of the respondent, discredited Mr O'Brien's evidence in relation to the entirely separate issue of as to what was said at the meeting on 10 December. Indeed it was difficult to see how it did discredit Mr O'Brien. There was no dispute between the respondent and Mr O'Brien about the fact that the respondent wanted a consultancy agreement with Glencore; nor was there any dispute that Mr O'Brien told the respondent that ultimately this was a matter that he would have to address with Glencore.

iv) It was not surprising that there was no contemporaneous document supporting Mr O'Brien's evidence that he had imposed a condition in respect of the bonus. As the judge accepted at paragraphs 47 – 48 of the judgment, Mr O'Brien's evidence was that, on the advice of Freshfields, nothing was put in writing in order to avoid the risk of triggering a requirement to consult with Glencore or the Takeover Panel in relation to the Transaction bonus.

v) The judge was wrong to state in paragraphs 67 of his judgment that Mr O'Brien's email of 1 March 2013 to Mr Reid showed that in his conversation with Mr Sawyer (another employee) "he had gone further and told him specifically that no waiver was required." The thrust of what was stated in Mr O'Brien's email, and indeed in his evidence, was that no *written waivers* had been required from those individuals had been told that the Transaction Bonus was being paid in substitution for the Prescribed Sum. In such circumstances I cannot agree with the judge's evaluation that this correspondence "resonated with the evidence of the respondent as to what he was told at the December 2012 meeting".

vi) Nor was the judge's view, apparently based on one line in paragraph 19 of Mr O'Brien's witness statement, that Mr O'Brien's had attempted to "create the impression, incorrectly, that the terms of offer of a Transaction Bonus were fixed by him with all relevant persons in conversation before any letter of

notification arrived", a fair criticism of the entirety of his evidence, which undermined his credibility. His oral evidence and other paragraphs of his witness statement made it clear that he had indeed started speaking to some employees in November 2012, before the Transaction Bonus letters were sent out. Mr O'Brien was not challenged in cross-examination on this aspect.

82. Many, if not all, of these points were not primary findings of fact by the judge, but rather evaluations by him of the effect of what was said in documents, and, in my judgment, they did little to support his view as to the credibility of Mr O'Brien on the principal issue.

83. For the above reasons I conclude that the totality of the evidence before the judge clearly established that, whatever precise words he used, Mr O'Brien made it clear to the respondent at the meeting on 10 December that, if the respondent was going to accept the payment of the Transaction Bonus he would not be entitled to claim the Prescribed Sum. In my judgment the judge was plainly wrong for the reasons which I have given not to reach this conclusion. The findings which he did make were not open to him on a proper analysis of the evidence. For these reasons I would allow the appeal and give judgment for the appellant.

The alleged failure to address the appellant's alternative case

84. The appellant's alternative case was that:

i) even if the judge were to reject the appellant's case as to what was said by Mr O'Brien in his discussion with the respondent on 10 December 2012 (notwithstanding the respondent's own admissions in that regard); and,

ii) even if he accepted the respondent's evidence (inconsistent with his pleaded case) that what Mr O'Brien said in respect of the payment of the Transaction Bonus was that "we prefer that people don't double dip or waste money on legal fees",

iii) a person in the position of the respondent with all the background knowledge available to the parties, would reasonably have understood those words to mean that the respondent could not be paid both the Transaction Bonus and the Prescribed Sum, because that would be double-dipping (i.e. taking payment for the same thing twice).

85. Mr Craig's submissions under this head were:

i) Even if Mr O'Brien had only said to the respondent in respect of the payment of the Transaction Bonus that "we prefer people don't double dip or waste money on legal fees", those words were not without context.

ii) That context was the evidence relating to what he and others had repeatedly been told when Xstrata was considering paying the Management Incentive Arrangements (MIA) earlier in 2012 (which arrangements were later voted down by Xstrata shareholders) as set out in the correspondence and his own evidence. This evidence showed:

a) the respondent knew that the amount of the Transaction Bonus in the sum of £487,925 was exactly the same as the amount of the Prescribed Sum for 2012 of £487,925;

b) the respondent knew, because he had been told repeatedly, that the amount of £487,925 was the calculation of the Prescribed Sum;

c) the respondent knew, because he had been told repeatedly in the context of the proposed MIA, that the payment of the first tranche of that proposed bonus of £487,925 was in substitution for the Prescribed Sum of £487,925;

d) that he could not "double recover" (i.e. double dip) by being paid both the first tranche of the MIA proposed bonus of £487,925 and the Prescribed Sum of £487,925; the words "double recover" and "double dip" were essentially the same.

iii) A reasonable person armed with the background information set out above would have understood that Mr O'Brien was making clear that an individual would not be able to take the Transaction Bonus of £487,925 and the Prescribed Sum of £487,925, because to do so would involve double-dipping, and people should not do that and then have to waste money on legal fees.

iv) The judge, however, failed properly to address this alternative case in his judgment.

v) He thereby failed to address properly or at all the appellant's alternative case. He did not refer at all in his judgment to any of the background matters set out above, notwithstanding the fact that they were expressly referred to and relied upon by the appellant.

86. Mr Choudhury's response was that the appellant's alternative case was not even pleaded. It was nonetheless properly considered by the judge as was patently clear from paragraphs 86-88 of the judgment (which had to be read with paragraphs 67 and 68 as that was where the further explanation to which the judge refers was contained). In paragraph 88 the judge explained why the alternative case could not succeed; namely because the words which the judge found had been said by Mr O'Brien could not have the effect contended for by the appellant. The judge did not need to go any further.

87. I accept Mr Craig's submission that the judge did not adequately address the appellant's alternative case which, if not expressly pleaded as an alternative case in the Defence, was certainly clearly on the table by the time of closing submissions. However, I would not allow the appeal on this ground.

88. The alternative case, as presented by Mr Craig in this court, was closely allied to the principal defence, namely that the words which Mr O'Brien had used at the meeting on 10 December were objectively sufficient to amount to the imposition of a condition. I have already concluded that that principal defence succeeds. The appellant's alternative case, if a true alternative, must assume that the primary case fails. The argument on the alternative case has to assume that nothing was said to the

respondent other than "We prefer that people don't double dip or waste money on legal fees." If Mr O'Brien meant "require", "prefer" was an inappropriate word to use to convey to the respondent that the bonus was conditional on foregoing the Prescribed Sum, even taking into account the background context of the MIA proposals. But if one takes into account all the matters that Mr Craig submitted should have been taken into account by the judge in addressing the alternative case (such as, for example, the respondent's admission in cross-examination that he appreciated that he was effectively being told by Mr O'Brien that there was a change to the Transaction Bonus letter, and that a "very important condition was being imposed"), and one reaches the conclusion that what was *actually* said by Mr O'Brien was sufficient to convey the message that people could not take the Prescribed Sum as well as the Transaction Bonus, that, in my judgment, simply goes to prove the primary case, rather than the alternative case.

89. For these reasons it is not necessary for me to address Mr Craig's criticisms of the manner in which the judge dealt with the appellant's alternative case.

The acceptance issue

90. The appellant's last ground of appeal was that if, and insofar as, the judge held at paragraph 92 of his judgment that, even if Mr O'Brien had told the respondent that the Transaction Bonus was being paid in lieu of the Prescribed Sum, the respondent nevertheless accepted the Transaction Bonus without that condition, because the acceptance was not unequivocally referable to the relevant offer, the judge was wrong to do so.

91. It does appear from paragraph 92 that the judge took the view that, even if the condition had been imposed by Mr O'Brien on the gratuitous Transaction Bonus, in the conversation between him and the respondent on 10 December, it was nonetheless open to the respondent to keep silent and accept the money without the burden of the condition. The judge appears to have thought that, in the absence of an express withdrawal of the offer made in the letter dated 4 December, the respondent was entitled to say that his acceptance of the money was referable to the offer contained in the original letter.

92. In my judgment that is clearly wrong in principle. The offer was a unilateral, gratuitous offer and could be amended by the respondent at any time before the money was transferred or accepted. If the condition had indeed been imposed, then there was no offer for the respondent to accept other than the offer to take the Transaction Bonus in substitution for the Prescribed Sum. And the respondent's conduct in accepting payment of that sum was unequivocally referable to that revised offer. Accordingly the judge was wrong to conclude that this point would in any event be a bar to the success of the respondent's defence.

Disposition

93. For the above reasons I would allow this appeal and give judgment in favour of the appellant. This is not a case where it would be appropriate to remit the matter for trial before another judge.

Lord Justice Patten:

94. I agree.

Lord Justice Moore-Bick:

95. I also agree.