IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 217 OF 2020 (NSJ)

BETWEEN:

ORMOND A. WILLIAMS

Plaintiff

AND:

(1) CAYMAN NATIONAL BANK LTD.
(2) CAYMAN NATIONAL CORPORATION LTD.
(3) CAYMAN NATIONAL PROPERTY HOLDINGS LTD.
(4) CAYMAN NATIONAL MORTGAGE FUND LTD.

Defendants

JUDGMENT ON THE PLAINTIFF'S APPLICATIONS FOR LEAVE TO AMEND AND FOR PRODUCTION OF DOCUMENTS

Appearances: Mr. Hector Robinson QC (instructed by Luke Burgess-Shannon of Mourant Ozannes) for the Plaintiff

Ms. Deok Joo Rhee QC (instructed by Huw Moses and Kerrie Cox of HSM Chambers) for the Defendants

Hearing: 9-11 December 2020

Further submissions: 23 December 2020 and 6 January 2021

Draft judgment circulated: 19 February 2021

Judgment delivered: 1 March 2021

HEADNOTE

Application for leave to amend and add new claims to the statement of claim – leave opposed inter alia on the basis that the new claims were bound to fail – claims for inducement to breach a contract of employment, unlawful and lawful means conspiracy, breach of an implied duty not to engage in conduct likely to undermine the implied obligation of mutual trust and confidence and breach of a tortious duty to take reasonable steps not to cause financial loss to the Plaintiff by acting unethically and improperly based on the duty held to exist in Rihan v Ernst & Young – application for production of documents pursuant to GCR. O. 24, r. 10(1) – waiver of privilege

Introduction

1. This case arises out of the termination of the Plaintiff's employment as president of the First Defendant in November 2018. This judgment deals with two interlocutory applications made by the Plaintiff. He has applied for leave to amend (the ***Application for Leave to Amend*)** the writ of summons dated 28 February 2019 (the ***Writ***) and the statement of claim dated 26 March 2019 (the ***Statement of Claim***) and for an order for the production of certain documents (the ***Production Application***).

2. The applications were heard on 9-11 December 2020. During the hearing and in response to various issues that had been debated during the hearing, the Plaintiff filed reply submissions together with a further revised draft of the amended statement of claim (the ***Revised Amended Statement of Claim***) (replacing the draft amended statement of claim filed with the Application for Leave to Amend). In light of this, I directed that the Defendants be permitted to file further post-hearing written submissions to update and set out their submissions in relation to the Revised Amended Statement of Claim and the Plaintiff's Reply Submissions and that the Plaintiff be permitted to reply to the Defendants' post-hearing submissions. The Defendants filed their post-hearing submissions on 23 December, 2020 and the Plaintiff filed his post-hearing reply submissions on 6 January 2020.

3. At the hearing the Plaintiff was represented by Mr. Hector Robinson QC (instructed by Mourant Ozannes (***Mourant***)). The Defendants were represented by Ms. Deok Joo Rhee QC (instructed by

HSM Chambers (***HSM***)). I am grateful for their submissions and assistance. In the judgment that follows, I have, for convenience, only referred to submissions being made by the relevant party rather than their counsel and mean no disrespect to Mr. Robinson and Ms Rhee in so doing.

4. I have concluded, for the reasons given below, as follows:

(a). the Application for Leave to Amend is granted with respect to the amendments to be made in relation to the Plaintiff's claims for inducement of breach of contract and conspiracy on the basis that the Defendants shall be paid an appropriate part of their costs of and associated with the Application for Leave to Amend.

(b). the Application for Leave to Amend is dismissed and leave to amend is not granted with respect to the amendments to be made in relation to the Plaintiff's claim for breach of the implied obligation of mutual trust and confidence, although I shall permit the Plaintiff, if he wishes and is able to do so, to make the necessary amendments to this claim that will make it arguable as a matter of law, which amendments I discuss below.

(c). the Application for Leave to Amend is dismissed and leave to amend is not granted with respect to the amendments to be made in relation to the Plaintiff's claim for breach of the tortious duty to take reasonable steps not to cause and to prevent financial loss to the Plaintiff.

(d). the Production Application is dismissed.

Background

5. The Plaintiff is a former employee and president of the First Defendant. He is a very experienced and senior banker. He had been notified of his appointment as president by a letter dated 15 July 2003, which he accepted the following day. His appointment took effect from 1 September 2003 and on 31 March 2004 the Plaintiff's appointment to the First Defendant's permanent staff was confirmed after the expiry of a six-month probation period. The Plaintiff was also appointed as a director of the First Defendant at around the time of his appointment as president. He had previously been employed as the executive vice president of the First Defendant (pursuant to an employment agreement dated 4 December, 2002).

6. The First Defendant is a wholly owned subsidiary of the Second Defendant. The Third Defendant is a wholly owned subsidiary of the First Defendant, while the Fourth Defendant is a wholly owned subsidiary of the Second Defendant.

7. The present dispute arose in the context of the offer made in August 2018 by the Republic Bank of Trinidad & Tobago (through its Barbados subsidiary) to acquire the majority shareholding in the Second Defendant (the ***Republic Bank Offer***). The Plaintiff asserts that he questioned the approach to the offer taken by the board of the Second Defendant and alleges that he was improperly dismissed as a result. He alleges that the First Defendant's termination of his employment was without reasonable notice or payment in lieu of notice and therefore wrongful. In addition, he alleges that the directors of the Second Defendant knowingly and wilfully or recklessly and without reasonable excuse or justification induced or procured the First Defendant to terminate his employment and were parties (in combination and with the directors of the First Defendant) to a conspiracy to injure him by unlawful means. He also claims that the First and Second Defendant were in breach of duties owed directly to him (even though he was not employed by the Second Defendant). The first alleged duty is an implied contractual duty owed by the First Defendant not to engage in conduct likely to undermine the implied obligation of mutual trust and confidence that was owed by and between the Plaintiff and the First Defendant pursuant to the Plaintiff's employment contract. The second alleged duty is a duty of care in tort owed by the Second Defendant to take reasonable steps not to cause and to prevent the Plaintiff from suffering financial loss by acting unethically and improperly in relation to the Republic Bank Offer.

8. Following the filing of the Statement of Claim, the parties proceeded to discovery (by the exchange of lists and the disclosure of documents) and have exchanged witness statements. The Plaintiff says that these documents and witness statements disclose material facts which give rise to additional causes of action. He also argues that since the service of the Writ and the Statement of Claim there have been significant developments in the law relating to the duties owed by a parent company to an employee of its subsidiary to take care to avoid financial loss to those employees. In particular, the Plaintiff relies on the decision of Mr. Justice Kerr in the QBD in London in *Rihan v Ernst & Young Global Limited and others* [2020] EWHC 901 (judgment delivered on 17 April 2020) (***Rihan***). The Plaintiff argues that the reasoning in that decision is applicable to the facts of the present case.

9. Accordingly, on 24 September 2020 the Plaintiff issued a summons seeking leave to amend the Writ and the Statement of Claim in the manner set out in the draft amended Writ and draft amended Statement of Claim that were attached to that summons. In addition, in the summons the Plaintiffs sought an order pursuant to GCR O.24, r.11 for the production of first, legal advice obtained by the Defendants in relation to the termination of the Plaintiff's employment and secondly, the severance package relating to the termination of the Plaintiff's employment which had been presented to the First Defendant's board on 6 November 2018. These documents had not been disclosed on discovery but the Plaintiff claims that they must be produced in view of the various references to and reliance on these documents in the Defendants' evidence.

10. It is also worth noting that:

(a). on 25 January 2019 the Plaintiff presented a complaint of unfair dismissal under the Labour Law (2011 Revision) (now the Labour Act) against the First Defendant. Following the hearing of the complaint on 18 and 19 November 2019, the Tribunal, by a decision of 7 April 2020, upheld the complaint (on the basis that there had been no warning given to the Plaintiff) and awarded him the maximum compensation of CI$ 90,720.00. That decision has been appealed by the First Defendant and the appeal is pending.

(b). on 18 August 2020, prior to the Plaintiff issuing the summons for leave to amend, the Defendants issued an application for summary judgment in respect of the Plaintiff's claim against the Second Defendant based on an inducement to breach his employment contract. The summary judgment application has not yet been listed for a hearing. The Defendants noted that this application had not been withdrawn and that they considered that the merits of that application remain unaffected by the Plaintiff's application for leave to amend.

The Application for Leave to Amend

The proposed amendments

11. As I have explained, the Plaintiff now seeks permission to amend the Writ and Statement of Claim in accordance with the Revised Amended Statement of Claim (and amendments to the general indorsement in the Writ which reflect the Revised Amended Statement of Claim). Therefore, I shall

focus on and consider the amendments proposed by and as drafted in the Revised Amended Statement of Claim.

12. The Plaintiff argues that the proposed amendments seek to clarify the pleaded facts, to plead additional particulars of the facts supporting the causes of action already pleaded and to plead new causes of action. The Plaintiff says that all the additional pleaded facts arise out of the Defendants' discovery and witness evidence and were not known and could not have been known to the Plaintiff at the date of the Writ and Statement of Claim.

13. The Statement of Claim recited the facts relating to the Defendants, the Plaintiff's employment by and career with the First Defendant and the events leading to and surrounding the termination of the Plaintiff's employment. The Statement of Claim noted that there was a significant degree of overlap in the membership of the boards of the First Defendant and the Second Defendant. According to the Plaintiff, there were only two people on the board of the First Defendant (in addition to himself) who were not directors of the Second Defendant (Mr. Bierley and Mr. Ebanks) and one person who was only a member of the board of the Second Defendant (Mr. Hunter) (see the Statement of Claim and the Revised Amended Statement of Claim at [79] and [80]). Stuart Dack (***Mr. Dack***) was chairman of the board of the First Defendant and president, CEO and a director of the Second Defendant. The Hon. Truman Bodden was the chairman of the Second Defendant (and a director of the First Defendant). The Statement of Claim also referred to various communications that the Plaintiff had with the directors of the First Defendant and the Second Defendant and to discussions between those directors. Reference was made in particular to meetings and discussions between the Plaintiff and Mr. Dack. These included a meeting on 3 August 2018, when Mr. Dack told the Plaintiff about the Republic Bank Offer and during which, according to the Plaintiff, he, the Plaintiff, raised various concerns; a meeting on 6 August 2018 attended by Mr. Dack, the Plaintiff, and the senior vice presidents of the other subsidiaries of the Second Defendant, during which the Republic Bank Offer was discussed; questions sent to Mr. Dack by the Plaintiff on 6 August 2018; an email dated 7 August 2018 from the Plaintiff to each director of the First Defendant raising concerns regarding the Republic Bank Offer and the information available to allow and the process for its review; a meeting on 9 August 2018 of the local directors of the Second Defendant's directors attended by the Plaintiff; an email from the Plaintiff dated 11 September 2018 (the ***September Email***) to the directors of the First Defendant raising further issues and concerns; an email dated 8 November 2018 from Mr. Dack to the Plaintiff scheduling a meeting for the following day and details of a meeting on 9 November 2018 attended

by the Plaintiff, Mr. Dack and two others at which Mr. Dack advised the Plaintiff that the First Defendant's board had met without the Plaintiff and unanimously decided that they had lost confidence in the Plaintiff and that his employment should be terminated and also gave to the Plaintiff a draft document marked "*without prejudice*" setting out the terms on which the First Defendant proposed to compensate the Plaintiff.

14. The Revised Amended Statement of Claim adds a number of references to additional emails, meetings and discussions of which the Plaintiff became aware through discovery. In particular, reference is made to an email dated 7 August 2018 from Mr. Bierley to Mr. Dack as president and CEO of the Second Defendant; an email in response from Mr. Dack dated 8 August 2018; an email from Mr. Wardle, a director of both the First Defendant and the Second Defendant, to Mr. Dack (the ***Wardle Email***); a board meeting of the Second Defendant on 18 September 2018 (the ***September Meeting***); a meeting of the board of the First Defendant on 10 October 2018; an email dated 16 October 2018 from Mr. Dack as president and CEO of the Second Defendant to the president and CEO of The Republic Financial Holdings Ltd seeking Republic Bank's consent to the Plaintiff's dismissal and the reply of the same date; and a further meeting of the directors of the First Defendant, other than the Plaintiff, on 6 November 2018.

15. The Writ and Statement of Claim included the following claims:

(a). against the First Defendant, a claim for damages for wrongful termination and breaches of the Plaintiff's contract of employment (and claims for director's fees and damages for loss of office as a director together with a declaration that the Plaintiff remained a director of the First Defendant).

(b). against the Second Defendant, a claim for damages for inducing the First Defendant to breach its contract with the Plaintiff, alleging that on various dates between May 2018 and November 2018 the Second Defendant knowingly, unlawfully and without reasonable justification procured or induced the First Defendant to terminate or otherwise breach the Plaintiff's employment contract with the First Defendant (and breach the Plaintiff's implied services contract as a director of the First Defendant) (the ***Inducement Claim***).

(c). against the First Defendant and the Second Defendant, a claim for exemplary and/or aggravated damages.

(d). against the Third Defendant and Fourth Defendant, declarations that the Plaintiff remained a director and claims for director's fees and damages for loss of office.

16. The Revised Amended Statement of Claim adds a number of further claims:

(a). against the First Defendant, a claim for damages for breach of the implied duty, arising from the terms of the Plaintiff's contract of employment, not to engage in conduct likely to undermine the implied obligation of mutual trust and confidence (the ***Mutual Trust and Confidence Claim***).

(b). against the First Defendant and the Second Defendant, a claim for damages for conspiracy to cause the Plaintiff harm by unlawful means or alternatively for conspiracy to cause financial harm to the Plaintiff, since the First Defendant and the Second Defendant in combination caused the First Defendant to terminate the Plaintiff's employment (the ***Conspiracy Claims***).

(c). against the Second Defendant, a claim for damages for breach of the tortious duty to take reasonable steps not to cause and to prevent financial loss to the Plaintiff, since the Second Defendant acted unethically and improperly with respect to the Republic Bank Offer and caused or alternatively failed to prevent the termination of the Plaintiff's employment by the First Defendant (the ***Prevention of Financial Loss Claim***).

17. The Revised Amended Statement of Claim also deleted the Plaintiff's claims for a declaration that he remained a director of the First Defendant, the Third Defendant and the Fourth Defendant, for loss of office as a director of the Third Defendant and the Fourth Defendant and for exemplary and aggravated damages.

The Plaintiff's submissions

18. The Plaintiff's position can be summarised as follows:

(a). the Court has a settled and wide discretion to allow amendments to the pleadings in proceedings in accordance with GCR, O.20, r.5(1) which provides:

"…the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

(b). he referred to the commentary in the Supreme Court Practice 1999 (the ***1999 White Book***) at 20/8/6 and 20/8/10 and submitted that the principles applicable to the exercise of the Court's discretion to give leave to amend were as follows:

(i). leave to amend will only be refused if the amended case is '*bound to fail*': *Cole v Smith* (2010) 1 CILR 136 at [10].

(ii). leave to amend should be granted if the proposed amendment would not cause injustice to the other side (and no injustice would result if the other side can be compensated in costs): *Swiss Bank and Trust Corporation v Iorgulescu* (1994-95) CILR 149 (***Swiss Bank***), at p.154.

(iii). if there was no prejudice to the other parties and refusal to amend would prevent the Court from considering matters central to the parties' dispute, amendment will be permitted: *TMSF v. Wisteria Bay Ltd*. (Grand Ct.), 2007 CILR 310.

(iv). where an amendment raised a new claim or defence, it was a matter for the discretion of the judge, guided by an assessment of where justice lay (*Swiss Bank*, at p.154). Leave to introduce a new cause of action should only be refused where the proposed amendment raised a *'useless claim'* because there was no available evidence to support it (*Swiss Bank*) or if it was one which would render the case of a substantially different character and which should more conveniently be the subject of a fresh action (*Grupo Torras v Bank of Butterfield International (Cayman))* (2001) CILR 9, at [34]).

(v). amendments will be allowed to introduce new causes of action based on substantially the same facts as already pleaded: *Lemos v. Coutts (Cayman) Ltd.* (Grand Ct) 2004–05 CILR 317.

(vi). where the claimant seeks leave to amend he must show that he has a real as opposed to a fanciful prospect of success. As the English Court of Appeal said recently in *In Elite Property Holdings v Barclays Bank Plc* [2019] EWCA Civ 204 (***Elite Property***) at

[40] to [42]:

> *"For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claimant has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: Three Rivers District Council v Bank of England (No3) [2003] 2 AC 1."*

(vii). the Court must also have regard to the overriding objective. This point was also made by the Court of Appeal in *Elite Property*:

> *"… it is important to bear in mind that the overriding objective applies and the question of whether permission to amend should be given must be considered in the light of the need to conduct litigation fairly and justly and at proportionate cost."*

(c). the additional particulars and proposed new causes of action all arose from the same facts, or substantially the same facts as had already been pleaded in the Statement of Claim, as further supported by the additional evidence derived from the Defendants' discovery and witness evidence.

(d). the new claims were not bound to fail, nor were they useless or unsupported by evidence. Rather, the Plaintiff had a real (as opposed to fanciful) prospect of success. The factual foundation of the case was solid and not entirely without substance, there were volumes of evidence to support the claims (not least a *prima facie* case) and the Plaintiff had pleaded full and detailed particulars of the facts to allow the Court to draw necessary inferences:

(i). the particulars of the Inducement Claim were consistent with the principles outlined in the leading cases on this issue, such as *OBG Ltd v Allan* [2008] AC 1 and *Greig v Insole* [1978] 1 WLR 302.

(ii). the particulars of the Mutual Trust and Confidence Claim against the First Defendant for breach of the implied duty not to engage in conduct likely to undermine the implied obligation of mutual trust and confidence between employer and employee

were consistent with the principles recognised in *Malik v BCCI S.A.* [1998] AC 20 (***BCCI***).

(iii). the particulars of the Conspiracy Claims against the First Defendant and the Second Defendant for unlawful means conspiracy and conspiracy to cause harm were consistent with the principles recognised in *Lonrho Plc v Fayed* [1992] 1 AC 448**.**

(iv). the particulars of the new Prevention of Financial Loss Claim against the Second Defendant for breach of the duty to take reasonable steps not to cause, and to prevent, financial loss were based on new developments, since the service of the Writ and Statement of Claim, in the law relating to the duty owed by a parent company to an employee of a subsidiary. These developments arose out of *Rihan***.** The Plaintiff submitted that the reasoning in that decision was applicable to the facts of the present case, and the Plaintiff accordingly sought leave to amend the Writ and Statement of Claim to plead the additional particulars required to support the new claim.

The Defendants' submissions

19. The Defendants have taken the opportunity of the Application for Leave to Amend to mount a full frontal attack on the legal basis of the Plaintiff's claims. They submit that each of the claims is deficient and bound to fail so that none of the proposed amendments should be permitted. While the Application for Leave to Amend is not a strike out application and the Defendants' application for summary judgment in respect of the Inducement Claim was not listed for hearing, it has become necessary, as will be apparent, to consider the legal basis of the Plaintiff's claims in some detail, and in greater depth than would be usual on a standard application for leave to amend. The Defendants also argue that the circumstances surrounding the Application for Leave to Amend, and the nature and seriousness of the allegations made against the directors of the Second Defendant and First Defendant are such that leave should be refused.

20. On the question of the approach to be adopted by the Court when considering the Application for Leave to Amend, the Defendants' submissions can be summarised as follows:

(a). the Defendants also referred to and relied on the commentary in the 1999 White Book, in particular the following passage at 20/2/12 (underlining added by the Defendants):

> *"The overriding principle with regard to amendments is that contained in r.8, namely, that, generally speaking, all amendments will be allowed at any stage of the proceedings and of any document in the proceedings (other than a judgment or order) on such terms as to costs or otherwise as the Court thinks just. This principle is subject to the countervailing rule or practice that an amendment will be refused or disallowed when, if it were made, it would result in prejudice or injury which cannot be properly compensated for by costs. Accordingly, as a general rule either party is allowed to make any amendment in his own pleadings or other proceedings which is reasonably necessary for the due presentation of his case on payment of the costs of an occasioned by the amendment, provided that has been no undue delay on his part, and provided also the amendment will not injure or prejudicially affect any vested rights of this opponent. But if the application is made male fide, or if the proposed amendment is sought to be made after undue delay, or will in any other way unfairly prejudice or cause detriment to the other party, or is irrelevant or useless or would raise merely a technical point, leave to amend will be refused*."

(b). amendments for the purpose of determining "*the real question in controversy between the parties*" or of "*correcting any defect or error in any proceedings"* ought to be permitted (relying on *Bodden v Thompson* [2011 (2) CILR 320]) and the plaintiff will be allowed to add a new claim which is "*so germane to, and connected with, the original cause of action, that it would be a denial of justice*" if leave to add it were refused (relying on the 1999 White Book at 20/8/10).

(c). however, as the commentary in the 1999 White Book at 20/8/10 noted:

> *"There will be difficulty, […] where there is a ground for believing that the application is not made in good faith. Thus, if either party seeks to amend his pleading, by introducing for the first time allegations of fraud, misrepresentation or other such serious allegation, the Court will ask why this new case was not presented originally, and may require to be satisfied as to the truth and substantiality [sic] of the proposed amendment (Lawrence v Norreys (1890) 39 Ch.D. 213; see judgment of Stirling J. at 221, and of Bowen LJ at 235)."*

(d). further, the court was entitled to have regard to the merits of the case in an application to amend if the merits were readily apparent without prolonged investigation into the merits of the case (the 1999 White Book at 20/8/6). In particular, the Court will always look at the materiality of the proposed amendment; an inconsistent or useless amendment will not be allowed; and leave will not be given to make any other amendment raising a case which must fail (the 1999 White Book at 20/8/24).

(e). the approach to be adopted by the Court was clearly set out in the judgment of Smellie J (as he then was) in this Court in *Cayman Hotel and Golf Incorporated v Resort Gems Limited* [1992-93 CILR 372] at [35]:

> *"(a) Generally speaking, all amendments ought to be allowed which are for the purpose of determining the real question in controversy between the parties to any proceedings or for correcting any defect or error in any proceedings (per Jenkins LJ in GL Baker Ltd v Medway Building Supplies Ltd ([1958] 1 WLR at 1231).*
>
> *(b). Leave should be given to amend unless the court is satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. However negligent or careless may have been the omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs (per Bramwell LJ in Tildesley v Harper (10 Ch.D. at 397) and per Brett MR in Clarapede v Commercial Union Assn (32 WR at 263).*
>
> *(c). An amendment ought to be allowed if thereby "the real substantial question" can be raised between the parties and multiplicity of legal proceedings avoided…*
>
> *(d). On the other hand, it should be remembered that there is a clear difference between allowing amendments to clarify the issues in dispute and those that provide distinct defences or claims to be raised for the first time (per Lord Griffiths in Ketteman v Hansel Properties Ltd ([1987] AC at 220)).*
>
> *(e). Furthermore, the court will always look at the materiality of the proposed amendment; inconsistent or useless amendments will not be allowed nor will amendments be allowed to raise a case which must fail: see The Supreme Court Practice 1999, para 20/5-8/23; Jones v Hughes ([1905] 1 Ch at 187 per Vaughan Williams LJ) and the judgment of the Court of Appeal of the Cayman Islands in Iorgulescu v Swiss Bank & Trust Corp. Ltd."*

(f). the Defendants noted the discussion in the authorities in this Court of the extent to which, in the determination of applications for leave to amend, the practice had been affected by the move from the more liberal approach adopted in England before the introduction of the Civil Procedure Rules (the ***CPR***) to a stricter approach adopted after the introduction of the CPR and later case law which put the onus on the applicant to show the strength of the new amended case and why justice required him to be able to pursue it, at least in the case of very late applications. In *Lemos & Ors v CIBC Bank and Trust Company (Cayman) Limited* (unreported, 19 February 2015), Smellie CJ had noted (at [16]) the statement in the House of Lords in *Ketteman v Hansel Properties* [1988] All ER 38 that *"[H]owever negligent or*

careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without prejudice to the other side. There is no injustice if the other side can be compensated by costs" and said that:

> *"In my view, this dictum still represents good practice despite the change in emphasis in the more recent case law. I describe the change as one of emphasis because the more recent case law emphasises the need for pro-active judicial case management to ensure the timely disposition of justice, while not purporting to detract from importance of doing justice in each case. And so where the more recent case law... speaks of a "heavy onus" resting upon an applicant seeking leave to amend….., the primary question must still be – however late in the day the application may be – whether or not justice or prejudice will result from leave to amend being granted."*

(g). the Defendants submitted that Smellie CJ's judgment served merely to confirm the continued applicability of the pre-CPR approach in the determination of applications to amend and his observation (quoted above) that "*the primary question must still be – however late in the day the application may be – whether or not injustice or prejudice will result from leave to amend being granted*" should not be taken to detract from his summary of the relevant principles in *Cayman Hotel* at [35]. Further, it was notable that whilst Smellie CJ recognised (at [16]) the "*change of emphasis in the more recent case law*" he had gone on (at [19]) to observe that (emphasis added by the Defendants):

> *"[…] even while a judge should always be mindful of the consequences of delay upon the timely and effective disposal of cases, it is hardly likely that an otherwise just and proper amendment will be disallowed out of such general concerns, not directly related to the case at bar. And where the amendment would be unjust, doomed to fail or otherwise improper; it will be disallowed, in any event. Thus, while at first glance the approach in the recent English cases may seem rather less liberal than that approved in Iorgulescu; on closer examination the practical difference will likely be inconsequential."*

21. As regards the Inducement Claim:

(a). the proposed amendments to the Inducement Claim should not be allowed. They could not be said to be necessary to enable the real dispute in controversy to be determined or otherwise to correct an error. They were in themselves useless and, in so far as they purported to identify an act of inducement (by Mr Dack) for which the Second Defendant was vicariously liable the serious allegations (of deliberate and false misrepresentations)

against Mr Dack were wholly unconvincing and bound to fail. Further, the Court could not be satisfied as to their truth and substantiality.

(b). there was nothing in [31] to [50] of the Revised Amended Statement of Claim (including the additional matters pleaded at [43A], [43B], [44] and [50B]) that was capable of supporting an inference that the Second Defendant's board decided that the First Defendant should terminate the Plaintiff's employment or that the Second Defendant's directors induced or procured the First Defendant to terminate the Plaintiff's employment (whether at the 18 September Meeting or otherwise). In particular, there was nothing in the Revised Amended Statement of Claim that could be taken to indicate that the decision to terminate the Plaintiff's employment took place (or must have taken place) at the 18 September Meeting rather than at the meeting of the First Defendant's directors on 10 October 2018. The Defendants argued that the Inducement Claim proceeded on the (mere) basis of the overlap between the boards of the First Defendant and the Second Defendant, which was plainly insufficient to found such a claim. The mere fact of the overlap in membership between the two boards could not mean that the actions of the First Defendant's directors were automatically to be imputed to the Second Defendant's board. The Defendants submitted that such an approach would violate the principle of independent corporate identity and relied on the judgments of the House of Lords in *Salomon (Pauper) v A Salomon and Company Limited* [1897] AC 22 at [51] and of the Singapore Court of Appeal in *Bumi Armada Offshore & Ors v Tozzi Srl* [2018] SGCA(I) 05 at [42], [43] and [50] (per Lord Neuberger) (***Bumi Armada***) (a case involving a particularly distinguished panel comprising Chief Justice Menon, Beverley McLachlin IJ and David Neuberger IJ – who I shall refer to as Lord Neuberger - and an appeal from the Singapore International Commercial Court (the ***SICC***)).

(c). but even if the matters pleaded in [31] to [50] of the Revised Amended Statement of Claim were capable of supporting such an inference, the Revised Amended Statement of Claim failed to meet the requirement in *Bumi Armada* (at [47]) that the Second Defendant's board and/or its directors acted *mala fide* or otherwise outside the scope of its/their authority. The Defendants submitted that the views of the various directors of the Second Defendant expressed in response to paragraph 6 of the September Email (extracted at [43B] of the Revised Amended Statement of Claim) on which the Plaintiff placed particular reliance (at [50A(a)] and [50A(b)] of the Revised Amended Statement of Claim), were nothing other than fair representations of the contents of the September Email. As such, had the Second

Defendant's directors decided (in their capacity as directors of the Second Defendant) that the Plaintiff's conduct, including the sending by him of emails to the First Defendant's directors, warranted his dismissal, this would not without more meet the *Bumi Armada* test. The Defendants noted that in [82], [83] and [84] of the Revised Amended Statement of Claim there was no allegation that the Second Defendant's board and/or its directors acted in breach of their fiduciary or other duties as directors of the Second Defendant (in [83] the Plaintiff no longer maintained that the members of the Second Defendant's board acted in breach of their duties, and it had been confirmed at the resumed hearing on 11 December 2020 that the Plaintiff was no longer seeking to rely on any claimed breaches of duties by the Second Defendant's directors).

(d). the allegation made at [82] of the Revised Amended Statement of Claim (that "*the [Second Defendant's] directors, and in particular those directors who were both directors of [the Second Defendant and the First Defendant], completely misconstrued, or deliberately ignored the nature and scope of their duties in relation to the Republic Bank Offer, and acted in furtherance of their personal interests as aforesaid in preference to the interests of [the First Defendant] and its stakeholders, whose interests the Plaintiff sought to protec*t") was insufficient and immaterial given that it fell short of any claim that the directors acted in breach of their duties as directors of the Second Defendant; given the absence of any claim that the Second Defendant's directors acted contrary to or otherwise in a manner detrimental to the interests of the Second Defendant and its shareholders; given the absence of any claim that the Second Defendant's directors acted contrary to or otherwise in a manner detrimental to, or failed to take into account, the interests of the First Defendant and its stakeholders and given the absence of any pleaded link between the motives alleged and the termination of the Plaintiff's employment.

(e). the allegations at [84] of the Revised Amended Statement of Claim (that "*in a deliberate move to silence the Plaintiff, and to prevent the Plaintiff from raising further questions which the [Second Defendant's]directors perceived as being potentially obstructive to the completion of the Republic Bank acquisition, and acting pursuant to a motive to spare their own bruised dignity arising from their interpretation of the contents of the Plaintiff's emails, and in particular, the contents of the Plaintiff's email dated 11 September 2018, the directors of [the Second Defendant], knowingly and willfully, or recklessly, and without reasonable excuse or justification induced or procured [the First Defendant] to terminate the Plaintiff's*

employment contract") were also insufficient and immaterial given that the allegations again fell short of any claim that the Second Defendant's directors had acted contrary to the interests of the Second Defendant and its shareholders or otherwise in breach of their duties as directors of the Second Defendant; given that the allegations that the directors acted in a deliberate move to silence the Plaintiff and to prevent him from raising further questions in respect of the Republic Bank Offer were contradicted by the chronology (the Defendants relied on the matters set out in their defence, at [82.2] and [82.3], which had not been contradicted by the Plaintiff); given that those allegations, and the further allegation that the directors had acted pursuant to a motive to spare their own dignity, were in any event immaterial absent any claim that the directors acted contrary to the interests of the Second Defendant and its shareholders, which claim had not been advanced (and reliance on any breach by the Second Defendant's directors of their duties had been expressly disavowed).

(f). the Defendants argued that a director of a company could not be liable for inducing his company to act in breach of contract, absent bad faith on his part and relied on the judgment of Lane J in *Antuzis & Ors v DJ Houghton Catching Services Ltd & Ors* [2019] EWHC 843 (***Antuzis***). In *Antuzis*, while the claim was upheld against both the defendant company for breach of contract and its directors for inducing the company's breaches of contract, it was relevant to the inducement finding that the directors knew that the company's actions were in breach of statutory provisions enacted for the benefit of employees and that a director who caused a company to act in such a way would be breaching his duties to the company, so that the directors had not acted *bona fide* towards the company (see in particular, at [116] to [133], and the illustrations at [120]). *Antuzis* (a rare example of where the *Bumi Armada* test was met) had established that it was the director's conduct and intention in relation to his duties *to the company*, not towards third parties, that mattered (see at [114]). The present case was very different from the position in *Antuzis*. In the present case, the Plaintiff had not pleaded a breach by the Second Defendant's directors of their duties to the Second Defendant (and/or breach of any statutory duties capable of giving rise to any harm to the Second Defendant). At their highest, the allegations made by the Plaintiff amounted to a claim that the directors were (in part) motivated by their personal interests and acted out of a desire to spare their bruised dignity. The former allegation was immaterial absent an allegation that the directors' personal interests conflicted with the interests of the Second Defendant and its shareholders and/or that they failed to take into account the interests of the First Defendant. The latter allegation was also insufficient in circumstances where the

existence of such a claimed motive was consistent with a decision taken in the interests of the Second Defendant. As was recognised in *Antuzis*, it is the directors' attitude towards the company (the Second Defendant) (and the breach by them of their duties owed to the Second Defendant) that determined whether they had acted without good faith or outside the scope of their authority.

(g). these averments failed to identify an act of inducement on the part of the Second Defendant (as distinct from the First Defendant). This was because the Plaintiff had to accept that the decision to dismiss him was taken by the First Defendant's board, because a claim of inducing a breach of contract is only secondary or accessory to the primary breach of contract by the contract-breaker, the First Defendant. As a necessary element to the Inducement Claim, the Plaintiff must be able to point, separately, to an act of inducement by the Second Defendant's board but his pleaded case identified no such act. For the reasons summarised above, it was insufficient for the Plaintiff to rely on the fact of the overlap in the membership of the boards of the First Defendant and the Second Defendant. The overlap did not result in the imputation of the actions of the Second Defendant's board to the First Defendant's board. The Defendants submitted that the position here was analogous to that considered by Lord Glennie in the Court of Session in *Tartan Army Limited v Sett* 2017 SLT 532 at [35] where he said as follows:

> *"There is no averment that Mr Emerson specifically assisted in the commission of any particular act of infringement, or that he did so pursuant to any common design. That is not a mere pleading point. The pursuer's case rests entirely upon the fact that Alba is a one-man company, owned and controlled by Mr Emerson. The inference, presumably, is that Mr Emerson took the decisions to publish and offer goods and services. That is obviously right, but to my mind it takes the pursuer nowhere. On that basis, every owner or director of a one-man company would be liable without more for the acts of the company. In every case the rule in Salomon, re-emphasised in Prest, could simply be side-stepped by an averment that the director was jointly liable with the company in the commission of the tort or delict. The "corporate veil" would not only be pierced; it would be left in tatters."*

(h). the alternative basis for the Inducement Claim (based on the allegations at [85] and [87(a)] of the Revised Amended Statement of Claim) was also bound to fail. In [85], the Plaintiff alleged that "*Further, or alternatively, Stuart Dack, acting in his capacity as President and CEO of [the Second Defendant], and for whose actions [the Second Defendant], is vicariously liable, in combination with the [Second Defendant's and the First Defendant's] directors, used unlawful means to cause financial harm to the Plaintiff by causing the [First*

Defendant's] directors to effect the termination of the Plaintiff's employment]. In [87], the Plaintiff alleged that "*even if the means used by the [Second Defendant's] directors and the [First Defendant's] directors were lawful, it is to be inferred that the objective of the actions of those directors was to cause financial harm to the Plaintiff.*" Paragraph [87] then set out further particulars of the Inducement Claim and the Conspiracy Claims. These included the following. That Mr. Dack, acting as president and CEO of the Second Defendant, knowingly and intentionally, or recklessly, and with the intention of inducing the First Defendant to terminate the Plaintiff's employment in breach of contract, or otherwise cause financial harm to the Plaintiff, or whilst appreciating the probable consequences of his actions, falsely and repeatedly misrepresented to the Second Defendant's and the First Defendant's directors (i) the content, tone, number and duration of meetings and conversations he had with the Plaintiff, with the intention that the directors would believe and act upon the belief that the Plaintiff, in his e-mails to the First Defendant's directors, was motivated purely, or primarily, by his narrow self-interest in retaining his position as president of the Bank; (ii) that Mr. Dack had discussed the issues raised in the Plaintiff's e-mails with the Plaintiff, and that the Plaintiff was persisting in an unreasonable manner despite those alleged discussions; (iii) that the Plaintiff had been communicating with persons outside the First Defendant and the Second Defendant's group regarding the issues raised in the Plaintiff's e-mails and about the Second Defendant board's handling of the acquisition process and (iv) that the Plaintiff had been marshalling external legal advice regarding the Second Defendant board's management of the Republic Bank acquisition process. It was averred that the Second Defendant's and the First Defendant's directors relied on Mr. Dack's misrepresentations, and acted upon them, by causing the First Defendant to terminate the Plaintiff's employment in breach of contract and causing financial harm to the Plaintiff, including to the Plaintiff's prospects of securing future comparable employment. The Defendants argued that the claim based on these allegations must also fail because Mr. Dack's views were plainly expressed as his own assessment of the reasons for the Plaintiff's stance and were insufficient and incapable in themselves of forming the operative basis of the First Defendant's decision to terminate the Plaintiff's employment, particularly since the Plaintiff had in any event sent emails setting out his views on the Republic Bank Offer and how it was being handled to the entirety of the First Defendant's board on 7 August 2018, 11 September 2018, 17 September 2018 and 18 September 2018 (as well as to Mr Dack and Mr Bodden on 25 October 2018 and 5 November 2018). The claim failed to take into account the fact that certain directors of the First Defendant had themselves contacted Mr. Dack with concerns as to the Plaintiff's

behaviour, prompting (in the case of Mr Bierley, who was only a director of the First Defendant), Mr Dack to share his views as to the reasons for Plaintiff's apparent objections to the Republic Bank Offer.

22. As regards the Conspiracy Claims:

(a). the introduction of the new and serious allegations in the Conspiracy Claims, which were pleaded against the directors of the First Defendant and the Second Defendant (for which First Defendant and the Second Defendant were said to be vicariously liable), should also not be permitted.

(b). the Plaintiff set out the Conspiracy Claims at [85], [86], [87], [87(b)] and [87(c)] of the Revised Amended Statement of Claim. Paragraph [87(b)] now averred that those individuals who were directors of both the First Defendant and the Second Defendant, acting with the individuals who were directors of either but not both of the First Defendant and the Second Defendant (and acting with the intention of causing financial harm to the Plaintiff or whilst appreciating the probable consequence of their actions), acted in breach of their duties as directors of the First Defendant, by preferring "*their personal interests, pursuant to a motive to spare their bruised dignity arising from their interpretation of the contents of the Plaintiff's emails, and in particular, the contents of the Plaintiff's email dated 11 September 2018, over the interests of [the First Defendant], in causing [the First Defendant] to terminate the Plaintiff's employment in breach of contract […]*".

(c). the Conspiracy Claims were directed only against the directors of the First Defendant (being directed against (i) the directors of the First Defendant who were also directors of the Second Defendant and (ii) the other directors of the First Defendant). As pleaded, the claims therefore did not support claims of unlawful or lawful means conspiracy as against the Second Defendant.

(d). as regards the unlawful means conspiracy claim:

(i). the Revised Amended Statement of Claim did not establish the use of unlawful means. Without accepting that a breach of fiduciary duty could constitute unlawful means for the purposes of such a claim (the Defendants referred to the joint judgment of Lord

Sumption and Lord Lloyd-Jones in the Supreme Court in *JSC BTA Bank v Ablyazov (No 14)* [2020] AC 727 at [15] where the question of whether breach of fiduciary duty could constitute unlawful means was expressly left open), the Defendants argued that even if it was, there was no evidential basis (pleaded or otherwise) for the claim that "*causing [the First Defendant] to terminate the Plaintiff's employment*" was contrary to the interests of the First Defendant or otherwise amounted to a breach by the First Defendant's directors of their fiduciary ("*and other*") duties to the First Defendant or that any of the First Defendant's directors (acting in that capacity) preferred the interests of the Second Defendant and its shareholders (including themselves) over the interests of the First Defendant (or that there was any divergence between these interests in respect of the Republic Bank Offer). Further, the facts averred in [87(c)] of the Revised Amended Statement of Claim (that the directors of the First Defendant and the Second Defendant, in combination, "*convened meetings of the [First Defendant's] board [on 10th October and 6th November 2018] at which the decision was purportedly taken to terminate the Plaintiff's employment, which meetings were contrary to the Articles of Association of [the First Defendant] by virtue of no notice of those meetings having been given to the Plaintiff* ") could not support a claim of unlawful means. It could not be said that the convening of meetings of the First Defendant's board (even if done without notice having been given to the Plaintiff) constituted unlawful means. It was merely the mechanism by which the necessary discussions and decisions in respect of the Plaintiff's continued employment by the First Defendant were had and made.

(ii). there was also no pleaded allegation of knowledge of any unlawfulness on the part of the directors of the First Defendant and the Second Defendant. In *British Industrial Plastics Ltd v Ferguson* [1938] 4 All ER 504 Finlay LJ in the English Court of Appeal had said that: "*The essence of conspiracy is the co-operation of the minds of the conspirators in pursuance of the unlawful design. A person could never be liable for conspiracy, either in a civil or criminal court, if he had no knowledge that the design was unlawful ...*" The Defendants accepted that there was some divergence of authority on this point and referred to *Stobart Group v Tinkler* [2019] EWHC 258 (Comm) (HHJ Russen QC) and the summary of the state of the authorities in the judgment of Zacaroli J in *The Racing Partnership Ltd v Done Brothers* [2019] EWHC 1156 (Ch); [2020] Ch 289 (in particular at [275] – [277]). The Defendants noted that

Zacaroli J had concluded (at [277]) that "*It might well be said that it is consistent with enforcing basis standards of behaviour that to find a person who conspires to perform criminal acts liable even if … he or she did not know that the acts were unlawful. But where….the unlawful conduct consists of infringing the claimant's private law rights, then I consider it is consistent with enforcing basic standards of civilized behaviour that a person is liable for conspiring to injure through such unlawful means only if he or she knows (to the requisite standard) that the claimant's rights are being infringed*." The Defendants submitted that, in the present case, which concerned an employment decision taken within a corporate context where the alleged co-conspirators were all directors of the parent and/or subsidiary (and no external parties were involved), there was all the more reason why knowledge on the part of the co-conspirators that the means to be employed is unlawful should be required.

(iii). there was no pleaded or evidential basis for a conspiracy or combination going beyond the ordinary and expected discussions between and amongst directors of a parent company and subsidiary or between directors of the subsidiary, that would ordinarily and properly precede a decision to dismiss a director and senior employee of the subsidiary on the grounds of loss of confidence.

(e). as regards the lawful means conspiracy claim, there was also no pleaded (or evidential) basis for a predominant intent to injure which was a necessary ingredient for the claim of lawful means conspiracy. Absent a pleaded or evidential basis for a predominant intent on the part of the directors in question to injure the Plaintiff, the claim for lawful means conspiracy was plainly bound to fail. The Revised Amended Statement of Claim did not contain any particulars of such a predominant intent. Instead, the particulars that are included and set out at [84] and [95] contradicted any contention that the motive for the Defendants' actions lay in a predominant intent to injure the Plaintiff. Paragraph [84] referred to the Defendants acting so as to silence the Plaintiff and prevent him from raising further questions and acting from their bruised dignity, not out of an intention to injure the Plaintiff. The Defendants argued that the factual position in this case was analogous to the basis on which the lawful conspiracy claim in *Rihan* was dismissed (at [775]):

"[…] I do not find on the balance of probabilities that the predominant purpose attributable to two or more of the defendants was to injure the claimant. I think the

predominant purpose was to put an end to the claimant's complaints about the Kaloti audit, to put an end to the trouble he was causing to the EY organisation, neutralize his influence over the reporting process and bring the Kaloti assurance audit and that of the other Dubai gold refiners to a conclusion."

(f). the Conspiracy Claims should be seen for what they were, namely unsustainable make-weights added at a late stage merely to give the appearance of substance to the Plaintiff's claims. The Court was entitled to and should find that it was not satisfied as to their truth and substantiality. Being bound to fail, the Conspiracy Claims were liable to be struck out, had they at the outset been included in the Statement of Claim. The fact that there was no satisfactory explanation as to why these (serious) allegations of conspiracy are only now sought to be added was relevant to the exercise of the Court's discretion.

23. As regards the Mutual Trust and Confidence Claim:

(a). the basis for this claim was set out at [90] of the Revised Amended Statement of Claim:

"In breach of its duties to the Plaintiff as set out above, [the First Defendant], by its directors, deliberately withheld information from the Plaintiff; refused to allow the Plaintiff to represent the interests of [the First Defendant's] stakeholders regarding the Republic Bank Offer; disregarded the Plaintiff's concerns regarding the Republic Bank Offer expressed in the interest of [the First Defendant]; and, after the Plaintiff sought to raise questions regarding the terms of the Republic Bank Offer and the manner in which the transaction was being conducted by and on behalf of [the Second Defendant], terminated the Plaintiff's employment thereby causing the Plaintiff financial loss, including the loss of the Plaintiff's further prospects of being employed in a role comparable with the Plaintiff's role as President of [the First Defendant], and loss of reputation."

(b). the Defendant argued that since the alleged breaches of the implied term were based on the circumstances leading up to and attendant on the Plaintiff's dismissal, they fell within the scope of the Labour Act as much as the dismissal itself given that, on the basis of the treatment alleged, the Plaintiff could have resigned and sought to claim constructive dismissal under the Labour Act. The matter was thus regulated by the statutory regime, and it was not open to the Plaintiff to seek to circumvent that regime through the bringing of an additional claim covering the same matters in contract (or in tort).

(c). the Defendants relied on the decision of the House of Lords in *Johnson v Unisys Ltd* [2003] 1 AC 618 (***Unisys***) and argued that the facts in that case were similar to those of the present

case. There the claimant instituted proceedings for breach of contract and negligence following his summary dismissal on conduct grounds. He alleged that his employers had not informed him of the complaints against him and sought to rely on an implied term of his contract that his employers would not without reasonable and proper cause conduct themselves in a way so as to damage the relationship of trust and confidence between the parties. He further alleged that the manner of his dismissal and the circumstances leading up to it had caused his mental breakdown and inability to find work, with the result that he would suffer a loss of earnings in excess of £400,000. As was the case here, the claimant had also (successfully) brought a claim for unfair dismissal, and had been awarded the maximum compensation. His claim was struck out. At first instance the judge considered that he was seeking to circumvent the unfair dismissal legislation. His appeal was dismissed by the Court of Appeal and the House of Lords (by a majority) dismissed his further appeal. Lord Hoffman said as follows:

> *"56. Part X of the Employment Rights Act 1996 therefore gives a remedy for exactly the conduct of which Mr Johnson complains. But Parliament had restricted that remedy to a maximum of £11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit.*
>
> *57. My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell, to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said:*
>
> > *"there is not one hint in the authorities that the … tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way? … it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear."*
>
> *58. I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.*
>
> *59. The same reason is in my opinion fatal to the claim based upon a duty of care. It is of course true that a duty of care can exist independently of the contractual relationship. But the grounds upon which I think it would be wrong to impose an implied contractual duty would make it equally wrong to achieve the same result by the imposition of a duty of care."*

(d). in so far as the Plaintiff sought to distinguish *Unisys* on the basis that the present case did not concern matters relating to the manner of his dismissal, such an argument was unsustainable given the essential nature of the Plaintiff's grievances (as set out in the Revised Amended Statement of Claim at [83], [90], and [94]). In any event, such an argument was bound to fail given that any repudiatory breach of the Plaintiff's contract of employment by the First Defendant (which may have entitled the Plaintiff to resign and claim constructive dismissal) was superseded by the Plaintiff's dismissal.

24. As regards the Prevention of Financial Loss Claim:

(a). particulars of this claim against the Second Defendant were set out in the Draft Amended Statement of Claim at [91] – [95] and [91] and [94] were particularly important:

> *"91. [The Second Defendant] owed to the Plaintiff a duty in tort to take reasonable steps not to cause and to prevent the Plaintiff from suffering financial loss by virtue of its failure to discharge its duties relating to the Republic Bank Offer in a professional and ethical manner. By virtue of that duty [the Second Defendant] was obliged to act ethically, professionally and properly in accordance with [the Second Defendant's] own ethical and professional standards of conduct as set out in the Cayman National Handbook of Benefits and Policies (**the Cayman National Handbook**) and in the CSX Takeover Code."*
>
> *94. In breach of [the Second Defendant's] own professional and ethical standards as set out in the Cayman National Handbook, and its obligations under the CSX Takeover Code, [the Second Defendant] deliberately withheld information regarding the Republic Bank Offer from the Plaintiff, refused to allow the Plaintiff properly and fully to represent the interests of [the First Defendant's] stakeholders regarding the Republic Bank Offer; disregarded the Plaintiff's expressed concerns relating to the potential impact of the Republic Bank Offer on [the First Defendant's] creditors and on staff morale; and wrongly treated the Plaintiff's expressed concerns relating to staff moral as an attack by the Plaintiff on the integrity of the [Second Defendant's] directors, and an expression of lack of confidence by the Plaintiff in [Second Defendant's] directors."*

(b). the Defendants submitted that this claim was bound to fail as a matter of law for three reasons. First, the "*professional and ethical standards*" in the Cayman National Handbook were plainly not part of the Plaintiff's contract of employment. Secondly, the ratio in *Rihan* did not apply in this case, since the existence of the claimed tortious liability was precluded by the decision in and principle established by *Unisys*. Thirdly, in an argument made during

oral submissions, the Defendants argued that the Plaintiff was unable to satisfy the requirement of proximity which was an essential precondition to the existence of the claimed duty of care.

(c). the first argument was based on the decision of Mr. Justice Stephen Hellman (Actg.) in this Court in *Taylor v Royal Bank of Canada Trust & Ors* [2018] (2) CILR 412, at [39] to [63] (in particular at [58]). In that case, an employee who had been dismissed by his employer brought a claim for damages for repudiatory and other breaches of contract. He had previously successfully brought a claim before the Labour Tribunal for unfair dismissal (and the Labour Tribunal had noted that it had no jurisdiction to make awards in respect of contractual entitlements such as accrued vacation leave). The Plaintiff had been issued with an employment handbook and argued that most of the handbook had been incorporated into his contract of employment and gave rise to mutually enforceable rights and obligations. The Court held that some of the provisions in the handbook were incorporated while others were not. The provisions which the Court considered to be vague, and abstract and merely intended to provide information were not incorporated. Those which imposed precise concrete obligations on the employer or employee were workable terms of a kind that might reasonably be expected to be found in a contract of employment and made commercial sense.

(d). secondly, in *Rihan* it was held that the audit duty recognised by the court would not be imposed where the claimant had the benefit of statutory protection. The audit duty arose because the defendant employer had assumed first a responsibility to conduct an audit of a client, on which the claimant worked, in an ethical manner by intervening and directing the manner in which it was carried out and secondly a responsibility to the claimant to protect him from financial loss suffered as a result of failing to conduct the audit in such a manner (see *Rihan* at [490]). Kerr J had expressly confirmed, by reference to *Unisys* and the statutory system of redress in employment tribunals, enacted in the UK by the Employment Rights Act 1996 and other legislation, that "*I would not have considered it reasonable to impose the audit duty in circumstances where the claimant could avail himself of the statutory protection*" (see [628]-[630]). However, "*Parliament has only extended to whistleblowers the protection of the statutory regime where they ordinarily work in this country*" ([633]). The Defendants argued that it was on this basis that Kerr J concluded (underlining added):

"632. *If the present case had arisen in a conventional employment context, where a claimant is able to invoke the statutory protection under Part IVA of the 1996 Act, the reasoning in Johnson v. Unisys Ltd would have persuaded me that the audit duty should not be allowed to supplement the statutory regime. In such a situation the employee obviously should not be allowed to bring a common law claim in tort after the expiry of the employment tribunal time limit (normally three months from the date of the relevant detriment or dismissal), circumventing the short deadline applying to the statutory cause of action.*

633. *For that reason, the examples I have given of solicitors, barristers or doctors putting pressure on their subordinates to behave improperly, might well in a UK context not attract the duty of care to behave ethically which I have been considering in this case. But Parliament has only extended to whistleblowers the protection of the statutory regime where they ordinarily work in this country. There is no such protection for those, like the claimant in this case, who work outside it.*

634. *The duty is likely to be ruled out as inconsistent with the statutory regime, but only where the statutory scheme itself provides that a person may invoke its protection. If I am right about that, it is a duty that applies only in very narrow circumstances. For that reason, the present case, like Mahmud's case and some of the other cases (including, according to Lord Goff, Henderson v Merrett Syndicates Ltd) should be regarded as an outlier, with a factual basis that will rarely if ever occur."*

635. *I conclude that it is fair, just and reasonable to recognise the existence on the unusual facts of this case of the "audit duty": the duty of care owed by the defendants to the claimant: to take reasonable steps to prevent the claimant from suffering loss of earnings by reason of the defendant's failure to perform the Kaloti audit in an ethical and professional manner."*

(e). the Prevention of Financial Loss Claim was effectively a claim for unfair dismissal and was covered by the statutory regime contained in the Labour Act. It was therefore precluded by the *Unisys* principle and the approach taken by Kerr J in *Rihan* as to when a duty of care in tort would be recognised and held to exist where there was an existing remedy under statute.

(f). thirdly, the Defendants argued that since the Plaintiff had no right to be involved, and the Second Defendant had no obligation to involve him, in the Second Defendant's decision making process with respect to the Republic Bank Offer, the relationship between the Second Defendant and the Plaintiff with respect to the Republic Bank Offer was not one of sufficient proximity to found a duty of care.

(g). Kerr J in *Rihan* had reminded himself (at [594]) of the following remarks of Lord Oliver in *Caparo* (at 651E-F):

> *"'proximity' in cases such as this is an expression used not necessarily as indicating literally 'closeness' in a physical or metaphorical sense but merely as a convenient label to describe circumstances from which the law will attribute a duty of care. It has to be borne in mind that the duty of care is inseparable from the damage which the plaintiff claims to have suffered from its breach. It is not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained."*

(h). in *Rihan* Kerr J had found (at [595]) that the claimant was in a sufficiently close relationship with the defendants to satisfy the proximity test, but only in a limited respect. This was only in relation to the audits where he was the responsible engagement partner.

(i). the Defendants submitted that in the present case since the Plaintiff had no official role in the consideration of the Republic Bank Offer, his relationship with the Second Defendant was insufficient to give rise to a duty of care on the Second Defendant.

25. The Defendants submitted that for these reasons and in the circumstances, the Court should exercise its discretion so as to refuse the Application for Leave to Amend. On a proper analysis of the proposed amendments, such a course is open to the Court on the authorities and is moreover consistent with and supported by the overriding objective. The Court should exercise its discretion having regard to the overriding objective and account should be taken of the following matters: (a) the seriousness of the new allegations; (b) the Plaintiff's failure in not raising these claims in the first instance/earlier; (c) the adequacy of the stated reasons for only now seeking to add these new allegations and/or causes of action and (d) the consequences of allowing the amendment(s).

26. The Defendants also submitted that the Court should exercise its power (of its own motion) to strike out the Inducement Claim pursuant to GCR O.18, rule 19(1)(a) (and in furtherance of the overriding objective and, in particular, paragraphs 4.1, 4.2(b) and 4.3 of the Preamble to the GCR). The Plaintiff having had the opportunity to place before the Court not only a draft amended Statement of Claim but also the Revised Amended Statement of Claim (formulated having had the benefit of both the Court's observations and the Defendants' submissions), he should not be afforded a further opportunity to present yet further revisions to his pleaded case. The clear

inability on the part of the Plaintiff to present a pleaded case which disclosed a reasonable cause of action/an arguable claim in respect of the above claims merely revealed the inherent lack of merit of the Plaintiff's claims.

The Plaintiff's reply to the Defendants' submissions

27. In response to these challenges made and objections put forward by the Defendants the Plaintiff made the following further points.

28. As regards the Inducement Claim:

(a). the question whether the decision to terminate the Plaintiff's employment was made by the Second Defendant at the September Meeting held, or by the First Defendant at some subsequent meeting, was a question of fact to be determined at the trial after the Court had heard the evidence. The Plaintiff relied on an inference which he asked the Court to draw from the primary facts which are set out in the Revised Amended Statement of Claim. It was for the Defendants to admit or deny the facts which the Plaintiff asks the Court to find by way of inference. If the Defendants deny the Plaintiff's allegations, the issues are joined and can then be the subject of further discovery, interrogatories or other appropriate enquiry. The Court cannot, at this stage, presume what the evidence will be and determine the Plaintiff's case on the basis of that presumption.

(b). there was no principle, whether derived from *Bumi Armada* or otherwise, that a parent company may only be liable for inducement of breach of contract by its subsidiary if the directors of the parent who carried out the acts of inducement acted *mala fide* or outside the scope of their authority. *Stocznia Gdanska SA v Latvian Shipping Company* [2003] 1 CLC 282 (***Stocznia***) was authority for the proposition that a parent company can be found liable for inducing a breach of contract by its subsidiary. In that case, the claim that the parent company directly induced a breach of contract by the subsidiary failed, but only for the absence of evidence. It was however notable that, on the same facts, the claim for indirect inducement of breach of contract succeeded. The relevant decision in that case was the decision by the directors of the parent company not to provide financing to the subsidiary to enable the subsidiary to fund its performance of the contract. There was no

discussion or suggestion in the judgment that the finding of indirect inducement was dependent on the directors of the parent company acting *mala fide*, or outside the scope of their authority. In fact, on the evidence, the directors of the parent were clearly acting within the scope of their authority. The Plaintiff submitted that to the contrary, an allegation that the directors of the Second Defendant acted outside the scope of their authority would be fatal to the claim against the Second Defendant which, of necessity, was based on vicarious liability. The Second Defendant could not be vicariously liable for acts of its directors done outside the scope of their authority. As Lord Woolf M.R. noted in *Credit Lyonnais Bank Nederland N.V. v Export Credits Guarantee Department* [2000] 1 A.C. 486 (***Credit Lyonnais***), at 494:

> *"This statement makes clear the principle on which vicarious liability depends. It is that the wrong of the servant or agent for which the master or principal is liable is one committed in the case of the servant in the course of his employment, and in the case of an agent in the course of his authority. It is fundamental to the whole approach to vicarious liability that an employer or principal should not be liable for the acts of the servant or agent which are not performed within this limitation…'*

(c). the Plaintiff argued that once a director's acts fall within the general scope of the director's authority, the company is liable for the director's acts even if motivated by some interest other than the pursuit of the company's interests, such as, as alleged in this case, to spare the directors' own bruised dignity. The Plaintiff relied on the following extract from the judgment of Lord Sumption in *Bilta UK Ltd (in Liquidation) v Nazir* [2015] 2 W.L.R. 1168 (***Bilta***), at [70]:

> '*…Vicarious liability does not involve any attribution of wrongdoing to the principal. It is merely a rule of law under which the principal may be held liable for the wrongdoing of someone else. This is one reason why the law has been able to impose it as broadly as it has. It extends far more widely than responsibility under the law of agency: to all acts done within the course of the agent's employment …and even if his acts are unknown to the principal, unauthorised by him and adverse to his interest or contrary to his express instructions.'*

(d). there was no principle which supported the argument that a failure to allege a breach of fiduciary duty by a director of a parent company would be fatal to a claim against the parent company for inducement of breach of contract by that parent company's subsidiary. That argument was contrary to the findings in *Stocznia* and was unsupported by the decision in *Bumi Armada*, which was authority for no more than a principle that the mere fact of the

relationship of parent and subsidiary, without more, was insufficient to give rise to a finding of inducement by the parent of breach of contract by the subsidiary. In fact, an allegation of breach of fiduciary duty by the directors of the Second Defendant would arguably be fatal to a claim against the Second Defendant based on vicarious liability since breach of fiduciary duty by a director would fall within the *fraud exception* to the circumstances where a principal would be liable for the acts of an agent acting within the scope of his authority. This was confirmed by Lord Sumption in *Bilta* at [71]:

> *'Bilta's answer to this, which was accepted by both the trial judge and the Court of Appeal, is that the dishonesty of Mr Chopra and Mr Nazir is not to be attributed to Bilta, because in an action for breach of duty against the directors there cannot be attributed to the company a fraud which is being practised against it by its agent…It is common ground that there is such a principle. It is commonly referred to as the fraud exception, but it is not limited to fraud. It applies in certain circumstances to prevent the attribution to a principal of his agent's knowledge of his own breach of duty even where the breach falls short of dishonesty…'*

(e). the Defendants' argument was at odds with this principle and would have the effect that a parent company could in no circumstances be liable for inducement to breach a contract. The weakness of the argument would be even clearer had the circumstances alleged been different, such as, for example, that the alleged acts of inducement were carried out by some employee of the parent company who was not a director, and who owed no fiduciary duties to the parent company similar to those owed by a director.

(f). the Defendants' reliance on *Antuzis* was also misplaced. In *Antuzis*, the claim was against the directors of the company for inducement of breach of contract by the company. The statements of principle taken from that case that the Defendants relied on were made in that context. They had no application to the circumstances of the present case where the allegation of inducement of breach of contract was against the company (the Second Defendant) based on the actions of its directors.

29. As regards the Conspiracy Claims, the Plaintiff submitted that it was at least arguable (as the Defendants conceded) that breaches of fiduciary duty or breaches of contract constitute unlawful means for the purpose of unlawful means conspiracy and this was sufficient for the purpose of the application for leave to amend as it related to adding the unlawful means Conspiracy Claim.

30. As regards the Mutual Trust and Confidence Claim:

(a). an employee was entitled to recover damages if the breaches of the implied term result in the termination of the employment. As stated by Lord Nicholls of Birkenhead in *BCCI*:

> *"An employee may elect to treat a sufficiently serious breach of trust and confidence as discharging him from his contract and, hence, as a constructive dismissal. The damages in such a case ought, in principle, to be the same as they would be if the employer had expressly dismissed the employee. The employee should be no better off, or worse off, in the two situations. In principle, so far as recoverability of financial losses are concerned, there is no basis for distinguishing (a) wrongful dismissal following a breach of the trust and confidence term, (b) constructive dismissal following the breach of confidence term, and (c) a breach of the trust and confidence term which only becomes known after contract ended for other reasons..."*

(b). there was nothing in *Unisys* that cut across, or was inconsistent with, that statement. *BCCI* was expressly distinguished in *Unisys* where the claim was based on damages claimed to have arisen from the manner of the dismissal rather than breaches of the implied term which occurred during the course of the employment. The principle in *BCCI* would be completely undermined if an employer could simply avoid foreseeable loss by wrongfully terminating the employment. In the present case, the Plaintiff sought to allege a number of breaches during the course of the employment which, at least arguably, gave rise to a breach of the implied term. His wrongful dismissal was a compounding factor, not an exonerating factor for the employer. The Mutual Trust and Confidence Claim was not based on the unfair manner of the Plaintiff's dismissal, but rather breaches of duty imposed by the implied term, which ultimately culminated in his dismissal by the First Defendant. Section 55(4) of the Labour Act clearly foreshadowed common law claims being brought by an employee, even where that employee recovers an award for unfair dismissal. At the very minimum, it foreshadowed contractual claims. The breach of the implied term (and the Mutual Trust and Confidence Claim) is a claim in contract, no different in this context to a claim for wrongful dismissal.

31. As regards the Prevention of Financial Loss Claim:

(a). the facts alleged in the Revised Amended Statement of Claim at [91] – [95] were sufficient to establish the degree of proximity which would give rise to the duty recognised in *Rihan.*

The Plaintiff had properly alleged that this duty was breached and that the breach had resulted in foreseeable loss.

(b). the Second Defendant's obligation to act ethically, professionally and properly was not dependent on the terms of the Cayman National Handbook being incorporated in the Plaintiff's employment contract. In any event, it was at least arguable that the terms of the Cayman National Handbook had been incorporated into the employment contract. It was important to note, the Plaintiff submitted, that his case was not based on a claim that he was entitled to participate in the decision making related to the Republic Bank Offer. The Plaintiff alleged that he expected that, based on the ethical and professional conduct expressly embraced by the Second Defendant, including the '*duty of fidelity to … depositors',* and the importance of '*prudence over profit',* he was entitled to represent the interests of the First Defendant's customers and employees, and could do so firmly and forcefully, if necessary, and that the Second Defendant had an obligation in the circumstances not to cause the First Defendant to terminate, and also to prevent the First Defendant, from terminating, the Plaintiff's employment for doing precisely what those principles implored all employees to do.

Analysis and Decision

32. I have noted above that the Defendants maintain two different types of challenge to the Application for Leave to Amend. The main thrust of their objection to the various amendments sought to be made by the Plaintiff is that the pleading of the amended claim and cause of action (and the evidence in support) is deficient such that the relevant claim is bound to fail. The Defendants also submit that the nature of the allegations made in the proposed amendments and circumstances surrounding the making of the Application for Leave to Amend are such that leave should not be granted.

33. The law and principles to be applied by the Court in considering an application for leave to amend are substantially agreed by the parties, as is clear from my summary of their respective submissions above.

34. I do not accept the Defendants' submissions with respect to the second category of objections. As I have noted above, the Defendants submitted that since (a) the new allegations included in the

Revised Amended Statement of Claim were serious, accused the relevant directors of deliberate wrongdoing and were inherently unbelievable and unsupported by the evidence filed to date; (b) the Plaintiff had failed to raise the new allegations and claims in the first version of his statement of claim or by way of amendment at an earlier date; (c) the inadequacy of the Plaintiff's reasons for only now seeking to add the new allegations and claims and (d) the damaging consequences on the conduct of the litigation that would follow from allowing the amendments, the Court, having regard to the overriding objective should refuse leave. I do not agree. I accept the Plaintiff's submissions on this issue. The additional particulars and proposed new causes of action related to and arose out the additional evidence derived from the Defendants' discovery and witness evidence and the Application for Leave to Amend was not unduly delayed or unjustifiable. The new facts supplemented those that had already been pleaded in the Statement of Claim. While the new allegations against the relevant directors are clearly serious and do include accusations of deliberate wrongdoing and misrepresentations, and I have had regard to the commentary in the 1999 White Book at 20/8/10 to which I was referred by the Defendants (that in such cases the Court will ask why this new case was not presented originally, and may require to be satisfied as to the truth and substance of the proposed amendments), I am satisfied that on balance it is appropriate to give leave for the relevant amendments to be made. The pleading is clear and detailed and there is sufficient evidence to support the pleading, such that the allegations should be tested at trial. I make no comment at this stage as to the Plaintiff's prospects of succeeding at trial on these issues save to say that the threshold for obtaining leave to amend has in my view been crossed. It seems to me that the amendments are reasonably necessary for the due presentation of the Plaintiff's case and there has been no undue delay on his part. Furthermore, granting leave will not be unjust to the Defendants as they can and should be compensated by an order for payment of the costs of and occasioned by the amendments.

35. The former objections based on the argument that the Plaintiff's new claims, and the Inducement Claim following the proposed amendments are bound to fail require careful and detailed analysis. I will consider each claim in turn and each of the different grounds on which the Defendants say that the relevant claim is bound to fail. Both the Plaintiff and the Defendants accepted that the principles set out in ***Elite Property*** (at [40] to [42) and quoted above) represent the proper approach for the Court to adopt. The Court will only allow an amendment if it has a reasonable prospect of success. However, the Court must be astute not to conduct a mini-trial in order to reach a conclusion on that issue. Because the Defendants have raised a number of points of law which give rise to complex questions concerning the effect and interpretation of various authorities, it is

necessary to consider the cases and the applicable law in some detail but doing so does not result in the Court conducting a mini-trial on this interlocutory application. I have kept the need to avoid doing so firmly in mind. I note, and take into account, the principle also applied in summary judgment applications (where the no real prospect of success test also applies albeit in a slightly different context) that where the issue raised by the amendments involves a controversial question of law in a developing area and there is much to be considered in light of the relevant authorities, and the application of the authorities to the facts as found at trial, the Court should be slow to refuse leave.

36. I note that the Defendants also submitted that the Court should exercise its power (of its own motion) to strike out the Inducement Claim pursuant to GCR O.18, rule 19(1)(a) (and in furtherance of the overriding objective). For the reasons given below, I do not consider that it would be justified or appropriate to do so.

The challenge to the Inducement Claim

The Defendants' argument that there was nothing in [31] to [50] of the Revised Amended Statement of Claim capable of supporting an inference that the Second Defendant's board decided that the First Defendant should terminate the Plaintiff's employment or that the Second Defendant's directors induced or procured the First Defendant to terminate the Plaintiff's employment (whether at the meeting of the Second Defendant's directors on 18 September 2018 or otherwise).

37. As I have noted, the Defendants submitted that there is nothing in [31] to [50] of the Revised Amended Statement of Claim that is capable of supporting an inference that the Second Defendant's board decided that the First Defendant should terminate the Plaintiff's employment or that the Second Defendant's directors induced or procured the First Defendant to terminate the Plaintiff's employment (whether at the September Meeting or otherwise). The Plaintiff in response submitted that his pleading properly and adequately set out the facts and matters from which the Court may draw such an inference and find that there was such a decision and such inducement or procurement. The issues in dispute were questions of fact to be determined at the trial after the Court had heard the evidence. In my view, the Plaintiff is correct and I reject the Defendants submissions on this point:

(a). the relevant paragraphs in the Revised Amended Statement of Claim plead facts concerning and refer to various actions taken, and statements regarding the Plaintiff made, by the directors of the Second Defendant. [43B] refers to emails from various directors of the

Second Defendant setting out their critical reaction to and views on the Plaintiff's September Email (based on the affidavit evidence filed by those directors in these proceedings); [44] refers to the Wardle Email (Mr. Wardle was a director of both the First Defendant and the Second Defendants) which called for action ("*decisive action*") to be taken promptly ("*sooner than later")* against the Plaintiff and it is averred that this was intended to mean terminating the Plaintiff's employment contract whether or not that was justified or would give rise to a breach of that contract; [45] avers that Mr. Dack, in response to Mr. Wardle's request, and as a director of the Second Defendant, convened the September Meeting and [46] pleads that an inference was to be drawn that the purpose of the September Meeting was to determine the Plaintiff's future (in essence, what action should be taken against him); [48] states that Mr. Dack, as an officer of Second Defendant, subsequently approached Republic Bank on 16 October 2018 to seek their consent to the termination of the Plaintiff's employment contract; [50A] sets out the inferences which the Plaintiff says should be drawn from these facts and matters, including the inference that the Second Defendant's board decided, at the September Meeting, that the First Defendant should terminate the Plaintiff's employment, regardless of cause and the inference that after the September Meeting, the directors of the Second Defendant induced the other directors of the First Defendant (who were not directors of the Second Defendant) to implement the decision of the Second Defendant's board made at the September Meeting.

(b). it seems to me to be plain that the Court *could* find, based on these facts, if proved at trial, that there was a decision by the Second Defendant's board that action should be taken to have the Plaintiff dismissed and that, having taken that decision, the directors of the Second Defendant required or persuaded the other directors of the First Defendant to give effect to and implement that decision by taking steps to dismiss the Plaintiff. The pleaded facts (and the evidence filed to date in support of the Plaintiff's claim) could permit the Court to find that the Second Defendant's board was the decision maker and that the other directors of the First Defendant were in effect directed how to act or persuaded to take action in accordance with the wishes and directions of the Second Defendant's board. It must be said that the documentary evidence places a number of hurdles in the way of the conclusion that it was the Second Defendant's directors who took the decision. For example, Mr. Dack's letter to Republic Bank dated 16 October 2018 refers to a meeting of the *First Defendant's* board which took place the previous week and states the *First Defendant's* directors had lost confidence in the Plaintiff and decided not to continue his employment. Furthermore, it is to

be expected, as I note below, that the principal decision maker with respect to the Plaintiff's contract of employment would be the First Defendant as the party to the contract. In addition, the evidence in support of the allegation that the directors of the Second Defendant induced the other directors of the First Defendant (who were not directors of the Second Defendant) to implement the decision of the Second Defendant's board made at the September Meeting is at present circumstantial and based on inference. But the evidence does show that the Plaintiff's position was considered by the Second Defendant's board at the September Meeting (see for example Mr. Dack's First Affidavit at [124]), that the Second Defendant's board's felt under attack, that the September Email generated a visceral reaction from the Second Defendants' directors, that the Second Defendant's board was leading the decision making with respect to the Republic Bank Offer, which was the subject of the Plaintiff's challenges and criticism, and that the deliberations regarding the Plaintiff's future were or may have been considered first by the Second Defendant's board in advance of the decisions, such as they were, taken by the First Defendant's board.

(c). I note that Lord Neuberger, in *Bumi Armada* at [50] – [52] (quoted below) analysed the extent to which employees of the parent company could be treated as acting for the subsidiary in taking the decision to breach the subsidiary's contract (in *Bumi Armada* the parent had employees but the subsidiary did not) and considered, on the facts of that case, that the employees who in fact took the decision must be treated as having acted as agents for the subsidiary, in particular because the subsidiary was the party to the relevant agreement that was breached (a right of first refusal). He also said that it would "*require cogent additional evidence*" to show that the individuals responsible for the subsidiary's failure to honour the right of first refusal were also acting for the parent, let alone that they were acting solely for the parent. I can see that it may be said (indeed the Defendants have in effect argued) that where the individuals who take a decision to breach a contract entered into by a subsidiary, as in the present case, hold two offices, as directors of the parent and of the subsidiary, they will be treated, absent clear evidence to the contrary, as taking the decision as directors and on behalf of the subsidiary whom the decision directly affects and relates as the contractual party. It might also be said that if the individuals who were directors of the Second Defendant and the First Defendant took the initial decision to dismiss the Plaintiff as directors of the Second Defendant, they could not be said to have persuaded or induced themselves to implement their own decision as directors of the First Defendant.

(d). but in my view, the Plaintiff's pleading and the evidence filed to date with respect to the role of the Second Defendant's directors (as decision makers and inducers) is sufficient to justify giving leave to amend and to satisfy the test in *Elite Property*. It will be necessary for the allegations and all the evidence to be reviewed and tested by cross examination at trial and the Plaintiff is entitled to have this done and to have the facts found by the Court at trial.

The Defendants' argument that the Revised Amended Statement of Claim failed to meet the requirement in Bumi Armada that the Second Defendant's board and/or its directors acted mala fide or otherwise outside the scope of its/their authority (a director of a company could not be liable for inducing his company to act acting in breach of contract, absent any bad faith on his part)

38. The Defendants argued that in any event, even if the pleaded facts might permit the Court to find that the termination decision was made by the Second Defendant's board and that the Second Defendant had induced or procured the First Defendant to take steps to dismiss the Plaintiff, the Inducement Claim would still fail as a matter of law.

39. The key authority on this point, as both parties accepted, is *Bumi Armada*. Even though it is not a decision of a court of this jurisdiction or of England and Wales, it is one of considerable authority and weight in view of the Singapore Court of Appeal panel involved and the fact that the leading judgment is given by Lord Neuberger.

40. In *Bumi Armada* the first defendant, Bumi Armada Offshore Holdings Limited (***BAOHL***) had been awarded a contract in relation to a project for the supply of facilities and services in connection with the development of a gas field in Indonesia. The project included the construction and lease of a floating production, storage and offloading unit, a key part of which was the gas processing facilities, which consisted of seven modules. The SICC at first instance had found first that BAOHL had breached the right of first refusal that it had granted to Tozzi Srl (***Tozzi***), in respect of the supply of all seven modules and secondly that BAOHL's parent company Bumi Armada Berhad (***BAB***) was liable in tort for inducing BAOHL's breach of contract. In relation to the claim against BAB, the Singapore Court of Appeal allowed the appeal.

41. It is, in my view, helpful to set out in full the key passages in the judgment of Lord Neuberger IJ (underlining added by me):

"45. In our view, the owner of, or indeed any shareholder in, a company cannot be held to be liable for inducing a breach of contract by that company if the actions said to give rise to its liability merely involved the owner or shareholder pursuing in good faith its own interest in its capacity as the owner of, or shareholder in, that company. If the sole, or majority, shareholder in a company formed the view that the company would be better off (and his shares would therefore be worth more) if the company breached a contract, and summoned a shareholder's meeting, or persuaded the directors, to give effect to that view, it would seem wrong that the injured party should be able to proceed against the shareholder for inducing or procuring the company's breach of contract. Such a result is essentially dictated by the rationale behind the decision in Salomon, as, if it were otherwise, a shareholder would effectively have to choose between sacrificing his right of pursuing his self-interest bona fide as a shareholder or finding himself liable for the company's breach of contract. Such an outcome could also lead to practical difficulties.

46. The point has been considered, albeit briefly, in a decision in the English Commercial Court in [Stocznia] [2001] 1 Lloyd's Rep 537. At [244], Thomas J described as "powerful" the argument that "it would have been open to Latco [ie, the parent company] to act in that way and, properly as shareholders, to make a decision that Latreefers [ie, the subsidiary company] would not perform the contracts" (although it is right to record that he did not decide the case on this point as it was unnecessary to do so). When the case came to the Court of Appeal, it was conceded (with the court's apparent approval) that Latco "would have committed no tort if it had merely decided without more that its own interests did not recommend the commitment of its resources to Latreefers' contracts; or if Latco had taken a formal decision as Latreefers' shareholders that Latreefers should not perform its contracts" (see Stocznia Gdanska SA v Latvian Shipping Company and others (No. 2) [2002] EWCA Civ 889 at [132]).

47. We agree with Thomas J: indeed, we go further and say that the argument he described as "powerful" was right; and, in agreement with the Court of Appeal, we consider that the concession was rightly made. In order to establish that a parent company is liable for inducing a breach of contract by its subsidiary, some factor over and above an actual act of inducement would be needed. In other words, the mere fact that a shareholder with a controlling interest acts in such a way as to induce a company to breach its contract as a matter of fact, is not enough to render the shareholder liable for inducing the breach of contract as a matter of law: something more is required. At least in the present case, we consider that what would be needed would be a finding that, in so acting, the parent company was pursuing an interest unrelated to (or, possibly, in addition to) its capacity as owner of the shares in the subsidiary. However, it would be unwise for us to suggest that this could be the only additional factor which would cut it: for instance, a finding of lack of good faith might suffice.

48. It follows from the above discussion that BAB could properly be made liable for BAOHL's breach of Tozzi's contract only if:

(a) BAB had, as a matter of fact, induced BAOHL to breach the contract; and

(b) in inducing the breach, BAB had acted in a way other than in good faith in pursuing its own interest as the owner of BAOHL.

49. *It seems to us that, properly analysed, the evidence does not make out either of these two requirements, which Tozzi must satisfy if it is to succeed in establishing that BAB is liable for inducing BAOHL's breach of contract. In other words, there is insufficient evidence which can fairly be said to support the contention that, as a matter of fact, BAB induced BAOHL to breach its contract with Tozzi, and, even if there were sufficient evidence for that purpose, there is no evidence to suggest that BAB acted in this way other than in good faith in pursuing its own interest as the owner of BAOHL.*

50. *Turning to the question whether BAB factually induced BAOHL's breach of contract, it is true that the individuals who decided to subcontract, and who subcontracted, the supply of the TI Packages to VME, without honouring Tozzi's right of first refusal, were employees of BAB, because BAOHL had no employees. However, that cannot, in and of itself, mean that BAB, as a matter of fact, was responsible for BAOHL's breach of contract. The fact that an individual is employed by the parent company does not prevent that individual from acting for a subsidiary rather than the parent company. When acting for the subsidiary, the simple fact that the individual was employed by the parent does not mean that the individual was also acting for the parent – let alone that he was only acting for the parent.*

51. *The decision not to give effect to Tozzi's right of first refusal (whether it was due to a positive decision or, less likely, an oversight) must have been made by the individuals concerned as agents for BAOHL, as it was BAOHL which granted the right of first refusal to Tozzi initially in the PBA in 2013, and subsequently at the 31 July meeting in 2014, it was BAOHL which owed the consequential obligation to Tozzi to offer a right of first refusal. Moreover, it was BAOHL which was the main contractor under the Project and was therefore in a position to comply with this obligation, and it was BAOHL which deprived Tozzi of the opportunity for which it had contracted by subcontracting with VME.*

52. *In those circumstances, it seems to us that it would require cogent additional evidence to show that the individuals responsible for BAOHL's failure to honour Tozzi's right of first refusal were also acting for BAB – let alone that they were acting solely for BAB.*

.....

56. *Even if the evidence had been sufficient to justify a finding that the individuals responsible for breaching Tozzi's right of first refusal were acting for BAB, it still would not justify the conclusion that BAB is liable in tort to Tozzi. In the first place, the finding would not alter the fact that the individuals were also, indeed primarily, acting for BAOHL, and it is a little difficult to see how the same individual doing the same thing on behalf of the contract-breaking company and a third party can lead to the third party doing anything to induce the contract-breaking company to breach its contract.*

57. *Secondly, and quite apart from that, there is nothing in the evidence to support the proposition that, if and in so far as they were acting for BAB, the individuals were doing anything other than pursuing BAB's bona fide interests as the owner of all the shares in BAOHL.*

> *58. Accordingly, we conclude that the SICC's conclusion that BAB is liable for inducing BAOHL's breach of contract cannot stand.*

42. A number of points emerge from Lord Neuberger's judgment:

(a). the two critical conditions which need to be established in order to hold a parent company liable for inducing its subsidiary to a breach a contract to which only the subsidiary is a party are (i) an inducement in fact and (ii) that the parent "*acted in a way other than in good faith in pursuing its own interest as the owner of*" the subsidiary.

(b). something more than mere inducement is required. There must be an additional factor. Lord Neuberger did not purport to provide an exhaustive list of what would constitute a sufficient additional factor. He did conclude that it would be sufficient if there was a finding that the parent company was pursuing an interest unrelated to (or *possibly* in addition to) its capacity as owner of the shares in the subsidiary. He also said that a finding of lack of good faith *might* suffice.

(c). the underlying principle is that proper shareholder decision making needs to be protected. Consistently with the separate entity doctrine recognised in *Salomon*, the parent and subsidiary are separate entities and the parent when making decisions as shareholder should not easily be made liable for breaches of contract by its subsidiary, otherwise the distinction in law between the two companies would be dismantled. It would be wrong to force a shareholder to choose between sacrificing his right of pursuing his self-interest *bona fide* as a shareholder and finding himself liable for the subsidiary's breach of contract.

(d). the focus is on the legitimacy of and basis for the shareholder's decision making, qua shareholder. Is it acting so as to protect and promote its interests as owner of the shares in the subsidiary? Therefore, if the parent is shown to be acting in order to promote a different interest, it will not be protected. If it is shown to be acting in order to promote its interest as shareholder and a different interest, a question will arise as to whether the other interest will be sufficient to taint the decision making process. This must depend on the nature of the other interest (or reason for the inducement) and the extent to which the parent takes it into account. Ultimately, the Court must decide whether the parent's decision making is

legitimate and sufficiently related to its position as the owner of the subsidiary. It seems to me that good faith becomes relevant for this purpose. If, for example, the parent, through its directors, knows that the breach of contract by its subsidiary would and could not adversely impact its interests as shareholder, then the parent would not be protected from liability for inducing the breach. Or if the parent's dominant reason for inducing the breach was vindictively to damage the contractual counterparty rather than protect its interests as shareholder, that should be sufficient to take the parent's decision making outside the protected territory. There would be no need, or justification, for protection in order to prevent shareholders who were acting properly to protect their investment in and as owner of the subsidiary from incurring liability under contracts entered into by the subsidiary.

43. Where a claim for inducing a breach of contract is brought by a party to a contract with the subsidiary against *the directors of the subsidiary*, the claimant must show that the directors were not acting *bona fide* and within the scope of their authority. Directors acting *bona fide* and within the scope of their authority will be treated as the alter ego of the subsidiary, and their acts treated as the acts of the subsidiary (as their principal), which is already liable for breach of the contract (of course, directors who commit another tort, other than inducing a breach of contract, can be liable as joint tortfeasors with their company). In a claim *against the directors*, it is necessary to establish that the directors (as agents) were acting in bad faith or outside the scope of their authority to make them personally liable and prevent their conduct being treated as the company's conduct. *Antuzis* was a case in which the claim was against directors (or fiduciary officers) of the contract breaker. In *Antuzis* an employee brought a claim not only against his employer (a company) but also against a director of the company and the company secretary personally. The court was asked to decide, as a preliminary issue, whether *the individuals* were personally liable for inducing the employer to breach the employment contract. The issue was whether the corporate officers could be liable in tort for inducing the corporate employer to breach the contract. The "*so called rule in*" (as Lane J described it) *Said v Butt* provided a defence if and to the extent that the corporate officers acted bona fide and within the scope of their authority.

44. However, where a claim for inducing a breach of contract is brought by a party to a contract with the subsidiary against *the parent,* the claimant is seeking to attribute the directors' conduct to the parent. The claimant is then relying on the principle of vicarious liability. A company will be vicariously liable for the torts of its directors/agents, as was said in *Credit Lyonnais*, "*committed ..... in the course of his authority*", although subsequent decisions of the UK Supreme Court have

moved beyond the distinction between doing an unauthorised act (no vicarious liability) and doing an authorised act in an unauthorised way (vicarious liability) and have focussed instead on whether there is a sufficiently close connection between the wrongful acts of the director/agent and the activities that the director/agent was appointed to undertake (so that the fact that the acts were unauthorised or not for the company's benefit would not of itself preclude liability) (see *Gower*, Principles of Modern Company Law, tenth edition, 2016, at 7-31).

45. In the present case, the Plaintiff's Inducement Claim is against the Second Defendant, not against the directors of the Second Defendant. To succeed in establishing liability (and leaving aside the question of loss and damages), the Plaintiff must, in summary, aver and prove facts that establish who took the decision to dismiss the Plaintiff; that they were acting for and took the decision on behalf of the Second Defendant; that those decision makers "*acted in a way other than in good faith in pursuing [the Second Defendant's] interest as the owner of*" the First Defendant and that the action of the decision makers nonetheless had a sufficiently close connection between the activities that they were appointed to undertake to establish vicarious liability.

46. In my view, the Defendants are wrong to argue that a necessary element of the cause of action in this case is a claim that the Second Defendant's board and/or its directors acted *mala fide* or otherwise outside the scope of its/their authority, and that the Inducement Claim must fail in the absence of an allegation that the directors acted in breach of their duties as directors of the Second Defendant or that they acted contrary to or otherwise in a manner detrimental to the interests of the Second Defendant and its shareholders. The key issue is not whether the directors were in breach of a duty owed to or acting against the interests of their, the parent, company but whether they were acting to protect and promote its interests as owner of the shares in the subsidiary. They might be acting in order to promote another, separate interest of the parent company and so acting in accordance with their duties and not in a manner that damaged its interests. Nonetheless, such action could still result in the parent being liable for inducing a breach of contract by the subsidiary since the directors' decision making might not be treated as sufficiently related to the parent's position as the owner of the subsidiary. As the Plaintiff rightly submitted, an allegation of breach of fiduciary duty by the directors of the Second Defendant would *arguably* be fatal to a claim *against the Second Defendant* based on vicarious liability.

47. In the present context, it seems to me that the Plaintiff's case, as pleaded, is essentially based on a claim of victimisation (a term used by the Plaintiff in [89] of the Revised Amended Statement of

Claim and in my view a fair reflection of the essence of the Plaintiff's case). He alleges that the Second Defendant's directors regarded him as a troublemaker and were offended by his challenges to and criticism of their conduct. As a result, in order to avoid further challenges to their own position and in effect to punish him for his disrespect and rudeness, they decided to arrange for him to be dismissed by the First Defendant. Their reasons, it is alleged, were self-centred and therefore focussed on themselves and their interests and not those of the Second Defendant and its stakeholders (or the First Defendant). This is, in substance, what is alleged in [84] of the Revised Amended Statement of Claim (quoted above). I am satisfied that this allegation and the facts alleged, if proved at trial, are capable of satisfying the requirements set out by Lord Neuberger in *Bumi Armada*. It could not be said, with apologies for the double negative, that the Second Defendant's directors were not "*doing anything other than pursuing [the Second Defendant's] bona fide interests as the owner of all the shares in the [First Defendant]*".

48. It appears that the allegation in the Revised Amended Statement of Claim is that silencing the Plaintiff and sparing "*their own bruised dignity*" was the sole reason for the decision made by the Second Defendant's directors to have the Plaintiff dismissed. If proved (if the Plaintiff establishes that he was victimised and treated in the manner alleged and as I have described) this would, in my view, be sufficient to satisfy the requirement of a finding that the Second Defendant was pursuing an interest unrelated to its capacity as owner of the shares in the First Defendant. Alternatively, even if the conduct complained of was not the sole but an additional reason for having the Plaintiff dismissed by the First Defendant (in addition perhaps to wishing to see the Republic Bank Offer proceed in the interests of the Second Defendant and its shareholders), that could be sufficient in law. In my view, the Plaintiff has shown that he has a real as opposed to a fanciful prospect of success on this aspect of the Inducement Claim and satisfied the test set out in *Elite Property* (in the passage quoted above). Of course, the Plaintiff will also need to make out the other elements of his claim, including that the Second Defendant was vicariously liable in the circumstances.

49. The Defendants argued that since Mr. Robinson during his submissions had confirmed that the Plaintiff was not alleging that the Second Defendant's directors were acting in breach of duty to the Second Defendant, the Plaintiff's case was contradictory or fundamentally undermined and flawed. If the Second Defendant's directors indeed acted as the Plaintiff alleged, they must be taken to have been acting for their own purposes and in their own interests, and not in the interests of the Second Defendant. I do not accept that argument. For the reasons I have given, the Plaintiff does not need, and indeed does not wish, to assert or establish a breach of duty by the Second Defendant's

directors. It may be that their conduct did amount to such a breach and that as a result or that in the circumstances it will not be possible to establish that the Second Defendant was vicariously liable for their conduct. But these are issues in my view to be decided at and only after the trial,that do not satisfy the bound to fail test that would preclude the Court granting leave.

The Defendants' argument that the claim based on Mr. Dack's alleged misrepresentations must also fail because Mr. Dack's views were insufficient and incapable in themselves of forming the operative basis of the First Defendant's decision to terminate the Plaintiff's employment

50. The Defendants note that [87(a)], which is in a section of the Revised Amended Statement of Claim headed "*Further Particulars of Inducement of Contract and Particulars of Unlawful Means Conspiracy and Conspiracy to Injure*", appears to provide particulars in support of the Inducement Claim. The Defendants suggest that the new particulars are introduced as a response to [82.1] of the Defendants' defence in which the Defendants averred that "*the Plaintiff had failed to particularise any material facts upon which he intends to rely to support the allegation that the board of the [Second Defendant] induced or procured [the First Defendant] to terminate his employment*."

51. [87(a)] pleads that Mr. Dack, as president and CEO of the Second Defendant, for whom the Second Defendant is vicariously liable, with the intention of inducing the First Defendant to terminate and breach the Plaintiff's contract of employment or otherwise causing financial harm to the Plaintiff, deliberately (knowingly and intentionally or recklessly and with the intention of inducing the First Defendant to breach the Plaintiff's employment contract) made various misrepresentations to the directors of the Second Defendant and of the First Defendant regarding his discussions with the Plaintiff and the Plaintiff's actions, which had resulted in the First Defendant breaching the Plaintiff's employment contract and causing financial harm to the Plaintiff.

52. The Defendants argued that the claim based on these allegations must also fail because Mr. Dack's views were plainly expressed as his own assessment of the reasons for the Plaintiff's stance and were insufficient and incapable *in themselves* of forming the operative basis of the First Defendant's decision to terminate the Plaintiff's employment. But I do not consider that the averments in [87(a)] are included as a separate ground for the Inducement Claim. As I have noted, [87(a)] appears under the heading "*Further Particulars of Inducement of Contract…."* [87(a)] sets out further facts in support of the Inducement Claim which are to be given weight and taken into account having regard to all the relevant facts and matters pleaded in the Revised Amended Statement of Claim. They do not need to be sufficient on their own to support the cause of action.

The misrepresentations alleged to have been made by Mr. Dack are part of the course of conduct which the Plaintiff says provides evidence of the inducement by the Second Defendant's directors. I also do not accept that the allegations can be dismissed at this stage as fanciful and unsupported by any evidence or as incapable of having an effect on the other directors of the First Defendant.

The challenge to the unlawful means Conspiracy Claim

A preliminary comment on the drafting of the paragraphs dealing with the Conspiracy Claims in the Revised Amended Statement of Claim

53. Paragraph 3 of the prayer in the Revised Amended Statement of Claim states that the Plaintiff claims damages against both the Second Defendant and the First Defendant for unlawful and lawful means conspiracy. The Conspiracy Claims are set out and included in the section of the Revised Amended Statement of Claim headed "*Claims for Inducement of Breach of Contract, Unlawful Means Conspiracy and Conspiracy to Injure:*"

(a). [78] repeats the facts and matters pleaded at [27] – [60] and then [79] – [83] appear to plead facts and matters relevant to all three claims.

(b). [84] deals with the Inducement Claim (against and with respect to the Second Defendant's directors).

(c). [85] pleads, "*further or alternatively*" that Mr. Dack, as president and CEO of the Second Defendant, for whom the Second Defendant is vicariously liable, *in combination with* the other directors of the Second Defendant and the First Defendant "*used unlawful means to cause financial harm to the Plaintiff by causing the [First Defendant's] directors to effect the termination of the Plaintiff's employment.*"

(d). [86] pleads in the further alternative that "*the [Second Defendant's directors] acting in that capacity and in combination with the [First Defendant's] directors who were not [directors of the Second Defendant] used unlawful means to cause financial harm to the Plaintiff by causing the [First Defendant] to terminate the Plaintiff's employment*."

(e). [87] pleads, also in the further alternative, that even if the means used by the "*[directors of the Second Defendant and of the First Defendant] were lawful, it [was] to be inferred that the objective of [their] actions was to cause financial harm to the Plaintiff."*

(f). [87(a) – (c)] set out "*Particulars of Inducement of Breach of Contract and Particulars of Unlawful Means Conspiracy and Conspiracy to Injure"*:

(i). I have already summarised what is pleaded in [87(a)]. [87(a)] refers specifically to action taken by Mr. Dack and might be thought to relate not only to the Inducement Claim but also to the unlawful Conspiracy Claim set out at [85], which also refers to Mr. Dack. However, while [85] refers to Mr. Dack acting in combination with the other directors of the Second Defendant and the First Defendant, [87(a)] only deals with action taken by Mr. Dack to induce the breach of the Plaintiff's employment contract. I therefore take it, as the Defendants did, that [87(a)] is not intended to support or relate to the unlawful Conspiracy Claim.

(ii). [87(b)] pleads that the directors of the Second Defendant who were also directors of the First Defendant (for whose actions the Second Defendant *and* the First Defendant were vicariously liable), in combination with the other directors of the First Defendant (Mr. Bierley and Mr. Ebanks)), unlawfully breached their duties as directors *of the First Defendant* by preferring their personal interests, pursuant to a motive to spare their bruised dignity over the interests of the *First Defendant*, causing the First Defendant to breach the Plaintiff's employment contract and financial harm to the Plaintiff. These appear to be the particulars in support of the claim set out at [85] and [86].

(iii). [87(c)] pleads that the directors of the Second Defendant and the First Defendant acting in combination (with the intention to cause financial harm to the Plaintiff or whilst appreciating the probable consequences of their actions), convened meetings of the First Defendant's board at which the decision was *purportedly* taken to terminate the Plaintiff's employment, which meetings were contrary to the First Defendant's articles since no notice of the meetings had been given to the Plaintiff. These appear to be the particulars in support of the claim set out at [87].

54. Accordingly, [85] and [86] together with [87(b)] and, possibly [87(c)] relate to the unlawful means Conspiracy Claims:

(a). the parties to the alleged conspiracy in relation to [85] are Mr. Dack and all the other directors of the Second Defendant and the First Defendant.

(b). the parties to the alleged conspiracy in relation to [86] are those individuals who were directors of both the Second Defendant and the First Defendant and the other directors of the First Defendant.

(c). the unlawful means for both alleged conspiracies appear to be as set out at [87(b)] and possibly [87(c)]. [87(b)] relies on a breach of duty to the First Defendant by the directors of the First Defendant (which includes the individuals who were directors of both the Second Defendant and the First Defendant and those who were only directors of the First Defendant, all of whom are said to have acted together such that, I assume, all are alleged to have acted in breach of duty).

(d). [87(c)] avers that the relevant board meetings of the First Defendant were convened in breach of the First Defendant's articles since notice was not given to the Plaintiff. It is not clear whether the Plaintiff relies on the failure to give notice and the asserted breach of the articles as unlawful means (there is no equivalent to [50A], which pleads the inferences to be drawn from the facts alleged in [31] – [50] in relation to the Inducement Claim, provided for the Conspiracy Claims which contributes to the challenges in construing the basis for the Conspiracy Claims). It seems to me that improperly convening a meeting of directors could not of itself constitute unlawful means for the purpose of unlawful means conspiracy (the effect of a failure to give the requisite notice would be that the meeting was improperly convened so that business could not validly be conducted at it). However, if the point is relied on by the Plaintiff it will require full and proper argument and since I consider that the Plaintiff's case based on breach of duty is sufficient for the purpose of his application for leave to amend, I do not need to address this issue further at this stage.

The Defendants' argument that the unlawful means Conspiracy Claims must fail because the Revised Amended Statement of Claim did not plead (and there was no evidence to establish) facts and acts which could amount to a breach of duty by the directors of the First Defendant (and therefore the use of unlawful means)

55. In my view, this argument must be rejected. It is, as the Plaintiff submitted and the Defendants accepted, arguable that breaches of fiduciary duty may constitute unlawful means for the purpose of unlawful means conspiracy. Paragraph [87(b)] of the Revised Amended Statement of Claim (which I have summarised above) includes an averment that the First Defendant's directors acted in breach of their duties as directors of the First Defendant. It also identifies why they are said to have acted in breach of those duties, namely by preferring "*their personal interests, pursuant to a motive to spare their bruised dignity arising from their interpretation of the contents of the Plaintiff's emails, and in particular, the contents of the Plaintiff's email dated 11 September 2018, over the interests of [the First Defendant], in causing [the First Defendant] to terminate the Plaintiff's employment in breach of contract […]*". Putting their personal position above the interests of the First Defendant, if the facts relied on in the Revised Amended Statement of Claim are proved, could constitute a breach of duty. In my view, the evidence filed to date is sufficient to satisfy the third limb of the *Elite Property* test, namely that the claimant (the Plaintiff) has material to support at least a prima facie case that the pleaded allegations are correct. It is clear from the affidavit evidence filed by all parties that there is a live and hotly contested dispute over what was said at various key meetings. But, as the Plaintiff asserts in his Second Witness Statement at [14], the evidence at least suggests that the September Email was significant in the process leading up to and perhaps causative of his dismissal (he says that "*each of the Defendants' witnesses appears to characterise what I stated at point 6 of [the September Email] as some kind of tipping point which precipitated the decision to terminate my employment*") and that, as the extracts from the affidavits filed by the Defendants' witnesses, included at [15] of the Plaintiff's Second Witness Statement show, the September Email resulted in a strong reaction from the directors of the Second Defendant who felt offended, incensed, disrespected and annoyed by what they took to be a "*personal attack*." This evidence could be sufficient to support at least an inference that the directors of the Second Defendant acted in the manner and for the reasons alleged by the Plaintiff.

The Defendants' argument that the unlawful means Conspiracy Claim must fail in the absence of a pleaded allegation of knowledge of unlawfulness on the part of the directors of the First Defendant and the Second Defendant

56. The current state of the law concerning the requirement for knowledge in a claim based on unlawful means conspiracy is neatly summarised in the following extract from *Clerk and Lindsell*

on Torts (23rd edition, 2020) at 23-120 (an extract that was cited by both the Plaintiff and the Defendants) (underlining added by me):

> *"Recent litigation has raised the question whether defendants can have committed an unlawful means conspiracy if they did not know that the means that they used to inflict harm on the claimant were unlawful. In Stobart Group Ltd v Tinkler, HH Judge Russen QC, sitting as a judge of the High Court, held himself bound by the decision of the Court of Appeal in Belmont Finance Corporation v Williams Furniture (No.2) to conclude that: "The fact that the conspirator did not know that his actions were unlawful is no defence to liability. In order for him to be liable, it is enough to show that he had sufficient knowledge of the essential facts, that acts which were unlawful were to be carried out so as to implicate him in liability for them." He also, however, offered arguments in support of the view that this was the right answer. He pointed to the practical problems that might be caused for claimants by having to inquire into each conspirator's legal knowledge in a case where, as in the one he was considering, the unlawfulness—breach of a director's fiduciary duties to the company—depended on law that was complicated and contestable; moreover, in such a case he believed it might be too easy for defendants to manufacture legal advice sufficient to negate any suggestion that a scheme was known to be unlawful; and he noted the knock-on legal issues that might arise with regard to "the standard of knowledge (or suspicion) required" and the legal burden of proof. But in The Racing Partnership Ltd v Done Brothers Zacaroli J reached a different conclusion. In this case it was alleged that one of the conspirators had committed the wrong of breach of confidence, though they honestly believed that they were at liberty to supply the information concerned, and the recipient was found to have been aware of a risk that the information could not be provided lawfully, but not to have known of the illegality, despite turning a blind eye to the risk. On the question whether proof of knowledge of the unlawfulness was required, Zacaroli J held that it was: the decision of the Court of Appeal in Belmont Finance, which Judge Russen QC had held himself bound by, was held to have been decided per incuriam the earlier, contrary, decision of the Court of Appeal in British Industrial Plastics Ltd v Ferguson. Significantly, however, Zacaroli J also disagreed with HH Judge Russen QC as to the merits of making knowledge a condition of liability: "I consider that to find a person liable, where that person knows that a (non-predominant) purpose of the combination is to injure the claimant but honestly believes, for example, that on its true construction the contract between the claimant and one of the conspirators does not prohibit the relevant action, would risk trespassing on legitimate competitive business practices." Thus whilst HH Judge Russen QC emphasised the practical problems of proving knowledge about points of law, Zacaroli J focused directly on the question whether tort law ought to prohibit a defendant from combining with others—with the intention of causing loss—if the defendant honestly believed that the combination's methods would be lawful. He also doubted, however, whether Judge Russen QC's preferred inquiry into whether a defendant "had sufficient knowledge of the essential facts, that acts which were unlawful were to be carried out" would prove to be simpler in practice than an inquiry into knowledge of the law.585 23-121*
>
> *Given the different opinions expressed, and the unsatisfactory state of the appellate authorities, it is likely that further litigation will be required to settle the question."*

57. The authorities are therefore in conflict on the question of whether (a) it is sufficient to show that a defendant to an alleged unlawful means conspiracy had sufficient knowledge of the essential facts

and that acts which were unlawful were to be carried out so as to implicate him in liability for them or (b) whether liability can only be established where the defendant can be shown to have believed that he/she was not permitted to act in the relevant manner (so that a defendant cannot be liable if they are shown to have honestly believed that were at liberty to act in the way that they did and were unaware that their actions were unlawful in the relevant respect). It is therefore at least arguable that (a) is sufficient to establish liability and that in this case all that the Plaintiff needs to show is that the relevant directors knew of the facts surrounding the decision to dismiss the Plaintiff and the steps to be taken by the First Defendant's directors. It seems to me that the facts asserted and relied on in particular the matters set out in [87(b)] of the Revised Amended Statement of Claim are sufficient in this respect. If proved at trial, the Court would be able to find (based on the primary facts asserted or by way of inference from those primary facts) that the First Defendant's directors had sufficient knowledge of the alleged decision and agreement to sack the Plaintiff and the alleged reasons for doing so. That seems to me to be sufficient to satisfy the the test in *Elite Property*. But even if the approach of Zacaroli J is right (and my current, preliminary view, which is not based on full argument, is that Mr. Justice Zacaroli's analysis and conclusions are to be preferred), it seems to me that the pleaded case and the evidence adduced to date are sufficient to satisfy the *Elite Property* test. [87(b)] pleads that the individuals who were directors of both the Second Defendant and the First Defendant acted "*knowingly and intentionally or recklessly and with the intention to cause financial harm to the Plaintiff*". This seems to me to be a sufficient pleading of a lack of an honest belief that what they were doing was legitimate and permissible, and that they knew that or were reckless as to whether they were acting in breach of duty. Furthermore, there is sufficient material in the evidence to support such a claim. I note that the drafting of [87(b)] attributes this state of mind only to the individuals who were directors of both the Second Defendant and the First Defendant, but not the other two directors of the First Defendant with whom they are alleged to have acted in combination. But I do not consider that this undermines the claim made. Even if the pleading properly construed does not allege that all the directors who were party to the conspiracy acted with the relevant state of mind, which is a matter for further argument, it does allege that most of them did and in my view it is at least arguable that it asserts that it is to be inferred that the other directors were parties to the common design, with knowledge of what was to be done and why and therefore are also to be taken to have been acting with the requisite belief that what was being done was impermissible. I appreciate that the allegations made against all the directors, and Mr. Dack in particular, are serious and that they are senior, experienced and otherwise respectable officers of a major financial institution. The allegations and the evidence will need to be thoroughly reviewed and tested at trial but in my view

the pleading is sufficiently particularised and the Plaintiff has done enough at this stage to justify the granting of leave to amend on this point.

The Defendants' argument that the unlawful means Conspiracy Claim must fail because there was no pleaded or evidential basis for a conspiracy or combination going beyond the ordinary and expected discussions between and amongst directors of a parent company and subsidiary or between directors of the subsidiary, that would ordinarily and properly precede a decision to dismiss a director and senior employee of the subsidiary on the grounds of loss of confidence.

58. I can see the force of the Defendants' argument that the directors of the Second Defendant and First Defendant were only engaged in proper discussions between directors of a parent company and its subsidiary (and between directors of the subsidiary) of a kind that would ordinarily precede a decision to dismiss a director and senior employee of the subsidiary on the grounds of loss of confidence (based on the Plaintiff's behaviour and emails). However, I do not accept that at this stage the Court can or should conclude that the Conspiracy Claims are entirely without substance, without material to support at least a *prima facie* case or based on insufficient facts which will allow the Court to draw the necessary inferences. For the reasons I have explained above, the Plaintiff has pleaded a claim based on victimisation and a vindictive and improper campaign against him and the allegations clearly go way beyond conduct that could be considered to be normal or acceptable in the circumstances.

The challenge to the lawful means Conspiracy Claim

The Defendants' argument that there was also no pleaded (or evidential) basis for a predominant intent to injure

59. The Defendants argued that the Revised Amended Statement of Claim, and [87(b)] in particular does not plead facts which establish, and there is no evidential basis for, a predominant intent to injure the Plaintiff. The Defendants also argue that by asserting (in [84]) that the relevant directors were motivated by "*a motive to spare their own bruised dignity*" the Plaintiff was undermining and contradicting its claim that the directors acted pursuant to a *predominant* intent to injure.

60. As noted above, the Defendants argued, based on the decision of Kerr J in *Rihan* (at [775]), that it was insufficient to allege that the predominant purpose of the relevant directors was to put an end to the claimant's complaints and the trouble he was causing. This was not the same as a predominant intent to injure the Plaintiff.

61. In *Rihan* Kerr J gave a succinct summary of the applicable law (at [761- 762]):

> *"761. It is common ground that a tortious conspiracy requires an agreement, combination, understanding or concerted action to injure, involving two or more persons, with a common intention (Clerk & Lindsell on Torts, 22nd edition, at 24-95). Where the conspiracy is to act by means that are in themselves not unlawful, Lord Bridge explained in Lonrho plc v. Fayed [1992] 1 AC 448, at 465G-H, citing previous high authority, that:*
>
> > *"[w]here conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous is may now seem, finds a sufficient ground to condemn their action as illegal and tortious. …"*
>
> *762. However, as Viscount Simon LC said in Crofter Hand Woven Harris Tweed Co Ltd v. Veitch [1942] AC 435, at 445 (cited by Lord Bridge in Lonrho plc v. Fayed at 465C): 626 Rihan v. Ernst & Young Global Ltd and others Approved Judgment*
>
> > *"… [i]f the predominant purpose is the lawful protection and promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person."*

62. His conclusions were set out at [775], quoted above, and also at [776] and [777]:

> *"776. It was easily foreseeable that the claimant would suffer the loss of his career and would respond to the instruction to return to Dubai by refusing to do so and eventually resigning from his position. But in the context of a lawful means conspiracy, foreseeability of damage is not enough to found liability; the foreseeability of damage does not suffice to surmount the higher hurdle of showing a predominant purpose to injure the claimant.*
>
> *777. Thus if, as I accept is more likely than not, Mr Otty and Mr Labaude had no specific ambition to secure the claimant's resignation and the consequent destruction of his career with the EY organisation but could readily foresee that it might ensue and were sanguine about the prospect, that could be a case of constructive dismissal in a conventional employment context but it is not enough for conspiracy to injure. I therefore dismiss that part of the claim."*

63. It seems to me that *Rihan* was a very different case. As I have explained above, the Plaintiff's case is that he was victimised and dismissed because of the offence taken by the Second Defendant's directors to his challenges and criticisms. The actions of which he complains, he asserts, were a

targeted and vindictive response to these challenges and criticisms. The action was "*intended to cause financial harm to the Plaintiff"* ([87(b)]. Once again, it seems to me that the Defendants' objection fails and that the Plaintiff has done enough to satisfy the test in *Elite Property* on this issue.

The challenge to both Conspiracy Claims

The Defendants' argument that since the Conspiracy Claims were directed only against the directors of the First Defendant they did not support claims of unlawful or lawful means conspiracy as against the Second Defendant.

64. In my view this challenge must also fail.

65. The relevant paragraphs of the Revised Amended Statement of Claim make it clear that the Plaintiff alleges that the parties to the conspiracy included directors of the Second Defendant, acting in that capacity. As I have noted above, first, [85] of the Revised Amended Statement of Claim asserts that the parties to the unlawful means conspiracy were Mr. Dack, as president and CEO of the Second Defendant, for whom the Second Defendant is vicariously liable, *in combination with* the other directors of the Second Defendant and the directors of the First Defendant and secondly, [86] pleads in the further alternative that the parties were "*the [Second Defendant's directors] acting in that capacity and in combination with the [First Defendant's] directors who were not [directors of the Second Defendant]*. Furthermore, [87] cross refers to the earlier pleading and states a claim for lawful means conspiracy even if the means used by the *[directors of the Second Defendant and of the First Defendant]*were not unlawful.

66. So it is clear that the conspiracy claims *are* directed against the directors of the Second Defendant, and through them and the principle of vicarious liability, to the Second Defendant in the sense that the Revised Amended Statement of Claim alleges that the directors of the Second Defendant were parties to the alleged conspiracy and acted in such a way and circumstances so as to trigger vicarious liability on the part of the Second Defendant.

67. It is true that the particulars in [87(b)] of the unlawful means assert that the Second Defendant was vicariously liable for actions taken by its directors while acting as directors of and in breach of their duties to the First Defendant. This certainly raises an issue and difficulty for the Plaintiff. It is, presumably, asserted that the relevant individuals were acting in dual capacities, as directors of

both the Second Defendant and the First Defendant, when taking these actions, in a manner that resulted in the Second Defendant (and the First Defendant) being vicariously liable for the conspiracy to which its directors are said to have been a party. The scope of the law of vicarious liability and the circumstances in which a company can be liable for the actions of its directors who hold multiple directorships were matters that were not dealt with in any depth by the Defendants (the Plaintiff did, as I have noted above, cite and rely on *Credit Lyonnais* and *Bilta* but there were no detailed submissions on the points I have identified or on the impact of subsequent UK Supreme Court cases on these issues). It would therefore be wrong for me to deal with this issue in any depth or to dismiss the Plaintiff's application for leave to amend on this basis. But I would say that it seems to me to be clear that there are triable issues as to whether the acts of the Second Defendant's directors which the Plaintiff relies on were on the facts carried out wholly or in part on behalf of the Second Defendant (or perhaps whether the nature and extent of the involvement of the Second Defendant's directors was of a kind and sufficient to engage the vicarious liability principle). These are matters and issues that can only properly be determined at trial, with the benefit of further submissions and cross examination.

The challenge to the Mutual Trust and Confidence Claim

The Defendants' argument that since the Plaintiff is seeking remedy for unfair circumstances attending his dismissal, the Mutual Trust and Confidence Claim was pre-empted by statute and barred by the Labour Law

68. I have already set out above [90] of the Revised Amended Statement of Claim. But it is helpful in order to see the basis of the Mutual Trust and Confidence Claim, to set it out again together with [88] and [89] (underlining added):

> *"88. At all material times there existed between CNB and the Plaintiff an implied obligation of mutual trust and confidence. This obligation arose by virtue of the express and/or implied terms of the Plaintiff's employment contract with CNB. The duty was enhanced by virtue of the Plaintiff's role as a director of CNB and the reliance that CNB placed on the Plaintiff throughout the course of his employment with respect to matters of strategy and governance regarding CNB and the wider Cayman National group. CNB owed to the Plaintiff a further duty not, without reasonable and proper cause, to engage in conduct likely to undermine the express or implied relationship of trust and confidence that existed between the CNB and the Plaintiff.*
>
> *89. By virtue of his own obligation of trust and confidence, and his duties as a director to act in good faith in the best interests of CNB, the Plaintiff had a duty to provide his opinion to the CNB board of directors fully and openly on matters of significance to*

the interests of CNB and its stakeholders. CNB had a concomitant duty not to victimise the Plaintiff by terminating the Plaintiff's employment by reason of the Plaintiff seeking to discharge his duties to CNB, or otherwise to cause the Plaintiff financial harm.

90. In breach of its duties to the Plaintiff as set out above, [the First Defendant], by its directors, deliberately withheld information from the Plaintiff; refused to allow the Plaintiff to represent the interests of [the First Defendant's] stakeholders regarding the Republic Bank Offer; disregarded the Plaintiff's concerns regarding the Republic Bank Offer expressed in the interest of [the First Defendant]; and, after the Plaintiff sought to raise questions regarding the terms of the Republic Bank Offer and the manner in which the transaction was being conducted by and on behalf of [the Second Defendant], terminated the Plaintiff's employment thereby causing the Plaintiff financial loss, including the loss of the Plaintiff's further prospects of being employed in a role comparable with the Plaintiff's role as President of [the First Defendant], and loss of reputation."

69. Paragraph 1(c) in the prayer to the Revised Amended Statement of Claim sets out the relief sought by the Plaintiff, namely "*damages for breach of the implied duty not to engage in conduct likely to undermine the implied obligation of mutual trust and confidence*".

70. The Defendants argued that the essential nature of the Plaintiff's grievances (as set out in the Revised Amended Statement of Claim at [83], [90], and [94]) showed that the Mutual Trust and Confidence Claim concerned matters relating to the manner of his dismissal which are regulated by the Labour Act and so precluded and pre-empted by the statute, in accordance with the principle set out in *Unisys*. The Mutual Trust and Confidence Claim was an attempt to circumvent the unfair dismissal legislation and was bound to fail. Furthermore, even if the Mutual Trust and Confidence Claim was based on pre-dismissal conduct and breaches such that the Plaintiff could claim a repudiatory breach of his employment contract by the First Defendant (and constructive dismissal entitling him to resign), any such claims were superseded by the Plaintiff's dismissal.

71. The Plaintiff responded by submitting that the Mutual Trust and Confidence Claim is in fact based on allegations of conduct during the course of the employment which, at least arguably, gave rise to a breach of the implied term. The claim was not based on the unfair manner of the Plaintiff's dismissal, but rather breaches of duty imposed by the implied term, which ultimately culminated in his dismissal by the First Defendant. As I have noted above, according to the Plaintiff, his wrongful dismissal was a compounding factor, not an exonerating factor for the employer.

72. It is clear that the claimant in *Unisys* sought to recover damages in consequence of his dismissal and by reference to the manner of his dismissal. As Lord Hoffmann noted (at [45]), the claimant claimed for psychiatric injury which he said was a consequence of a breach of the implied term of trust and confidence which required Unisys to treat him fairly *in the procedures for dismissal.* The claimant's "*most substantial complaint [was] of financial loss flowing from psychiatric injury which he [said] was a consequence of the unfair manner of his dismissal*" ([55]). That loss was a consequence of the unfair dismissal which could form the subject matter of a compensatory award under Part X of the UK's Employment Rights Act 1996 (in respect of which the legislature had imposed a financial limit). Accordingly, the statute gave "*a remedy for exactly the conduct*" of which the claimant complained ([56]). As Lord Hoffmann further noted "*The question [was] whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit ….. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.*"

73. By contrast, as Lord Woolf M.R. noted in the Court of Appeal in *Unisys* [1999] ICR 809 at 814G, the plaintiffs in *BCCI* were only seeking to recover damages for the pecuniary losses which flowed from an *anterior* breach of the implied term of good faith. He said as follows (underlining added):

> *"were not primarily seeking to recover damages in consequence of their dismissal. As appears from the argument of their counsel..... they were "only seek[ing] to recover damages for the pecuniary losses which flow from an* ***anterior*** *breach of the implied term of good faith" (emphasis added). The bank, by which the plaintiffs had been employed, had been operated in a corrupt and dishonest manner. Following its collapse, the corrupt and dishonest manner in which it had conducted its business became widely known. This had the consequence that the plaintiffs were handicapped on the labour market. They were stigmatised by reason of their previous employment and they suffered loss in consequence: see Lord Nicholls of Birkenhead [1997] I.C.R. 606, 609F. This constituted a breach by the bank of its contract of employment with the plaintiffs. The bank had impliedly agreed not to conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust which it had with its employees. The conduct of the bank was of a repudiatory nature which would have entitled the plaintiffs, if they had been aware of it (which at the relevant time they were not), to bring to an end their contracts of employment. However, in fact, their employment came to an end because they were dismissed because of redundancy. Their claim for damages was not connected with the manner of their dismissal. Any connection between their dismissal and their claim for damages was indirect."*

74. The conduct complained of in *BCCI* was that BCCI operated its business dishonestly and corruptly (see *BCCI* per Lord Nicholls at page 34D). In such a case "*an innocent employee was entitled to*

say "I wish to have nothing more to do with this organisation. I am not prepared to help this business by working for it. I am leaving at once.....the innocent employee's entitlement to leave at once must derive from the bank being in breach of a term of the contract of employment which the employee is entitled to treat as a repudiation by the bank of its contractual obligations. This is the source of the right to step away from the contract forthwith" (at page 34E-H).

75. *Unisys* is not a straightforward decision and, as *Collins, Ewing and McColgan* note in Labour Law, 2nd edition, 2019, at pages 835-836 "*The full implications of [Unisys] are still emerging*" and the distinctions which the court is required to draw may be clear in theory but in practice hard to apply to the facts of particular cases. "*For the purpose of the [Unisys] exclusion zone ... it is necessary for the employee to establish that any ... loss was caused by the employer's conduct prior to the events that triggered [his/her] resignation [or dismissal]."* The crucial distinction (based on *Unisys* and the subsequent House of Lords decision in *Eastwood v Magnox Electric* and *McCabe v Cornwall County Council* [2004] UKHL 35, [2005] 1 A.C. 503) (***Eastwood***)) is "*between causes of action, whether breaches of implied terms or of a tortious duty of care, which concerned conduct prior to dismissal and other claims regarding implied terms and torts concerning the manner of dismissal. The question is whether the cause of action at common law precedes and is independent of the dismissal process or whether it flows directly from the employer's failure to act fairly when taking steps leading to dismissal. The latter claims are precluded by [Unisys]"* (neither *Collins, Ewing and McColgan* nor the *Eastwood* decision were included in the authorities produced for the hearing although *Eastwood*, as I note below, is referred to in the extracts from *Clerk & Lindsell* that were included – but since they only neatly summarise my own view of the holding in and principle underlying the decision in *Unisys* I consider it appropriate and helpful to mention *Collins, Ewing and McColgan's* discussion of these points).

76. Accordingly, it is necessary to review the conduct on which the Mutual Trust and Confidence Claim is based and which is said to give rise to the breaches of the First Defendant's obligations. This is set out in [90]. This covers the alleged treatment of the Plaintiff by the First Defendant in relation to the Republic Bank Offer, *prior* to his dismissal, which involved according to the Plaintiff shutting him out from the process by withholding information and failing to allow him to participate actively to represent the position of the First Defendant and its stakeholders (in the manner recited in various other parts of the Revised Amended Statement of Claim). [90] refers to the First Defendant deliberately withholding information from the Plaintiff, refusing to allow him

to represent the interests of the First Defendant's stakeholders regarding the Republic Bank Offer and disregarding his concerns regarding the Republic Bank Offer. But [90] also goes on to state that (underlining added) "*after the Plaintiff sought to raise questions regarding the terms of the Republic Bank Offer and the manner in which the transaction was being conducted by and on behalf of [the Second Defendant], [the First Defendant] terminated the Plaintiff's employment thereby causing the Plaintiff financial loss, including the loss of the Plaintiff's further prospects of being employed in a role comparable with the Plaintiff's role as President of [the First Defendant], and loss of reputation.*"

77. It seems to me that the financial loss which the Plaintiff claims for is said to have been caused by and to be a consequence of his dismissal, not the anterior breaches which are set out earlier in that paragraph. [90] appears to link the loss to the dismissal and [89] reinforces this by asserting that the victimisation of which the Plaintiff complains was manifested in the process by and reasons for which he was dismissed (he says that the First Defendant had a duty not to victimise him "*by terminating*" his employment "*by reason of*" the action he took in relation to the Republic Bank Offer, when "*seeking to discharge his duties to [the First Defendant]*)." The claim is not independent of the dismissal process and flows from the steps taken by the First Defendant leading to the Plaintiff's dismissal. It seems to me that [90] can and should be read as a claim in which the Plaintiff is, to adopt Lord Woolf's terminology, "*seeking to recover damages in consequence of [his] dismissal*" and making a claim for damages *"connected with the manner of [his] dismissal*". The connection between the claim for damages and the dismissal is close and cannot be said to be indirect. On this basis, the claim is barred by the *Unisys* principle and is within the *Unisys* exclusion zone.

78. The references to the First Defendant's treatment of the Plaintiff in relation to the Republic Bank Offer in the earlier part of [90] would, on this reading, be treated as setting out the misconduct of the First Defendant leading up to the dismissal, but nonetheless the dismissal was the operative cause of the claimed loss, not the misconduct (and earlier breaches of contract) and the manner of the dismissal was the real ground of the Plaintiff's complaint.

79. This construction is supported and confirmed by [96] (underlining added):

> *"The [Second Defendant's] directors, and [the First Defendant's] directors knew, or ought to have known, the terms of the Plaintiff's employment contract, the age of the Plaintiff and the unavailability of comparable positions for which the Plaintiff would be suitable, given his*

age, level of seniority and the highly competitive nature of the market at that level. The [Second Defendant's] directors and the [the First Defendant's] directors must have foreseen that by virtue of [the First Defendant's] termination of the Plaintiff's employment, the Plaintiff would be deprived of an income, or of an income comparable to that which he earned as President of [the First Defendant] from the date of the termination of the Plaintiff's employment to his expected retirement age of 70, as in the case of [Mr.] Dack. The Plaintiff was unemployed for a period until he started his own business O A Williams Consulting from which his earnings are significantly less than his earnings as President of the [First Defendant]. [The Second Defendant] and [the First Defendant] are therefore liable to compensate the Plaintiff for the full extent of the loss and damage to the Plaintiff which was reasonably foreseeable by the [Second Defendant's] and the [the First Defendant's] directors.

80. As I have noted, the Plaintiff denies this construction and says that his claim is based on the First Defendant's conduct and breaches of duty imposed by the implied term during the course of his employment and not on the unfair manner of his dismissal. The pre-dismissal conduct complained of caused his loss and ultimately culminated (as a matter of chronology) in his dismissal but his claim is not based on breaches of contract arising from conduct relating to his dismissal nor are the losses he claims caused by his dismissal. This reading of [90] treats the four breaches of duty identified in that paragraph as separate and independent actionable breaches (and causes of action) which have caused the loss claimed, so that such loss is said to arise (the operative cause of the loss is) not (just) from the termination of the Plaintiff's employment.

81. I accept, for the reasons I have briefly explained above, that a claim for loss independently caused by the conduct referred to in [90], other than conduct going to the manner of dismissal and flowing from the termination could properly form the basis of a claim and would not be precluded by the *Unisys* principle. But [90] (and the other paragraphs I have identified) would need to be amended to make this clear. It seems to me that the Plaintiff should be given the opportunity to correct the problem in the drafting of these paragraphs so that the pleading clearly matches the formulation of the Plaintiff's claim and position as presented at the hearing. This seems to me to be permissible and appropriate in the circumstances, as the amendment reflects a point of drafting clarification, to make the drafting of the Revised Amended Statement of Claim consistent with the Plaintiff's case as presented at the hearing. I take into account the Defendants' argument that the Plaintiff has already been given a sufficient opportunity to get its drafting right, with the benefit of the Court's questions and commentary during the first day of the hearing. However, the Plaintiff did formulate a proper claim at the hearing and if he wishes to maintain that claim he should, in my view, be given the opportunity to amend his pleading to bring that into line with the claim as formulated

(although he will need to pay the Plaintiff's costs arising in relation to the application in so far as they concern the Mutual Trust and Confidence Claim).

82. It is open to the Plaintiff to say that the only breaches of contract he relies on are the anterior breaches which resulted from his treatment in relation to the Republic Bank Offer and that these breaches caused his loss, for which he claims damages (so that his cause of action preceded and was independent of the dismissal process). He could also argue that he could have treated these breaches of contract as giving rise to a constructive dismissal, permitting him to resign and claim damages, which he would have done had he not been wrongfully dismissed. Such damages might include what Lord Nicholls described as "*continuing financial losses*" in *BCCI* (at 36H -37D) if and to the extent it was proved that it was reasonably foreseeable that the type of loss claimed was a serious possibility (underlining added):

> *"Exceptionally, however, the losses suffered by an employee as a result of a breach of the trust and confidence term may not consist of, or be confined to, loss of pay and other premature termination losses. Leaving aside injured feelings and anxiety, which are not the basis of the claim in the present case, an employee may find himself worse off financially than when he entered into the contract. The most obvious example is conduct, in breach of the trust and confidence term, which prejudicially affects an employee's future employment prospects. The conduct may diminish the employee's attractiveness to future employers.*
>
> *The loss in the present case is of this character. B.C.C.I. promised, in an implied term, not to conduct a dishonest or corrupt business. The promised benefit was employment by an honest employer. This benefit did not materialise. Proof that Mr. Mahmud and Mr. Malik were handicapped in the labour market in consequence of B.C.C.I's. corruption may not be easy, but that is an assumed fact for the purpose of this preliminary issue.*
>
> *There is here an important point of principle. Are financial losses of this character, which I shall call "continuing financial losses," recoverable for breach of the trust and confidence term? This is the crucial point in the present appeals. In my view, if it was reasonably foreseeable that a particular type of loss of this character was a serious possibility, and loss of this type is sustained in consequence of a breach, then in principle damages in respect of the loss should be recoverable.*
>
> *In the present case the agreed facts make no assumption, either way, D about whether the applicants' handicap in the labour market was reasonably foreseeable by the bank. On this there must be scope for argument. I would not regard the absence of this necessary ingredient from the assumed facts as a sufficient reason*

83. To succeed, the Plaintiff will need to show that what damaged his reputation was being shut out from the process for reviewing the Republic Bank Offer, not being allowed to represent the interests of the First Defendant's stakeholders in relation to that offer and having his concerns and

views disregarded. There clearly was a causal link in *BCCI* between BCCI's corrupt conduct of its business and the damage suffered by the former employees when they were looking for new jobs. As Lord Woolf M.R. said, "*Following its collapse, the corrupt and dishonest manner in which [BCCI] had conducted its business became widely known. This had the consequence that the plaintiffs were handicapped on the labour market*." The Plaintiff will also need to establish such a causal link and provide the necessary particulars of his loss to support his claim before trial (see [102] of the Revised Amended Statement of Claim).

84. The Defendants argue that Plaintiff's claim based on these breaches of the implied obligation of mutual trust and confidence are barred because any repudiatory breach of the Plaintiff's contract of employment was superseded by the Plaintiff's dismissal. I am not satisfied that this argument is right. The dismissal of the Plaintiff, which, being wrongful, gave rise to claims for unfair dismissal and wrongful dismissal cannot of itself result in the elimination of claims based on pre-dismissal breaches of contract, provided that the loss caused by such breaches has not already been covered and compensated for by the unfair dismissal/wrongful dismissal claim (and as the Plaintiff submitted, an employer should not be in a better position by wrongfully dismissing the employee). As is stated in *Clerk and Lindsell* on Torts (23rd edition, 2020) at 12-41:

> *"However, if an employee has acquired a cause of action (whether in contract or in tort) before the dismissal he is still entitled to pursue that cause of action notwithstanding a subsequent unfair dismissal and the statutory right to a remedy for that unfair dismissal that arises. So, although damages for psychiatric harm are not recoverable in an action for wrongful dismissal, there may be a common law claim in relation to events that preceded the dismissal (including events leading up to the dismissal).*"

Clerk and Lindsell cites, in support of the proposition contained in the second sentence, *Eastwood* and *Monk v Cann Hall Primary School [2013] EWCA Civ 826* and notes (in footnote 256) that "*In such a case care will have to be taken to identify the date of dismissal (particularly in the case of constructive dismissal); and for the claim to succeed the evidence will have to point to the employer's pre-dismissal breach of duty as the cause of the claimant's psychiatric illness, as opposed to the dismissal itself*." And as Kerr J noted at [544] in *Rihan*, by reference to the speech of Lord Nicholls in *BCCI*:

> *"The position should be no different, Lord Nicholls reasoned at 37C-D, whether the employer wrongfully dismisses the employee in breach of the trust and confidence term; whether the employee resigns and is constructively dismissed following a breach of the term;*

or whether the employee only discovers the conduct amounting to breach of the term after leaving the employment, as in the assumed facts of the case before the House."

85. The same principles apply in the present case (even though the Plaintiff is not claiming for psychological loss). Furthermore, while the Plaintiff does not, following his dismissal, need to rely on the First Defendant's repudiation of the employment contract in order to establish that the contract has been terminated, I do not see that this precludes him claiming damages for loss separately caused by the breaches of the implied obligation of mutual trust and confidence.

86. The Plaintiff argued, although to my mind not with great conviction, that section 55(4) of the Labour Act meant that the principle established by *Unisys* had no application in this jurisdiction. Section 55(4) states as follows:

"In the case if any action before any court in respect of a dismissal for which an award has been made under subsection (1), the court shall, in making any award of damages, take into account and deduct from the award of damages any sum awarded by a Labour Tribunal under subsection (1)."

87. The Plaintiff argued that since this provision acknowledged that claims in addition to an unfair dismissal claim before a Labour Tribunal could be made in other proceedings and that only required that an award made by the Labour Tribunal be deduced from any damages awarded in those other proceedings it followed that the Labour Act was not intended to and did not have the effect of precluding other claims based on the manner of the claimant's dismissal and an award of damages for unfair dismissal (above the statutory limit). I am not satisfied that this is a proper construction of section 55(4). First, if that was right, what would be the purpose of including the statutory limit for unfair dismissal claims and the other procedural rules regulating the timing and conduct of claims for unfair dismissal? Secondly, before concluding that section 55(4) is to be given the effect contended for by the Plaintiff, with the result that the position in Cayman will be substantially different from that in the UK under legislation enacted for a similar purpose, I would need to see materials which explained the context in and purpose for which section 55(4) was passed which supported and justified the Plaintiff's proposed construction.

The challenge to the Prevention of Financial Loss Claim

The formulation of claim

88. The Prevention of Financial Loss Claim is set out at [91] – [95] of the Revised Amended Statement of Claim as follows:

> *"91. [The Second Defendant] owed to the Plaintiff a duty in tort to take reasonable steps not to cause and to prevent the Plaintiff from suffering financial loss by virtue of its failure to discharge its duties relating to the Republic Bank Offer in a professional and ethical manner. By virtue of that duty [the Second Defendant] was obliged to act ethically, professionally and properly in accordance with [the Second Defendant] own ethical and professional standards of conduct as set out in the Cayman National Handbook of Benefits and Policies (the* ***Cayman National Handbook****) and in the CSX Takeover Code.*
>
> *92. The Cayman National Handbook states, among other things, that Cayman National's 'professional and ethical standards are based on honesty, integrity, trust, respect for each other and commitment to service.' Among the 'core values' stated in the Cayman National Handbook is a commitment to 'always remember our duty of fidelity to our depositors and those who place their assets and financial affairs in our hands and always to place prudence over profit.'*
>
> *93. Paragraph 9 of the General Principles set out in the CSX Takeover Code places an obligation on the directors [of] [the Second Defendant], being an offeree company the subject of a takeover offer, when advising its shareholders, to 'act only in their capacity as directors and not have regard to their personal or family shareholdings or to their personal relationships with the companies.' Paragraph 9 further states that, 'It is the shareholders' interests taken as a whole, together with those of employees and creditors, which should be considered when directors are giving advice to shareholders.'*
>
> *94. In breach of [the Second Defendant's] own professional and ethical standards as set out in the Cayman National Handbook, and its obligations under the CSX Takeover Code, [the Second Defendant] deliberately withheld information regarding the Republic Bank Offer from the Plaintiff; refused to allow the Plaintiff properly and fully to represent the interests of [the First Defendant's] stakeholders regarding the Republic Bank Offer; disregarded the Plaintiff's expressed concerns relating to the potential impact of the Republic Bank Offer on [the First Defendant's] creditors and on staff morale; and wrongly treated the Plaintiff's expressed concerns relating to staff morale as an attack by the Plaintiff on the integrity of the [Second Defendant's] directors, and an expression of lack of confidence by the Plaintiff in the [Second Defendant's] directors.*
>
> *95. [The Second Defendant], by its directors acting pursuant to a motive to spare their bruised dignity, and/or in an effort to silence the Plaintiff, used its own failures and breaches of its own stated professional and ethical standards and its failure to have due regard to the requirements of the CSX Takeover Code as the basis for causing [the First Defendant] to terminate the Plaintiff's employment, or alternatively, for failing to prevent [the First Defendant] from terminating the Plaintiff's employment. In their actions and failures the*

[Second Defendant's] directors knew or appreciated that the probable consequence of their actions and failures was that such termination would cause the Plaintiff to suffer financial loss, including the loss of prospects of securing comparable future employment."

The decision in Rihan

89. In *Rihan* the claimant had worked in the Middle East for entities grouped together under the global banner of Ernst & Young (***EY***). The defendants were UK-based limited companies and limited liability partnerships within that group. In 2013, the claimant, as audit engagement partner in the group's Dubai branch, participated in an assurance audit of a Dubai based precious metals dealer (Kaloti). His case was that he became aware of serious irregularities, which gave rise to a reasonable suspicion that Kaloti was involved in money laundering. The local regulatory body (DMCC) put improper pressure on him and the Dubai branch to mislead readers of relevant reporting documents into thinking that Kaloti's business practices were essentially sound when, manifestly, they were not. In mid-2013, the claimant left Dubai with his family fearing for his and his family's safety if he were to challenge the position of Kaloti and the DMCC from within Dubai. The claimant said that senior officers acting on behalf of all, or at least some, of the defendants then made and developed proposals that amounted to acquiescence and collusion with the DMCC's agenda of protecting Kaloti against adverse audit assurance findings and preventing them being made public. He refused to sign assurance audit reports in the form proposed, and was then replaced as audit partner by an accountant who sanitised the findings and improperly lent the group's name to a flagrantly misleading assurance reporting process. The claimant subsequently refused to return to his duties in Dubai, citing safety concerns. In January 2014, he resigned and disclosed the wrongdoing he had encountered to mass media organisations. He then issued a claim for damages for negligence and conspiracy to injure for economic loss only, mainly in the form of loss of earnings. His claim was against EY entities by whom he was not employed.

90. Kerr J held that the defendants had a duty in tort to take reasonable steps to prevent the claimant from suffering a loss of earnings by reason of their failure to perform the Kaloti audit in an ethical and professional manner (the ***audit duty***). He set out the applicable background principles of law and the legally significant features of the relevant authorities as follows (underlining added):

"569. From that survey of the cases I find most relevant to this proposed novel duty of care, I draw the following. First, <u>the law does not recognise any general duty, whether in the tort of negligence or as part of the portmanteau trust and confidence contract</u>

term, to protect the employee against economic loss suffered after the end of the employment.

570. *Second, the cases do not differentiate sharply between an employee (or former employee) properly so-called, and what could be called a "quasi-employee"; a term I use as convenient shorthand for police officers or others in a relationship that closely resembles employment but is not defined by a contract of employment. I mean to include quasi-employees in the discussion below, unless I indicate otherwise.*

571. *Third, the employer (including, by the same token, a quasi-employer) may, by way of exception, come under a limited duty, in tort or pursuant to the trust and confidence contract term or some other bespoke implied term, to protect (in contract) or take reasonable care to protect (in tort) the post-employment economic interests of the employee. Scally, Spring and Mahmud are examples of cases where that exception applied.*

572. *Fourth, where the parties are in a close relationship (so that the requirements of foreseeability of damage and proximity are met) the analysis does not depend greatly on whether the claimant and defendant are in a contractual relationship of employment; save that if the relationship is not one of contract, the claim is brought in tort and the duty is to take reasonable care. The presence or absence of a contract does not appear to determine the outcome; rather, it determines whether the cause of action is in tort or in contract: see Spring, per Lord Slynn at 337F-G, 339A; per Lord Woolf at 340H, 341D-F and 354A-B; Williams, per Lord Steyn at 837F-G ("the law of tort, as the general law, has to fulfil an essentially gap-filling role"); Mahmud, per Lord Steyn at 52F-H, where the claim was brought in contract but Spring (a tort case) was relevant to the analysis; and James-Bowen, per Lord Lloyd-Jones at [21] and elsewhere.*

573. *Fifth, it is no surprise to find that the outcome in such cases rarely depends on the presence or absence of contract: the law recognises duties in other situations, arising in tort, contract or both, that are co-terminous in content or close to being so. The obligation to provide a safe place of work and a safe system of work is one example. The duty to exercise reasonable skill and care when providing services or advice is another. Indeed, in negligent misstatement cases the absence of contract is the very reason why it was necessary to develop the law to accommodate the Hedley Byrne principle.*

574. *Sixth, the cases such as Vedanta concerning parents and their subsidiaries may or may not yield a duty of care owed by the parent, depending on the facts (see also Arden LJ's judgment in Chandler v. Cape plc [2012] 1 WLR 3111, at [80]). The injured claimant is likely to have a contract with the subsidiary but not the parent. To win against the parent the claimant must establish a duty of care in tort applying ordinary principles, but the content of the duty if established is effectively the same as, or close to, that of the duty owed by the subsidiary under the employment contract.*

575. *Seventh, the law gives weight to the quality of the defendant's conduct. It is a pointer towards a duty of care (or contractual equivalent) if the conduct is immoral and unethical and causes serious and unjustified financial harm, as in Mahmud (see the speeches of Lords Nicholls and Steyn (the others agreeing with one or both)). If the*

conduct is only careless but causes serious and unjustified harm, as in Spring, that is a less strong indicator, but still an indicator, that a duty should be recognised (as recognised in the speeches of Lords Lowry, Slynn and Woolf).

576. Eighth, the court may be unwilling to allow the common law to develop in a manner that cuts across the content of a statutory scheme ordained by parliament and occupying the same territory: Johnson v. Unisys Ltd. Parliament having trodden the relevant ground, the judiciary should leave the field clear for parliament to decide if or how the law should develop within the occupied territory.

577. Ninth, however, the majority in Spring (other than Lord Goff) rejected the invitation to apply that reasoning to deny recognition of a novel duty of care which overlapped with the territory of another tort or torts (defamation and malicious falsehood). Furthermore, the members of the court (or the majority) in Spring and Mahmud did not regard the economic damage in those cases as damage to reputation; the claimant's reputation could suffer and that could cause him financial loss, but conceptually the damage was loss of employment opportunity (see Lord Nicholls in Mahmud at 40B-41C; Lord Steyn at 50A-52G; and the speeches of Lords Slynn and Woolf in Spring)."

91. Kerr J's reasoning in coming to his decision (after noting that the duty could not be based on an assumption of liability analysis) can be summarised as follows:

(a). it had been readily foreseeable that the claimant would suffer financial loss if the Kaloti audit had been conducted and concluded in a manner the claimant considered unethical and unacceptable. It had become progressively clearer to the defendants' main actors in the meetings, conversations, telephone calls and emails, addressed to the leadership, that the claimant would feel bound to dissociate himself from the audit and the group's role in it, if his protests went unheeded.

(b). furthermore, the proximity requirement had been met in relation to the audit of Kaloti (only) where the claimant had been the responsible engagement partner.

(c). it was also fair, just and reasonable to impose the audit duty since it was not a huge leap from imposing a duty of care to protect against physical injury and consequent financial loss by providing a physically safe work environment, to imposing a duty of care to protect against economic loss, in the form of loss of future employment opportunity, by providing an ethically safe work environment, free from professional misconduct (or criminal conduct) in a professional setting. Such a duty closely mirrored the content of the trust and confidence term in the context of regular employment. The law of tort would protect an employee or

quasi-employee from having their career ruined by becoming tainted with unemployability after being embroiled by the employer or quasi-employer in unethical conduct and forced to dissociate themselves from the wrongful activity.

(d). but the defendants would only be required to do what they were in any event bound to do as a matter of professional ethics, which accorded with generally accepted views of morality in the context of reporting such exercises. As Kerr noted at [602]:

> *"Performance of [the audit duty] would require the person subject to it to behave ethically and properly, in accordance with established norms of conduct which are found in documents such as the IFAC Code, the defendants' own code of conduct and the 2012*

Professional ethics were important, likewise it was important also that accountants and other professionals should not have pressure put on them by their employers (or quasi-employers) to act unethically. There was a lack of merit in the defendants' assertion that it was just and reasonable for a person such as them to be free from any duty not to act unethically.

(e). the statutory regime for the protection of whistleblowers was relevant to whether it was just and reasonable to permit the emergence of a common law duty protecting them, alongside the statutory protection. It would not have been reasonable to impose the audit duty in circumstances where the claimant could avail himself of the statutory protection. I have quoted above, when summarising the Defendant's submissions, [632] – [635] of Kerr J's judgment on this point, but it is helpful also to set out the immediately preceding paragraphs in which the learned judge framed the issue he was addressing (underlining added):

> *"628. One further aspect of the "audit duty" could lead to the conclusion that, despite the above reasoning, it would not be just and reasonable for the law to impose the "audit duty" of care. It arises from Johnson v. Unisys Ltd and the statutory system of redress in employment tribunals, enacted in the 1996 Act and other legislation.*
>
> *629. In line with the reasoning in Johnson, it might be thought that the duty of care in relation to the ethical conduct of the Kaloti audit should not be allowed to co-exist alongside the bespoke statutory regime for the protection of whistleblowers, as they are known, in Part IVA of the 1996 Act, added by the Public Interest Disclosure Act 1998. [I note that the 1998 Act added section 103A to the 1996 Act in the following terms: "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."]*

630. *I only need to decide whether the audit duty exists on the facts of this case. However, the statutory regime for whistleblowers is relevant to whether it is just and reasonable to permit the emergence of a common law duty protecting them, alongside the statutory protection. I should make it plain that I would not have considered it reasonable to impose the audit duty in circumstances where the claimant could avail himself of the statutory protection.*

631. *Damages for "stigma" are available in statutory whistleblowing claims. As the learned editors of Harvey on Industrial Relations and Employment Law put it (at CIII [128]):*

> *"One feature of whistleblowing cases which explains some particularly high awards (by unfair dismissal law standards) is that, although the claimant was legally in the right in making the protected disclosure in question, it may be that in practice the fact of being a whistleblower, if known to potential alternative employers, has a severely limiting effect on his or her future prospects of employment in that profession, trade or industry; in an extreme case it may end any such prospect altogether. Future loss may therefore be a major aspect of compensation, especially if the individual is obliged to take less remunerative work instead in the long term. Normally, future loss in unfair dismissal cases concentrates on how long the claimant would have stayed with the employer otherwise and/or how long it will be before he or she does obtain equally well paid work. However, in a whistleblowing case where the claimant maintains a major or indeed complete loss of such a prospect, it may be appropriate to consider 'stigma' damages akin to those available in discrimination cases …."*

(f). the defendants had breached the audit duty owed to the claimant in that, by issuing the final reports, they had involved him in improper conduct in breach of the International Federation of Accountants (***IFAC***) Code. This had been the culmination of an unethical audit that the defendants should not have lent their name to. It was appropriate to test the relevant conduct against the yardstick of the IFAC Code (rather than just the local ethical standards in Dubai). By proposing a change to the compliance period to miss out an inconvenient year, the defendants had been put in breach of the principles of integrity, objectivity and professional behaviour. The defendants had thereby sought to involve the claimant in unethical conduct, putting them in breach of the audit duty of care.

The Defendants' argument that the claim failed since in order to succeed the "professional and ethical standards" in the Cayman National Handbook needed to be incorporated into the Plaintiff's contract of employment but had not been

92. The Defendants argued that the Prevention of Financial Loss Claim depended on the Plaintiff establishing that the "*professional and ethical standards*" in the Cayman National Handbook were part of his contract of employment. Since, on the pleaded case and evidence filed to date, they were

not, the claim was bound to fail. The Plaintiff rejected that submission and argued that the Second Defendant's obligation to act ethically, professionally and properly was not dependent on the terms of the Cayman National Handbook being incorporated in the Plaintiff's employment contract. I accept the Plaintiff's submission on this point (I note that the Plaintiff also argued that in any event it was at least arguable that the terms of the Cayman National Handbook had been so incorporated but do not consider it necessary to deal with that additional, fall back, argument).

93. The Plaintiff during submissions in reply to the Defendants' arguments sought to explain and characterise the Prevention of Financial Loss Claim. He submitted, as I have noted, that his case was not based on a claim that he was entitled to participate in the decision making related to the Republic Bank Offer. He asserted that he expected that, based on the ethical and professional conduct expressly embraced by the Second Defendant, including the *'duty of fidelity to ... depositors'*, and the importance of *'prudence over profit'*, he was entitled to represent the interests of the Bank's customers and employees, and could do so firmly and forcefully, if necessary, and that the Second Defendant had an obligation in the circumstances not to cause the First Defendant to terminate, and also to prevent the First Defendant, from terminating, the Plaintiff's employment for doing precisely what those principles implored all employees to do.

94. I consider below more fully the basis of the Prevention of Financial Loss Claim but at this point I just need to deal with the Defendants' contention that in order to succeed the Plaintiff needed to show that the parts of the Cayman National Handbook that he relied on were incorporated into his employment contract. The Prevention of Financial Loss Claim is based on the existence of a duty of care said to be owed by the Second Defendant to the Plaintiff. It is formulated and set out in [91] of the Revised Amended Statement of Claim as being a duty *"to take reasonable steps not to cause and to prevent the Plaintiff from suffering financial loss by virtue of its failure to discharge its duties relating to the Republic Bank Offer in a professional and ethical manner*." The breach of duty is (see [94] and [95]) based on (or at least is said to include) the allegedly unprofessional and unethical conduct of the Second Defendant in its treatment of the Plaintiff in connection with the Republic Bank Offer. The standards relied on for establishing the propriety of the Second Defendant's conduct are those adopted by the Second Defendant for itself and its staff in the Cayman National Handbook (which are to be taken to apply to the Second Defendant's directors). The Plaintiff also relies on the alleged breaches by the Second Defendant's directors of the General Principles set out in the CSX Takeover Code. The Plaintiff asserts that the Second Defendant's directors acted in breach of these standards and obligations. For the purpose of establishing a duty, and breach of the duty, of care in tort, the standards by which the Second Defendant's directors'

conduct is to be judged need not be incorporated into a contract to which the Plaintiff is a party. So, for example, the standards by which EY's conduct was judged in *Rihan* were those established by the IFAC Code – which were non-contractual. Where the claim is based on a duty owed to a claimant to avoid the claimant suffering financial loss and a breach of such duty by engaging and involving the claimant in unethical conduct which caused him/her financial loss, there is no need for the claimant to show that the defendant was under a contractual obligation to him/her to act in accordance with the relevant standards. The claimant's relationship with the defendant and the foreseeability of such financial loss if the defendant behaved in the unethical manner alleged are the key components of the cause of action (together with the other elements of the claim as described by Kerr J in *Rihan*).

The Defendants' argument that the decision in Rihan did not apply in this case and that the existence of the claimed tortious liability was precluded by the decision in and principle established by Unisys

95. The Defendants also submitted that they could not be subject to the claimed duty because the existence of such a duty would be inconsistent with the statutory regime under the Labour Act which provided the Plaintiff with statutory protection for the conduct which he claimed was covered by the duty. The Defendants' core contention was that the Prevention of Financial Loss Claim was in substance a (disguised) claim for unfair dismissal. As such, it was covered by the statutory regime contained in the Labour Act.

96. The Plaintiff's characterisation of the Prevention of Financial Loss Claim, which I have summarised above, accepted that the claim was connected with his dismissal. He appeared to be claiming that his treatment by the Second Defendant's directors was improper and unethical (and inconsistent with the code of conduct established by the Cayman National Handbook and the applicable provisions of the takeover code) because directors complying with standards of proper behaviour and the code in response to a takeover offer would and should have allowed a senior employee and director of the main banking subsidiary in the group robustly to question the merits of the offer and represent and speak for the interests of the subsidiary's creditors, employees and other stakeholders without being victimised and penalised for so doing by being dismissed by the subsidiary. It does appear that, both in the Plaintiff's summary of the nature of his claim and in [95] of the Revised Amended Statement of Claim, that his dismissal is said to be the immediate and operative cause of the financial loss he claims and that his core complaint concerns the reasons for and manner of his dismissal.

97. [95], as noted above, states that the Second Defendant, by its directors, "*used its own failures and breaches of its own stated professional and ethical standards and its failure to have due regard to the requirements of the CSX Takeover Code as the basis for causing [the First Defendant] to terminate the Plaintiff's employment, or alternatively, for failing to prevent [the First Defendant] from terminating the Plaintiff's employment. In their actions and failures the [Second Defendant's] directors knew or appreciated that the probable consequence of their actions and failures was that such termination would cause the Plaintiff to suffer financial loss, including the loss of prospects of securing comparable future employment* (underlining added)." The Plaintiff's conduct, in response to his alleged mistreatment by and the misconduct of the Second Defendant's directors (by refusing to provide him with the necessary information and an opportunity to present his views), was deliberately misconstrued and misrepresented and then used as the basis for causing or not preventing his dismissal by the First Defendant. The Second Defendant's directors' misconduct towards the Plaintiff involved a failure to comply with the applicable ethical standards and regulatory rules. But the loss he claims for was caused by those directors causing the First Defendant to dismiss him for improper and unfair reasons. The misconduct and unethical behaviour of the Second Defendant's directors in failing to provide him with the necessary information and an opportunity to present his views prevented the Plaintiff from being able to play the role he says he was entitled to play. But that failure was not the cause of his loss. The cause of his loss was his dismissal, which was, on the case made in [95], brought about because the Second Defendant's directors caused the First Defendant to dismiss, or failed to prevent the First Defendant from dismissing, him. The Second Defendant's directors used the result of their misconduct and unethical behaviour as the excuse for doing so (they "*used [their] own failures and breaches of its own stated professional and ethical standards and its failure to have due regard to the requirements of the CSX Takeover Code as the basis*" for causing or failing to prevent his dismissal).

98. Even if the Plaintiff is correct in his formulation of the Prevention of Financial Loss Claim, which I shall discuss below, the claim is, as it seems to me, subject to two problems. First, as the Defendants contend, the Plaintiff is in substance making a claim based on the manner of and for loss flowing from his dismissal. Secondly, the claim appears to be based on the Second Defendant's directors' inducement of the First Defendant and to mirror the Inducement Claim. I shall briefly discuss each point in turn.

99. On the Plaintiff's formulation of the Prevention of Financial Loss Claim, it is, for the reasons I have given above and as the Defendants submit, precluded by the decision in and the principle established by *Unisys*. *Unisys* involved a claim by an employee against his employer, as did *BCCI*. But here, the Plaintiff claims against the Second Defendant, his employer's parent company. Does that make any difference? In *Rihan*, as I have noted, the claimant claimed against E&Y entities by whom he was not employed. At [617], Kerr J noted that:

> *"The treatment of which the claimant complains in this case is akin to what in ordinary employment would be a complaint of constructive dismissal. However, he had no remedy against any of the defendants for constructive dismissal; he was not employed by any of them*."

But, the fact that the claim was made against entities other than the claimant's employer did not prevent the existence of a duty of care, provided that the conditions for establishing the requisite proximity were satisfied. Kerr J said the following at [574], [576] and [619] (underlining added):

> *"574. Sixth, the cases such as Vedanta concerning parents and their subsidiaries may or may not yield a duty of care owed by the parent, depending on the facts (see also Arden LJ's judgment in Chandler v. Cape plc [2012] 1 WLR 3111, at [80]). The injured claimant is likely to have a contract with the subsidiary but not the parent. To win against the parent the claimant must establish a duty of care in tort applying ordinary principles, but the content of the duty if established is effectively the same as, or close to, that of the duty owed by the subsidiary under the employment contract.*
>
> .....
>
> *576. Eighth, the court may be unwilling to allow the common law to develop in a manner that cuts across the content of a statutory scheme ordained by parliament and occupying the same territory: Johnson v. Unisys Ltd. Parliament having trodden the relevant ground, the judiciary should leave the field clear for parliament to decide if or how the law should develop within the occupied territory*
>
> .....
>
> *619. Where a person such as this claimant ordinarily works outside Great Britain and therefore cannot avail himself of the statutory regime, a duty of care in tort is the only "gap filling" (in Lord Steyn's phrase in Williams) option. The cases involving parent companies and subsidiaries (e.g. Vedanta, Okpabi and Chandler) illustrate the circumstances in which the requirement of proximity will be met. The judgment of Arden LJ at [80] in Chandler, decided on appeal after a trial, is particularly helpful in this regard, as noted above.*"

100. Accordingly, the duty of care may be owed by a parent to an employee of a subsidiary and is not precluded merely because the content of the duty is "*the same as, or close to, that of the duty owed by the subsidiary under the employment contract*." Whether the duty subsists depends in particular on whether, on the facts, the relationship between the parent and the subsidiary/employee and the surrounding circumstances show that the proximity test is satisfied. And I discuss the proximity issue further below.

101. Kerr J held that the claim would however have been barred if the duty relied on would "*cut across the content of a statutory scheme*." He held that it would not have been reasonable to impose the audit duty in circumstances where the claimant could avail himself of the statutory protection. The statutory protection in question was, as we have seen above, provided by the protection of whistleblowers in Part IVA of the 1996 Act, pursuant to which an employee who was dismissed is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal was that the employee made a protected disclosure. Kerr J appears to have considered that had the claimant been entitled to rely on these provisions and show that his dismissal by his employer was unfair, it would not be right to impose the audit duty on the other entities within the EY group (i.e. non-employers). Imposing a duty of care and liability on these non-employer entities would involve cutting across and be inconsistent with the statutory scheme even though those entities could not themselves be affected and made liable by the operation of the statutory protection.

102. In my view, the same analysis applies here. The fact that the Prevention of Financial Loss Claim is in substance a claim for losses flowing from the unfair manner of the Plaintiff's dismissal and therefore subject to the *Unisys* principle precludes the Court from imposing the duty of care in tort (based on an analogy with the audit duty recognised in *Rihan*) which the Plaintiff claims to exist.

103. It also seems to me that, as I have explained, not only that the Prevention of Financial Loss Claim is a claim for losses caused by and relating to the reasons for the Plaintiff's dismissal but it also depends on the alleged inducement by the directors of the Second Defendant of the First Defendant's directors. [95] states, as I have said, that the Second Defendant, by its directors, "*used its own failures and breaches of its own stated professional and ethical standards and its failure to have due regard to the requirements of the CSX Takeover Code as the basis for causing [the First Defendant] to terminate the Plaintiff's employment, or alternatively, for failing to prevent [the First Defendant] from terminating the Plaintiff's employment."* The inducement is an essential part of

the claim and cause of action. It therefore seems to me that the Prevention of Financial Loss Claim is in substance simply another way of formulating and putting, by adding further particulars, the Inducement Claim and is not and cannot be treated as a separate claim based on an independent tort.

The Defendants' argument that even if a claim based on the duty of care identified in Rihan was not precluded because such a duty would be inconsistent with the Labour Law, it was bound to fail because the Plaintiff was unable to satisfy the proximity requirement

104. To establish the existence of the duty of care on which the Prevention of Financial Loss Claim is based, the Plaintiff needs to show that the requirements for the existence of the duty were satisfied, particularly that it was foreseeable that he would suffer financial loss if the Second Defendant's directors behaved improperly towards him, that the requirement of proximity was satisfied and that it was fair, just and reasonable to impose the duty.

105. The Plaintiff argues that the Prevention of Financial Loss Claim is (at least arguably) based on a duty of care that is analogous to, or only an incremental development of, the audit duty recognised and upheld in *Rihan* (and that the reasoning in Rihan can be applied to justify the existence of the claimed duty in this case). It was unhelpful that the Plaintiff did not spell out and make clear precisely how this was established. It seems to me, doing the best I can, that the Prevention of Financial Loss Claim can be understood and translated into *Rihan* terminology by saying that the Plaintiff is claiming that the Second Defendant was subject to a duty of care to protect him against economic loss, in the form of loss of future employment opportunity, by treating him properly and by acting in accordance with its own standards of ethical and proper behaviour and the relevant regulatory rules governing its conduct in response to a public bid; that the duty arose because it was foreseeable that by treating him in the unethical and improper manner in which they did he would suffer financial loss (because his ability to remain with the First Defendant would be jeopardised); that his position as president and CEO of the First Defendant meant that the Republic Bank Offer had a direct impact on him such that he would be directly affected by the Second Defendant's directors' conduct and was in a relationship with the Second Defendant sufficient to establish the requisite proximity and that the Second Defendant's directors had acted in breach of this duty.

106. The audit duty recognised by Kerr J in *Rihan* imposed a duty to take reasonable steps to prevent the claimant from suffering loss of earnings by reason of the defendants' failure to perform the Kaloti audit in an ethical and professional manner (see [512] of the judgment). In substance, it required an

employer to provide an ethically safe work environment, free from professional misconduct (or criminal conduct) in a professional setting. Kerr J concluded, as I have noted, that the law of tort would protect an employee or quasi-employee from having their career ruined by becoming tainted with unemployability after being embroiled by the employer or quasi-employer in unethical conduct and forced to dissociate themselves from the wrongful activity.

107. In the present case, the Plaintiff asserts that a parent company (the Second Defendant) owes a duty in tort to a senior employee of its subsidiary to take reasonable steps to prevent the employee from suffering loss of earnings by reason of the parent's failure to act towards the employee, when responding to a takeover offer for the shares of the parent, in an ethical and professional manner consistent with the standards of conduct endorsed by the parent (and accepted as applying to itself) in the Cayman National Handbook and imposed on it by CSX Takeover Code.

108. As Kerr J in *Rihan* noted at [623] – [626] (underlining added):

> *"623. One important point to mention is that if the duty exists, it should be confined to those persons and activities in respect of which the proximity requirement is satisfied. Thus, in the present case, I have already noted that the defendants could not owe the claimant the "audit duty" of care in respect of, for example, [a different] audit.*
>
> *624. Similarly, in the example of a solicitor instructing the subordinate to bury a disclosable document, I do not think it likely that the solicitor and the firm would owe the duty of care to other subordinate lawyers or staff within the firm, not involved in the particular litigation but, say, involved in other litigation. The requirement of proximity (though it is always a question of fact) would probably only be satisfied in relation to the solicitor told to behave improperly on a specific occasion or in relation to a specific case.*
>
> *625. In the example of a silk instructing a junior to mislead the court, the requirement of proximity would probably not be met (though it is always a question of fact) in the case of other juniors within the chambers who had not been asked to mislead any court but felt they should leave the set of chambers. The duty would be even less likely to be owed to the chambers clerks or administrative staff, by the same reasoning.*
>
> *626. Applying that reasoning to the present case, the duty would be owed to members of the team conducting the Kaloti audit. Within that team, only those unwilling to lend their professional name to the conduct of the audit, i.e. the claimant, would be in any position to bring a claim in negligence for breach of the audit duty. Those such as Mr O'Sullivan and Mr Wareing who willingly took part in the conduct of the audit would be treated as having acquiesced in the conduct.*"

109. It seems to me that it would be more than an incremental development to treat a parent company (through its directors) engaged in the defence of a public takeover bid as being required to give a senior director of its (principal) subsidiary an opportunity to have his say on the merits of the bid and its impact on the subsidiary and its stakeholders and to be protected from unethical treatment in the process. It is also strongly arguable that it was not foreseeable that the senior employee would suffer financial loss if not given such an opportunity or that the failure to provide him with the opportunity and the mistreatment would cause him the loss claimed, absent an inducement by the parent of the subsidiary to terminate his employment. The present case seems to be a long way away from the types of exceptional case of which *Rihan* is one in which a duty of care is held to be owed by an employer or entity closely connected with and related to an employer to provide a safe (whether physically or ethically) working environment to an employee in which to perform his work.

110 Nonetheless, but for my decision that in this case, in view of the way in which the Prevention of Financial Loss Claim is pleaded, the recognition of a duty of care in tort would in any event be precluded by the *Unisys* principle, I would grant leave to amend, for two main reasons:

(a). in order to form a firm and final view on the proximity issue and the existence and breach of the asserted duty it would be necessary both to make findings of fact as to the relationship between the Plaintiff and the Second Defendant and as to what was foreseeable in the circumstances, It would also be necessary to consider, in a manner that has not been done for the purpose of the present application, the authorities, including the judgment of Arden LJ in *Chandler v Cape* to which Kerr J made reference (and the other authorities including no doubt very recent judgments of the Supreme Court), dealing with when a parent company can owe a duty of care in respect of the liabilities of its subsidiary. This can only properly be done at trial.

(b). furthermore, I would accept that the Prevention of Financial Loss Claim does raise a number of new and controversial questions of law in a developing area which, as I have noted above, is a factor which weighs in favour of allowing the amendments and permitting there to be a trial.

The Production Application

The Production Application

111. The Plaintiff seeks production of certain documents which have been referred to in the evidence filed in support of the Defendants' defence to these proceedings. By a notice of 23 July 2020 (the ***Notice***) contained in a letter from the Plaintiff's attorneys. Mourant, to the Defendants' attorneys, HSM, and served pursuant to GCR. O. 24, r. 10, the Plaintiff sought production of (a) the legal advice provided to the Second Defendant's board approximately three weeks after 18 September 2018 and just prior to the First Defendant's board meeting on 19 October 2018 and (b) a copy of the severance package proposal in respect of the Plaintiff, presented to the First Defendant's board at a meeting of that board on 6 November 2018 (the ***Documents***). GCR. O. 24, r. 10(1) allows a party to serve a notice requiring production from another party of documents to which "*reference*" is made in any pleadings or evidence. Following the Defendant's objection to inspection and production of the Documents, the Plaintiff applied for an order for the production under GCR. O. 24, r. 11(1), which is in the following terms:

> *(1) If a party who is required by rule 9 to serve such a notice as is therein mentioned or who is served with a notice under rule 10(1) –*
>
> *(a). fails to serve a notice under rule 9 or, as the case may be, rule 10(2); or*
>
> *(b) objects to produce any document for inspection; or*
>
> *(c) offers inspection at a time or place such that, in the opinion of the Court, it is unreasonable to offer inspection then, or, as the case may be, there, then, subject to rule 14(1),*
>
> *the Court may, on the application of the party entitled to inspection, make an order for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.*
>
> *(2) Without prejudice to paragraph (1), but subject to rule 14(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.*
>
> *(3) An application for an order under paragraph (2) must be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are in the possession, custody or power of the other party and that they relate to a matter in question in the cause or matter.*"

112. The affidavit of Mr. Luke Burgess-Shannon, of Mourant, was filed in support of the Plaintiff's application. He states (at [15]) that the Defendants' witness evidence contains "*repeated reference to*" the Documents and (at [16]) cites, as "*examples*" extracts from the evidence of Mr Clarence Flowers (at [21] and [25]), Mr Bierley (at [32] and [33]), Mr Leonard Ebanks (at [39]), Mr Wardle (at [33] and [34]), and Ms Sherri Bodden-Cowan (at [45]). Having referred (at [18]) to the position set out (in response to the Notice) by HSM in its letter of 27 July 2020 objecting to the production of the documents on the ground that legal professional privilege attached to them and had not been waived, he set out the basis for the production application (at [19]) as follows:

> "*Notwithstanding the reasons for the Defendants' refusal, the Plaintiff remains of the view that (i) the Documents are highly relevant to the Plaintiff's case, (ii) that, given th[eir] clear relevance, production of the Documents was necessary (said Documents not otherwise being available to the Plaintiff) for disposing fairly of the cause or matter and (iii) that it remains clear that the Documents sought form part of the Defendants' case and are relied upon as to contents."*

113. The relevant references in the Defendant's affidavit evidence are as follows:

(a). the affidavit of Mr. Flowers dated 28 February 2020 states (at [21]) that, *"... it was about 3 weeks later when Stuart circulated the legal advice which had been received and proposed a meeting for CNB board members to discuss the Plaintiff's continued employment.*"

(b). the affidavit of Mr. Bierley dated 27 February 2020 states (at [32] and [33]) as follows:

> *"32. I received an email on October 7th 2018 which included a copy of the legal advice concerning the Plaintiff. As I, and all other [First Defendant's] directors were planning to attend the scheduled Extraordinary General Meeting (EGM) of [the Second Defendant's] shareholders on October 9th 2018 (the vote to amend [the Second Defendant's] Articles so that the Republic offer could proceed), a meeting of the [First Defendant's] directors was arranged for the following day, October 10th 2018."*
>
> *33. The meeting of the [First Defendant's] directors was unremarkable in the fact that a unanimous decision was made to dismiss the Plaintiff from his employment. The legal advice was discussed briefly and it was agreed that Stuart should prepare a severance package in conjunction with the legal advisers, in order to seek a compromise agreement on the Plaintiff's departure."*

(c). the affidavit of Mr. Ebanks dated 25 February 2020 states (at [39]) that, "*Stuart sent an email to all [the First Defendant's] directors (with the exception of the Plaintiff) on October 7*

2018, appending a copy of the legal advice concerning the Plaintiff. As all directors were planning to attend the scheduled Extraordinary General Meeting (EGM) of [the Second Defendant's] shareholders on October 9th 2018 in the [sic] to amend [the Second Defendant's] Articles so that the Republic offer could proceed, a meeting of [First Defendant's] directors was arranged and held the following day, October 10th 2018."

(d). the first affidavit of Mr. Wardle dated 24 February 2020 states (at [33] and [34]) that:

> *"33 …As [the First Defendant's] directors, they had decided that it was appropriate to seek legal advice on the matter of the Plaintiff's continued role as bank President and I agreed this was the correct course. I was of the opinion that the Plaintiff had not only demonstrated his lack of confidence in (and respect for) his own board of directors but his own judgment was now called into question.*
>
> *34. The legal advice was circulated to [the First Defendant's] board members by an email on October 7th 2018 and a corresponding meeting was arranged for 3pm October 10th 2018, the day after the Extraordinary General Meeting of [the Second Defendant's] shareholders whom on that occasion, voted to amend [the Second Defendant's] Articles so that the Republic offer could proceed. I attended the meeting and there was unanimous agreement that a severance package should be drawn up in the hope that an amicable settlement could be achieved to resolve the Plaintiff's departure from his position as bank President."*

(e). the affidavits of Mr. Flowers (at [25]) and Ms. Bodden-Cowan ([45]) make reference to a severance package presented at a meeting of 6 November 2018.

The Plaintiff's submissions

114. The Plaintiff submitted, and the Defendants do not contest, that "*reference*" is made to the Documents in the Defendants' evidence. The Plaintiff argued that any privilege that may have attached to the Documents had fallen away or been impliedly waived, by virtue of the detailed references to them in the Defendants' own evidence (and that the burden of proof was on the party resisting production). The Plaintiff referred to and relied on a number of authorities (and accepted that Cayman and English law were identical on this issue). One of these was the recent decision of Mr. Justice Waksman in the Commercial Court *in PCP Capital Partners LLP and another v Barclays Bank plc* [2020] EWHC 1393 (Comm) (***PCP***). Waksman J allowed an application for further disclosure of privileged documents on the basis that legal professional privilege had been waived. The learned judge found that the detailed references in the defendant's witness statements

to the involvement of lawyers and to taking comfort from their advice amounted to more than simply referring to the fact of the advice. It could only mean that the lawyers were approving what was being done as lawful. Similarly, in the defendant's written opening, the effect of certain statements could only be that the lawyers approved the agreements in question, and the only reason to make those assertions was to assist the defendant on the merits of its case about the legitimacy of those agreements. Accordingly, the judge held that collateral waiver had occurred. The Plaintiff submitted that similar reasoning applied in the present case given that the Defendants appeared to have taken legal advice on the Plaintiff's dismissal and relied upon it, and the present proceedings related to the legitimacy of that dismissal. The Plaintiff also referred to the following passages in *Passmore on Privilege* (4th ed., Sweet & Maxwell) at 7-187 and 7-189:

> *"7-187* *In addressing waiver applications, questions of whether the litigant has merely referred to a privileged document or gone further and revealed some or all of its contents, and whether there has been a deployment of these materials, continue to loom large in the court's approach....*
>
> *7-189* *....where a privileged document is referred to in some way in the litigation process, a successful waiver application will usually need to address whether (1) there is a "mere reference" to a privileged document as opposed to use of its contents (2) the extent to which the reference to the document is being used or relied on in the proceedings (3) whether it is fair to the user's opponent to allow the use of the document without more, and therefore (4) whether there should be more extensive disclosure of the user's privileged materials to ensure there is no "cherry picking".*

115. The Plaintiff submitted that there had been more than a mere reference to the Documents. The Documents were clearly central to the Defendants' case and were being used and relied on in these proceedings. The Defendants had gone beyond mere reference and had revealed some or all of the contents of the Documents (both in these proceedings and in the process of dismissing the Plaintiff). As illustrated in *PCP*, waiver was possible even where there was only a reference to the effect or conclusion of legal advice, as opposed to the contents. Production was justified and required in the interest of fairness and justice. The Court had to conduct a balancing exercise and in this case the appropriate balance militate strongly in favour of production since (1) there was a strong case on necessity, (2) any commercial sensitivity in the Documents which may be asserted could be protected through redaction, (3) the Plaintiff will preserve the confidentiality in the Documents and (4) justice dictated openness.

The Defendants' submissions

116. The Defendants opposed the production application on the basis that unless it could be said that privilege had been waived in respect of the Documents, they remained protected from disclosure by legal professional privilege. It was not open to the Plaintiff to gainsay that position through the assertions as to their "*clear relevance*" and that disclosure was necessary "*for disposing fairly of the cause or matter*". That position was neither founded on principle, nor had any authority been cited in support of it. The Defendants submitted that while the right under GCR O.24, r. 10 to inspection of a document referred to in "*the pleadings or affidavits*" of any party appeared to be unqualified, the same general rights to withhold inspection applied under this provision (relying on *Rubin v Expandable Ltd* [2008] 1 WLR 1099, at [39]). As such, GCR O.24, r. 10 did not confer a right for a party to inspect documents which are protected by legal professional privilege. The Defendants submitted that the Documents were covered by legal professional privilege. The legal advice sought from and provided by HSM was plainly covered by legal advice privilege. The severance package prepared by HSM and thereafter presented to the Plaintiff was similarly covered by legal professional privilege and/or was in any event made without prejudice. The sole question for determination was whether the references in the Defendants' evidence to the Documents could be said to amount to an implied waiver of privilege. The Defendants submitted that it was clearly established that the mere mention of a document in a witness statement did not entail the automatic and absolute loss of any privilege in the document (relying again on *Rubin v Expandable Ltd*, at [38] and *National Crime Agency v Abacha* [2016] EWCA Civ 760 at [28]). The Defendants accepted that waiver will occur where a party is "*deploying*" the material in court. The key issue was whether there had been disclosure of or reliance on the contents of the document rather than its actual existence and effect (the Defendants referred to the current White Book in England and Wales, 2020, at [31.3.5] and [31.14.6]).

117. The Defendants submitted that in the present case, their witnesses could not be said in any of the affidavits referred to, to have relied on the content of the legal advice and/or the severance package, rather than their actual existence and/or effect. Their evidence amounted only to a narrative of events leading up to and attendant on the termination of the Plaintiff's employment. Further, it was incontrovertible that where legal professional privilege existed and was not waived (or abrogated by statute), it was paramount and absolute and not subject to the balancing exercise of weighing competing public interests against each other as in the field of public interest immunity. As such,

there could be no scope for ordering its production for inspection on the basis that disclosure was "*necessary*" to dispose fairly of the cause of the matter.

118. The Defendants also said that, if they were wrong on these points, and if the Court considered that privilege had been waived, they would apply and should be treated as having applied for leave for their evidence to be amended so as to remove the references to the Documents. They relied on *In Buttes Gas & Oil Co v Hammer (No. 3)* [1981] QB 223 (reversed by the House of Lords on different grounds), in which the court would have allowed a party to avoid waiver by amending their pleading to remove reliance on the privilege document.

Discussion and decision

119. In *PCP*, Mr. Justice Waksman neatly summarised the applicable law as follows (underlining added):

> *"47. I begin with a number of overarching points:*
>
> *(1) Legal professional privilege is regarded as a fundamental right of the client whose privilege it is. The loss of that right through waiver is therefore to be carefully controlled;*
>
> *(2). Generally, privileged documents cannot be ordered to be provided in litigation by the party whose privilege it is unless this is as a result of a waiver;*
>
> *(3). Absent waiver, the fact that such documents might be highly relevant does not entail their production;*
>
> *(4). Applications for documents based on a waiver of privilege entail at least the two following fundamental questions:*
>
> *(a) Has there been a waiver of privilege?*
>
> *(b). If so, is it appropriate to order production of privileged documents other than those to which reference has been made which was the foundation for the waiver?*
>
> *(5) The concept of fairness underpins the rationale for having a concept of waiver which can then entail the production of further privileged documents. This is because if the party waiving is, by the waiver thereby creating a partial picture only of the relevant legal advice, it is unfair to the other party to allow him to "cherry pick" in this way.*
>
> *(6). That said, it is also clear that the question of whether or not there has been a waiver is not to be decided simply by an appeal to broad considerations of fairness.*

> *48. As to the question of waiver itself, it is not easy to find a succinct and clear definition of when it arises, going beyond general statements to the effect, for example, that the party alleged to have waived them has deployed them in some way as part of its case. But on any view in my judgment, first, the reference to the legal advice must be sufficient (a point I return to below) and second, the party waiving must be relying on that reference in some way to support or advance his case on an issue that the court has to decide.*
>
> *49. I give two examples of what is clearly not waiver. First, a purely narrative reference to the giving of legal advice does not constitute waiver. This is because, on any view, there is no reliance upon it in relation to an issue in the case. Nor does a mere reference to the fact of legal advice along these lines, "My solicitor gave me detailed advice. The following day I entered into the contract". That is not waiver, however tempting it may be to say that what is really being said is "I entered into the contract as a result of that legal advice". The corresponding point is that if that latter expression is used, then there will be waiver.*

120. Mr. Justice Waksman went on to consider what he labelled "*the vexed question which still confounds the law of privilege, namely the idea that, quite apart from reliance, waiver cannot arise if the reference is to the "effect" of the legal advice as opposed to its "contents"*". He discussed the decision in *Marubeni v Alafouzos* [1986] WL 408062 in which a solicitor in support of an application to serve out had deposed that "*The plaintiffs have obtained outside Japanese legal advice which categorically states that this agreement does not render performance of the sale contract illegal in any way whatsoever*." This was a case in which there had been a clear reference to the legal advice and to its conclusion, although not the underlying reasoning or any detail as to its contents. The English Court of Appeal had held that there was no waiver, on the basis that all the deponent was saying was that he was asking the court to allow service out of the jurisdiction. He was being frank with the court and really just saying "*I have received certain information from Japan and I believe it provides no defence to the Defendants*." In other words, he was not relying on the contents of the document: he was relying on the effect of the document. He had to refer to the Japanese lawyers because he was under a duty to give the source of his information and he could only do so by referring to what they had told him. However, he rejected a mechanistic application of the content/effect distinction and concluded (at [60]) that (underlining added):

> "*.....in my judgment the correct approach to applying the content/effect distinction is this: the application of the content/effect distinction, as a means of determining whether there has been a waiver or not, cannot be applied mechanistically. Its application has to be viewed and made through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is; and (c) the particular context of the*

case in question. This is an acutely fact-sensitive exercise. To be clear, this means that in a particular case, the fact that only the conclusion of the legal advice referred to is stated as opposed to the detail of the contents may not prevent there being a waiver."

Accordingly, in *Marubeni* there had been no reliance by the claimant on the solicitor's advice once the affidavit has been lodged. The solicitor had to depose to the advice received because it was a procedural requirement under the rules for service out, but once deposed to, the fact that the lawyers had advised there was no defence in Japanese law was irrelevant to the issue of service out after it had been dealt with initially. If the parties served out sought to set aside service on the basis, for example, that there was an extremely strong defence in Japanese law, then the court might have to decide that question. But if it did, what the applicant's solicitors originally advised is neither here nor there. A claim before the court was not a good claim because the claimant's solicitors had said so. It was a good claim if the court thinks so.

121. The Plaintiff did not seek to explain or demonstrate precisely how and why the Documents were central to the Defendants' case and were being used and relied on by the Defendants. The Plaintiff did not refer me to any parts of the Amended Defence, nor have I found, any parts of the Amended Defence that indicated that the Defendants were relying on the legal advice they had received with respect to the Plaintiff's dismissal as part of their defence to the Plaintiff's claims (of course, the Amended Defence will need to be further amended to deal with and respond to the amendments to the Revised Amended Statement of Claim for which permission to amend is granted). It seems to me that the only suggestion of a reference to the content of the legal advice and of reliance being placed by one of the Defendants' witnesses on the advice was in Mr. Bierley's statement that "*The meeting of the [First Defendant's] directors was unremarkable in the fact that a unanimous decision was made to dismiss the Plaintiff from his employment. The legal advice was discussed briefly and it was agreed that Stuart should prepare a severance package in conjunction with the legal advisers, in order to seek a compromise agreement on the Plaintiff's departure."* It might be said that it is to be inferred from this statement that the legal advice supported and gave a legal basis for the decision to dismiss. However, I consider that this would be going too far. It seems to me that the reference to the legal advice by Mr, Bierley is just part of the narrative description of what took place, and that this is the case with the other references to the legal advice in the other affidavits. There is no basis, in my view, for concluding that the advice is being relied on to establish the Defendants' position and case on an issue in dispute. There is no reliance on the existence or content of the advice to justify their conduct in response to the Plaintiff's allegations and claims. There are no references to the contents of the advice. There has been no crossing of the

line from reference to deployment. It might, at some point in the future, be said that obtaining advice was evidence of a proper process and that by acting in accordance with the advice the directors had acted properly. That would be a different matter. But as matters currently stand, it seems to me that the references to legal advice are included only to provide a comprehensive account and a complete narrative of events. In this connection I would note the comments of Elias J in *Brennan v. Sunderland City Council* [2009] I.C.R. 479 (at [70]:

> "*We should emphasise that the situation would change if the material was subsequently to be relied upon by the council. For example, if they seek to rely upon the legal advice to support a stance that they were driven into a four-year pay protection period against their will, then they would be seeking to use the advice to their advantage and we would have thought that it would be clear that waiver had occurred. However, that is not how the council are currently seeking to put their case."*

122. I also consider the Defendants' submissions to the effect that the Court cannot engage in a general balancing exercise when considering whether to permit production of privileged documents. The judgment of Waksman J makes that point good, and I agree with it.

123. The Defendants maintained that the severance package which had been prepared by HSM and thereafter presented to the Plaintiff was also covered by legal professional privilege. They further argued that the package was in any event communicated to the Plaintiff on a without prejudice basis. The Plaintiff did not seek to challenge this characterisation and it seems to me that for the purpose of the Production Application it should be accepted. As with the references to the legal advice provided to the Second Defendant's board, the references to the severance package in the affidavits was only part of the narrative description of what took place between the Defendants (in particular the First Defendant) and the Plaintiff.

124. Accordingly, for these reasons, the Production Application is dismissed.

Mr. Justice Segal

Judge of the Grand Court, Cayman Islands

1 March, 2021