Neutral Citation Number: [2022] EWHC 884 (TCC)

Case No: HT-2021-000363

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 11th April 2022

Before :

MR JUSTICE EYRE

- -

Between :

IBM UNITED KINGDOM LIMITED	**Claimant**
- and -	
1) LZLABS GmbH	**Defendants**
2) WINSOPIA LIMITED	
3) LZLABS UK LIMITED	
4) MARK JONATHAN CRESSWELL	
5) THILO ROCKMANN	

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Matthew Lavy and Gideon Shirazi (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Claimant**
Mark Vanhegan QC and Jaani Riordan (instructed by **Clifford Chance LLP**) for the **Defendants**

Hearing date: 7th April 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EYRE

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 2:00pm on 11 April 2022

Mr Justice Eyre:

1. On 9th August 2013 the Second Defendant entered into an IBM Customer Agreement ("the ICA") with the Claimant. The ICA licensed the Second Defendant to use versions of the Claimant's Mainframe Software. The ICA contained restrictions on the uses to which the Second Defendant could put the Mainframe Software.

2. The First Defendant supplies software and related services including a Software Defined Mainframe platform ("the SDM"). The Second and Third Defendants are wholly-owned subsidiaries of the First Defendant. The Claimant's case, in summary, is that the SDM has been created using information obtained by reverse engineering from the Claimant's Mainframe Software. It is said that this was done by the First – Third Defendants with the Second Defendant being in breach of the terms of the ICA by allowing or participating in this exercise. The Fourth and Fifth Defendants are officers or former officers of the First – Third Defendants and are alleged to have induced the Second Defendant's breach of the terms of the ICA.

3. The Fourth and Fifth Defendants apply for the striking out of the claim against them pursuant to CPR Pt 3.4(2)(a) or (b) alternatively for summary judgment pursuant to Pt 24. The First and Third Defendants seek the striking out of two paragraphs of the Amended Particulars of Claim as being the inappropriate pleading of immaterial matters.

The Parties' Contentions in Summary.

4. In summary for the Fourth and Fifth Defendants Mr Vanhegan QC and Mr Riordan say that the case against their clients is inadequately particularised and fails to disclose a tenable cause of action. Moreover, these defendants were acting as directors of the Second Defendant and the effect of the rule derived from *Said v Butt* [1920] 3 KB 498 is they cannot be liable for inducing a breach of contract by the Second Defendant unless they are shown to have been acting in bad faith or outside the scope of their authority. That is not alleged and so also on that basis the Claimant has failed to show a cause of action or a claim with a real prospect of success.

5. For the Claimant Mr Lavy and Mr Shirazi accept that the Claimant's case is set out in very general terms. However, they say that it is adequately pleaded in circumstances where the relevant dealings were all within the private knowledge of the Defendants. They say that the Amended Particulars of Claim sets out sufficient by way of background to raise an inference of the conduct alleged against the Defendants. In respect of the *Said v Butt* principle they say that the Claimant has sufficient prospect of establishing that the Fourth and Fifth Defendants acted in breach of their duties to the Second Defendant when inducing it to breach the ICA for summary judgment to be inappropriate.

The Statements of Case.

6. At [1] – [9] the Amended Particulars of Claim set out the case as to the nature of the operations of the Claimant and of the First – Third Defendants and describe the Claimant's Mainframe Software and the SDM. At [10] the Fourth and Fifth Defendants are described thus:

> "The Fourth Defendant is Executive Chairman (formerly Chief Executive Officer and a director) of the First Defendant and a director of each of the Second and Third Defendants. The Fifth Defendant is the Chief Executive Officer (formerly Executive Chairman and a director) of the First Defendant, and a director of each of the Second and Third Defendants."

7. Under the heading "The US Injunction" the following then appear:

> "11. The Claimant believes that the founder and ultimate beneficial owner of the corporate Defendants is Mr John Moores. Mr Moores is subject to an injunction dated 31 May 2011 granted to IBM by the United States District Court in the Western District of Texas which (amongst other things) prohibits Mr Moores and various other parties from directly or indirectly reverse assembling, reverse compiling or otherwise translating any IBM Program or any portion thereof without prior written consent of IBM. The term 'IBM Program' as defined in the injunction captured (amongst other IBM software) all of the IBM Mainframe Software. Accordingly, absent express written authorisation from IBM, the injunction prohibits Mr Moores and other persons from directly or indirectly from reverse assembling, reverse compiling or otherwise translating any of the IBM Mainframe Software.
>
> 12. At present the Claimant does not have knowledge of the extent of involvement of Mr Moores and other persons (whether real or corporate) that are subject to the terms of the injunction in the matters of which complaint is made herein. Pending disclosure and/or provision of further information, the Claimant reserves the right to seek to join Mr Moores and/or other persons subject to the injunction to this action."

8. The terms of the ICA and related matters are then pleaded.

9. At [23] the Claimant pleads that it is to be inferred that the Second Defendant has used the Claimant's Mainframe Software for reverse engineering. At [24] – [27] the Amended Particulars of Claim set out the ways in which this use is said to have been a breach of the ICA and the matters from which it is said the breach is to be inferred. At [27.23] it is alleged that the Second Defendant had no legitimate reason to acquire the IBM Mainframe and the Mainframe Software and that it is to be inferred that they were acquired for the purposes of the reverse engineering exercise. In addition there is said to have been a breach of the ICA in failing to accede to an audit request.

10. At [29] – [30] it is said that the Second Defendant's breaches of the ICA were undertaken at the direction, instruction, or request of the First Defendant and with the assistance of the Third Defendant.

11. At [31] this is pleaded:

> "31. Pending disclosure and/or provision of further information, the Claimant relies on the following facts and matters in relation to the First Defendant's state of knowledge and in relation to the Third Defendant's state of knowledge:
>
> 31.1. The Fourth Defendant, by dint of his role at the First, Second and Third Defendants, knew that the Second Defendant had acquired an IBM mainframe and the IBM Mainframe Software for the purposes of the First Defendant's development and operation of the SDM and that the Second Defendant intended to reverse assemble, reverse compile or otherwise reverse engineer parts of the IBM Mainframe Software or to allow others (including the Third Defendant) to do so. In circumstances where he is personally enjoined by the US District Court from directly or indirectly reverse assembling, reverse compiling or otherwise translating any IBM Program (as set out in

paragraph 10 above), it is inconceivable that he did not review the terms of the ICA carefully and appreciate that the proposed activities amounted or would give rise to breach by the Second Defendant of its obligations thereunder. Alternatively, the Fourth Defendant was reckless in that regard.

31.2 The Fifth Defendant, by dint of his role at the First, Second and Third Defendants, also knew that the Second Defendant had acquired an IBM mainframe and the IBM Mainframe Software for the purposes of developing and operating the SDM and that the Second Defendant intended to reverse assemble, reverse compile or otherwise reverse engineer parts of the IBM Mainframe Software or to allow others (including the Third Defendant) to do so. As signatory to the ICA on behalf of the Second Defendant, it is inconceivable that he did not review the terms of the ICA and appreciate that the proposed activities amounted or would give rise to breach of its obligations thereunder. Alternatively, the Fifth Defendant was reckless in that regard.

31.3 The First Defendant is fixed with the knowledge of the Fourth and Fifth Defendants, who acted at all material times and for all material purposes as its directors and as directors of the Second Defendant."

12. The case against the Fourth and Fifth Defendants is put thus at [33] and [34]:

"33 Further, pending disclosure and/or provision of further information, each of the Fourth and Fifth Defendants:

33.1. Personally directed, instructed and/or requested the activities of the Second Defendant that amounted to or gave rise to breaches of the ICA or, alternatively, in their capacity as directors and executive officers of the First Defendant and/or of the Second Defendant, approved and/or ratified such directions, instructions and/or requests;

33.2. Knew that the activities of the Second Defendant being directed, instructed and/or requested by the First Defendant amounted or would give rise to breaches of the ICA or, alternatively, they were reckless in that regard (as to which paragraphs 31.1 and 31.2 above are repeated).

34. In light of the aforesaid, it is inconceivable that the Second Defendant carried out the aforesaid activities and that the First Defendant directed, instructed and/or requested it to do so without both the Fourth and Fifth Defendant intending the breaches of the ICA to which those activities amounted or gave rise. Accordingly, the Fourth and Fifth Defendants are each liable to the Claimant for such damage as was caused by the Second Defendant's breaches of the ICA."

13. The alleged breach of the audit requirements is then pleaded and this and the other alleged breaches are said to have entitled the Claimant to terminate the ICA under its terms or to have constituted repudiatory breaches.

14. By way of relief the Claimant seeks delivery up, a declaration, and injunctive relief together with an account of profits alternatively damages.

15. The Fourth and Fifth Defendants sought further particulars in respect of the case against them. The response was in short terms asserting that the Claimant would rely on the matters set out in [31] of the Amended Particulars of Claim in support of the contention that the Fourth and Fifth Defendants "personally directed, instructed, or requested" the relevant activities of the Second Defendant. The Claimant said that pending disclosure it was unable to particularise when, where, and to whom the directions or instructions were given or requests made. In response to a request for particulars of the facts and

matters relied upon as supporting the inferences on which its case was based the Claimant again referred to [31].

16. In their Defence and Counterclaim the First – Third Defendants denied liability contending, inter alia, that the Defendants had set up a Clean Room process to ensure that there was no breach of the ICA in the course of the Second Defendant providing services to the First Defendant. In the Reply and Defence to Counterclaim it was said that the creation of this process was a deliberate illusion "designed to conceal the Defendants' breaches of contract".

17. Before me passing reference was made to [18.3.6] of the Reply where it was alleged that the Fourth and Fifth Defendants regularly instructed the staff of the First Defendant and the Third Defendant to work directly with the Second Defendant's staff. In my judgement this did not advance matters in respect of the questions I have to address.

18. Similarly, the witness statement of Katherine Vernon served in opposition to the Defendants' application set out more of the Claimant's case as to the background but did not assist with the issues before me.

The Approach to be taken.

19. CPR Pt 3.4(2)(a) provides for the striking out of a statement of case if it "discloses no reasonable grounds for bringing or defending a claim". In somewhat condensed terms the approach to be taken is for the court to look to the pleading and then, proceeding on the footing that the facts alleged are capable of being established at trial, consider whether a cause of action or defence sustainable as a matter of law is shown.

20. Although there was a difference of emphasis the parties before me were agreed as to the necessary elements of the tort of inducing breach of contract. It suffices to note Lord Hodge's summary of those elements in *Global Resources Group v Mackay* [2008] SLT 104 at [11] as adopted by Popplewell LJ in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [21]:

> "(1) there must be a breach of contract by B;
>
> (2) A must induce B to break his contract with C by persuading, encouraging or assisting him to do so;
>
> (3) A must know of the contract and know his conduct will have that effect;
>
> (4) A must intend to procure the breach of contract either as an end in itself or as the means by which he achieves some further end;
>
> (5) if A has a lawful justification for inducing B to break his contract with C, that may provide a defence against liability."

21. Pt 3.4(2)(b) provides for the striking out of a statement of case as an abuse of process or if it is otherwise likely to obstruct the just disposal of proceedings. The principles to be applied when considering the striking out of pleadings or parts thereof as containing immaterial matters were summarised thus by Akenhead J in *Charter UK Ltd v Nationwide Building Society* [2009] EWHC 1002 (TCC) at [16]:

> "1. Claim forms and particulars of claim must identify the nature of the claim and the remedies sought.

2. Particulars of claim must contain the basic facts on which the claimant relies to support its claim or claims.

3. The remedies sought must relate to the claim or claims made and the basic facts pleaded by the claimant.

4. Generally at least there should be no half measures taken in the claim or in particulars of claim in terms of pleading matter which is immaterial to the relief or remedies sought.

5. It would be wrong, at least generally, in principle, to plead a matter which does not support or relate to any of the remedies sought.

6. It would be wrong in principle to plead a matter which is immaterial to the claim or claims made or relief sought for the purpose of securing disclosure of documentation relating to such immaterial matter.

7. Whilst infelicities in pleadings will not usually justify striking out, where no cause of action is pleaded then the court must give serious consideration to striking out that part of the pleading, particularly where its presence complicates and confuses the fair conduct of the proceedings.

8. Either through the CPR or through its inherent jurisdiction the court has wide powers to strike out parts of a pleading if it contains immaterial matter, particularly in circumstances when its continued presence will confuse the resolution of the underlying and properly pleaded claims.

9. A party absent agreement has no automatic right to amend its Particulars of Claim."

22. Pt 24 provides for summary judgment to be given against a claimant on a claim or an issue if the claimant has no real prospect of succeeding on that claim or issue and there is no other compelling reason for it to be disposed of at trial. In that regard the approach to be taken was set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] saying:

"… The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial*: Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at

> the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

Paragraphs 11 and 12 of the Amended Particulars of Claim.

23. Mr Lavy did not seek to argue that these paragraphs contained matters which were material to the Claimant's cause of action. He was right not to do so. They contain averments about Mr John Moores and other unnamed persons who are not parties to the proceedings and in respect of whom no other allegation is made in the Amended Particulars of Claim. The Claimant "reserves the right to seek to join" those persons to the action in due course but that does not mean that the allegations about them are material to the proceedings as currently constituted. Mr Lavy did submit that these matters were potentially relevant to the equitable relief sought by the Claimant. This appears to be on the footing that if the alleged breaches are proved then it will be relevant to the issue of the grant of an injunction that the ultimate owner of the First – Third Defendants is himself subject to an injunction prohibiting reverse engineering from the IBM Mainframe Software. I do not accept that. If the Claimant's case is made out then injunctive relief is likely to follow regardless of the ownership of the First – Third Defendants. These matters might become relevant if the Defendants were to argue that the alleged breaches were inadvertent or that the reverse engineering had been inadvertent or innocent and to say that for that reason the Claimant should not be granted an injunction but that is not currently the position.

24. It follows that as the claim is currently constituted the matters set out in these paragraphs are not material to the issues between the parties. They do not advance the question of whether the Defendants acted in the way alleged nor that of the consequences which should follow. They are, accordingly, to be struck out consistently with the approach articulated by Akenhead J in *Charter UK Ltd*. The position would have been different if the Claimant had alleged that Mr Moores or any of the other, currently unnamed parties, had an involvement in the actions of the Defendants but that is not being done and having chosen to make no such allegation the Claimant cannot include this material.

Paragraph 31 of the Amended Particulars of Claim.

25. The Fourth and Fifth Defendants have applied for the striking out of this paragraph of the Amended Particulars of Claim. The Claimant accepts that the reference to the Fourth Defendant having been subject to an injunction granted by the US District Court is incorrect and needs to be removed by re-amendment. This paragraph is not otherwise apt to be struck out. It is not an allegation against the Fourth and Fifth Defendants but rather an allegation as to the state of knowledge of the First Defendant and the Third Defendant. In the event that the claim made against the Fourth Defendant or the Fifth Defendant in the balance of the pleading is struck out the reference to Mr Cresswell and Mr Rockmann as the Fourth Defendant and the Fifth Defendant respectively will need to be revised but otherwise the pleading can stand.

The Rule in *Said v Butt* and the Circumstances in which a Director can be liable for inducing a Breach of Contract by the Company of which he is a Director.

26. In *Said v Butt* the defendant was the chairman and managing director of the company which operated the Palace Theatre. The plaintiff's case was that the defendant had induced that company to breach the contract flowing from the sale of a ticket to his agent. McCardie J found on the facts that there had been no contract and consequently that no breach had been induced. However, he went on to conclude that even if there had been a contract the defendant would not have been liable for inducing the company to breach it. He expressed the principle thus at 506:

> "…if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken."

27. McCardie J based the rule on the proposition that the acts of an employee are to be treated as the acts of that person's employer. It is not in issue that the rule remains good law. The rule was articulated in the following way by Gloster J in *Crystalens Ltd v White* [2006] EWHC 3356 (Comm) using more modern language and setting the rule in the context of the corporate entity doctrine and the principle of limited liability:

> "11…the general rule that, in circumstances where a director is acting bona fide and within the ambit of his authority, he has no personal liability for procuring his company to commit a breach of contract.
>
> …
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> 15. In my judgment, it would be contrary to the principle of limited liability if, in the circumstances postulated in *Said v Butt*, namely that an employee director is acting within his authority and bona fide in the interests of his company, could be liable in such circumstances for inducing a breach of contract on the part of the company in circumstances absent, additional features, such as conspiracy or dishonesty."

28. The contention that a director against whom a claim is made was acting in bad faith and outside the scope of his or her authority has to be pleaded and a failure to do so means a tenable cause of action has not been articulated. In *Holding Oil Finance Inc & another v Marc Rich & Co AG & others* (1996) the deputy judge had held that the allegation that a director was acting mala fides and outside the scope of his authority was "an integral part of the cause of action" which needed to be pleaded. On appeal Aldous LJ (with whom Nourse LJ and Sir John Balcombe agreed) upheld this approach. He expressly rejected the argument that it was for the director in question to plead and prove that he was acting in good faith and within the scope of his authority. Instead it

was for the party alleging liability to plead not only the allegation that the director had induced a breach of contract but also the factual basis for making him liable namely that he was acting in bad faith and outside the scope of his authority.

29. Mr Lavy submitted that the approach of the Court of Appeal in *Holding Oil* should be viewed with caution because it pre-dated *OBG v Allan* [2008] 1 AC 1 and the clarification there of the principles governing the tort of inducing a breach of contract. Mr Lavy also submitted that it was not apparent that in *Holding Oil* the Court of Appeal was laying down a general point of principle. I reject those submissions. There is no basis for the suggestion that the decision in *OBG v Allan* in some way superseded the principle derived from *Said v Butt* and its consequences for the proper pleading of claims. It is apparent that the decision in *Holding Oil* as to the elements which needed to be pleaded followed from the Court of Appeal's assessment of the elements necessary for liability to be established and from the requirement for those elements to be pleaded if a cause of action was to be shown. That assessment is binding on me and there is no basis for the suggestion that it is not of general application.

30. The approach taken in *Crystalens* is illustrative of the approach to be taken to applications for striking out and/or summary judgment where it is alleged that a director is liable for inducing a breach of contract by his or her company. The facts are also indicative of the kind of conduct which will take a director outside the scope of the *Said v Butt* principle. The allegation there was that in inducing the breach of contract the defendant director had not been acting in the interests of the company of which he was director but rather in his own interests and those of the company's parent company. The particulars of claim did not allege that the defendant had acted in bad faith or outside the scope of his authority. In those circumstances Gloster J approached the case by considering whether there was evidence showing that the claimant had real prospects of showing that the director had acted in bad faith and outside the scope of his authority. If there was such evidence then it would be appropriate to permit amendment of the particulars of claim rather than striking out the unamended claim or granting summary judgment. However, having concluded there was no such evidence Gloster J did then strike out the claim.

31. In *Antuzis & others v DJ Houghton Catching Services Ltd & others* [2019] EWHC 843 (QB), [2019] Bus LR 1532 the defendant directors had caused the company of which they were the directors and the sole owners to act in repeated breach of the terms incorporated in the contracts of the company's employees. It is to be noted that the conduct in question amounted to deliberate and repeated breaches involving exploitation of the vulnerable employees and that it was done with a view to maximising the profits from which the directors alone stood to benefit.

32. It was in those circumstances that Lane J had to consider whether the directors' actions were outside the scope of the rule in *Said v Butt* such as to expose them to liability for inducing the breaches of contract. Lane J had regard to the analysis undertaken by the Court of Appeal of Singapore in *Arthaputra v St Microelectronics Asia Pacific Pte Ltd* [2018] SGCA 17 and to that court's acceptance of the approach taken by Waller J in *Ridgeway Maritime Inc v Beulah Wings Ltd (The Leon)* [1991] 2 Lloyd's Rep 611. In the light of that Lane J concluded, at [114], that the inquiry as to whether the director acted bona fide and within the scope of his authority is to be focused on the director's duties to the company and not to any third party. The question is not whether the director was acting in bad faith towards the third party whose contract with the company

is to be broken but rather whether the director is in breach of his or her duty to the company. Waller J had equated "bona fide" with "lawfully" and regarded the relevant question as being whether the director was "seeking to force the company to do something contrary to its own interests".

33. However, at [115] Lane J explained that this did not mean that the nature of the breach of contract in question was irrelevant. He said that "the nature of the breach and its consequences may directly inform whether the officer of the company has breached his or her duties towards the company". Those duties include the duties set out in section 172 of the Companies Act 2006.

34. At [117] Lane J accepted that the question was not simply whether the director had caused the company to breach an obligation imposed by law. He then proceeded to explain the way in which the nature of the breach may be relevant to the determination of whether the director was or was not acting bona fide for the purposes of the *Said v Butt* rule. He said:

> "119 The nature of the breach of contract is directly relevant to the determination of whether, in a particular case, a director has complied with section 172, as regards his or her duty to the company and the ultimate question whether inducing the breach is actionable against the director.
>
> 120 There is, plainly, a world of difference between, on the one hand, a director consciously and deliberately causing a company to breach its contract with a supplier, by not paying the supplier on time because, unusually, the company has encountered cash flow difficulties, and, on the other hand, a director of a restaurant company who decides the company should supply customers of the chain with burgers made of horse meat instead of beef, on the basis that horse meat is cheaper. In the second example, the resulting scandal, when the director's actions come to light, would be, at the very least, likely to inflict severe reputational damage on the company, from which it might take years to recover, if it recovered at all.
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> 121 In this example, the fact that supplying horse meat is likely to violate food and trading standards legislation is plainly relevant because it is society's disapproval of acting in this manner that gives rise to the statutory duty and the breach of that duty is therefore indicative of societal disapproval of what the director has caused the company to do and the resulting reputational damage to the company.
>
> 122 Accordingly, as a general matter, the fact that the breach of contract has such a statutory element may point to there being a failure on the part of the director to comply with his or her duties to the company and, by extension, to the director's liability to a third party for inducing the breach of contract. Whether such a breach has these effects will, however, depend on the circumstances of the particular case."

35. It was in the light of that analysis that Lane J took account of the nature of the breach of contract and its consequences together with the motivation of the directors to conclude that there had been a breach of the directors' duties. At [127] – [130] he characterised the position on the facts of that case thus:

> "127 D2 and D3 did all these things because they were concerned to maximise the profits of D1, which they—and only they—enjoyed. But, just as in the restaurant example, the desire to maximise profits has had catastrophic consequences for D1. When the malpractices finally came to light, D1's fortunes dramatically declined. Far from having a reputation for high standards for business conduct, D1 stands exposed as a pariah.

> 128 Before the exposure of D1, D2 and D3's activities were manifestly not in interests of the company's employees, so far as the chicken catchers were concerned. Following exposure, their activities can be seen not to have been in the interests of any of the employees, since there are no longer any supervisors or drivers.
>
> 129 That is not, in fact, quite right, if one accepts D2's evidence that D3 drives a minibus under the auspices of D1. This exiguous activity of D1 cannot, however, rationally be said to be in any way comparable with the previous state of the company, which, before the malpractices of D2 and D3 came to light, was the biggest chicken-catching operator in the south of England.
>
> 130 In short, D2 and D3 were not acting bona fide vis-à-vis D1. …"

36. Mr Vanhegan did not question Lane J's analysis of the law although he did point out the extreme nature of the conduct which had caused Lane J to conclude that the directors in the case before him had acted in breach of their duties to the company. In my judgement, and applying Lane J's analysis, the matter has to be approached on the basis that the question of whether a director acted bona fide and within the scope of his or her authority will be very dependent on the circumstances of the particular case. Regard is to be had to the director's duties to the company. The director will not have been acting bona fide if he or she was in breach of the duties set out in section 172. However, the question must be considered in the round remembering that liability is to be seen as an exception to the general rule that a director will not be liable in tort for inducing the company of which he or she is a director to breach a contract. It follows that not every instance of causing a company to breach a contract or a legal obligation will involve a director in a breach of the section 172 duties nor will every such instance cause him or her to be characterised as acting in bad faith for the purposes of the rule in *Said v Butt*. The key will be whether the director was properly acting to promote the success of the company taking account of the matters to which he or she is required by section 172 to have regard. In that exercise it will be necessary to consider the circumstances as a whole. Those will include the motivation of the director and the nature of the duties said to be broken but in addition the nature of the obligations being broken by the company and the consequences of the company's breach can be relevant to the question of whether the director can properly have been said to have been acting in the interests of the company.

Paragraphs 33 and 34 of the Amended Particulars of Claim: the Adequacy of the Pleading in General Terms.

37. The Second Defendant's alleged breaches of the ICA are set out in some detail in the Claimant's pleading. However, the contention that the Fourth and Fifth Defendants induced the Second Defendant to breach the ICA is set out in the most general terms. It is said that these Defendants caused the breaches by directing, instructing, or requesting the activities of the Second Defendant which gave rise to the breaches and/or approved or ratified such directions, instructions, or requests. The way or ways in which they did so are not further particularised and still less are the acts said to have amounted to direction, instruction, or request pleaded. It is said that the Fourth and Fifth Defendants knew that the relevant actions of the Second Defendant were or would be breaches of the ICA and that they intended to procure these breaches.

38. Mr Lavy accepts that the case here is "pleaded in general terms". However, he says that it is sufficient to avoid being struck out at this stage. Mr Lavy says that it is almost inevitable that the Claimant will not be in a position until after disclosure to give particulars of the acts by which these Defendants induced the Second Defendant to breach the ICA. That is because those are matters within the knowledge of the Defendants and which were not public acts. Mr Lavy accepts that it may be appropriate for the allegation to be expanded after disclosure and also that if at that stage the Claimant is not able to point to the ways in which the Fourth and Fifth Defendants induced the Second Defendant's breaches of the ICA then the claim would not be sustainable. However, he says that sufficient material has been put forward by way of background for it to be a proper inference at this stage that the Fourth and Fifth Defendants brought about the breaches.

39. Mr Vanhegan focuses on the sketchiness of the pleading of the alleged inducement. He says that for a claim in that regard properly to be alleged a claimant has to identify the act or acts which are said to have amounted to inducing or procuring the breach in question. In the absence of that no tenable claim has been shown and the putative defendant does not know the case which needs to be answered.

40. I am satisfied that the Amended Particulars of Claim adequately identify the matters relied on as to these Defendants' knowledge of the ICA and of the fact that a breach would result from the alleged actions of the Second Defendant. I am also satisfied that the allegation that these Defendants intended the breaches to occur is sufficiently pleaded. The means by which the Defendants are said to have induced the breaches are, indeed, pleaded in the most general of terms and without particularisation of the acts said to have amounted to the inducement. However, I am persuaded that, subject to the points I will consider below in respect of the particular respects in which the Defendants are said to have acted, the pleading is just sufficient to avoid being struck out under Pt 3.4(2)(a) or (b). In short provided that the cause of action is properly established in other respects the sparse terms in which the way in which the Defendants induced the breach is set out does not mean that the pleading does not disclose reasonable grounds for bringing the claim. The background is such that there is just a sufficient basis for the contention that it is to be inferred that it was the actions of these Defendants which induced the breach by the Second Defendant.

Paragraphs 33 and 34 of the Amended Particulars of Claim: the Allegation that the Fourth and Fifth Defendants acted personally.

41. The contention that the Fourth and Fifth Defendants "personally" procured the Second Defendant's breaches of the ICA discloses reasonable grounds for bringing the claim in the sense of asserting a cause of action which is not demurrable. It is an averment that a particular individual induced a breach of contract by the Second Defendant. Accordingly, the contention does not fall to be struck out under Pt 3.4(2)(a).

42. The contention is, however, one in respect of which the Fourth and Fifth Defendants are entitled to summary judgment because it is a claim in respect of which the Claimant has no real prospect of success to the extent that it is a contention that these Defendants acted other than in their capacity as directors of the Second Defendant. The Fourth and Fifth Defendants were officers of the Second Defendant and their capacity as such is set out in the Amended Particulars of Claim at [10]. It is simply unrealistic, in the absence of clear evidence and a properly particularised allegation, to suggest that in

directing, instructing, or requesting the Second Defendant to breach the ICA the Fourth and Fifth Defendants were acting other than as directors of the Second Defendant. A director can, of course, in his or her personal capacity request the company of which he or she is a director to act in a particular way and will not be acting as director when doing so. However, there is no indication that the Claimant's case is put on that basis. Rather the case as put in the Amended Particulars of Claim and in Miss Vernon's statement in opposition to the application is that the Fourth and Fifth Defendant exercised control over the Second Defendant and used that to cause it to breach the ICA. In the absence of clear evidence, that control is to be taken as having been exercised by them as directors of the Second Defendant and the Claimant has not advanced any matters giving rise to an inference that it was exercised in any other capacity.

43. It follows that to the extent that this part of the Amended Particulars of Claim is put forward as an allegation that the Fourth and Fifth Defendants acted in a way other than as directors of the Second Defendant it has no real prospect of success and the Fourth and Fifth Defendants are entitled to summary judgment. To the extent that it is simply an averment that it was the Defendants' own actions which amounted to direction, instruction, or request then it is unexceptionable although it adds nothing to the contention that they were acting as directors of the Second Defendant. However, it has no real prospects of success as an allegation that they were acting in their personal capacities. I will consider below the extent to which the case can tenably be put on the basis that these Defendants were not acting bona fide or within the scope of their authority for the purposes of the *Said v Butt* principle but the Defendants are entitled to summary judgment to the extent that it is being said that they were not at least purporting to act in their capacity as directors of the Second Defendant.

Paragraphs 33 and 34 of the Amended Particulars of Claim: the Allegation that the Fourth and Fifth Defendants acted as Directors and Officers of the First Defendant.

44. Similar considerations apply to the contention that the Fourth and Fifth Defendants were acting "as directors and executive officers of the First Defendant". If these Defendants were so acting then the principle derived from *Said v Butt* would not operate to preclude liability. A director can be personally liable for the tortious actions which he causes a company of which he is a director to commit and this is so even if the tort in question is one where the company induces a breach of contract by a third party. It follows that this part of the pleading does not fall to be struck out under Pt 3.4(2)(a). However, as already noted the Fourth and Fifth Defendants were directors of the Second Defendant. The starting point as a matter of common sense and reality is that when acting in respect of the Second Defendant they were acting in their capacities as such directors. Particularly is this so in respect of the acts in relation to that company which are said to have amounted to direction or instruction. Even if it is to be said that these Defendants acting as officers of the First Defendant directed, instructed, or requested themselves as directors of the Second Defendant to act in a particular way the relevant acts would still have been their acts as directors of the Second Defendant. This is so if only because the Fourth and Fifth Defendants are not automata and must have decided, as directors of the Second Defendant, to act upon such direction, instruction, or request. It was the acts of these Defendants as directors of the Second Defendant which were the relevant direction, instruction, or request.

45. It is possible, albeit rather artificial, as a matter of law to envisage circumstances where it could be said that the relevant acts were those of the Fourth and Fifth Defendants as officers of the First Defendant. This would be the position if as directors of the Second Defendant the Fourth and Fifth Defendants were somehow obliged to act on an instruction from themselves as directors of the First Defendant. In those circumstances it might be possible to analyse the position as being one where these Defendants had induced the Second Defendant's breaches of the ICA in their capacity as officers of the First Defendant. However, that analysis would only begin to be tenable if it were to be said that in their capacity as directors of the Second Defendant the Fourth and Fifth Defendants were compelled to act on instructions which they gave themselves as directors of the First Defendant. For that to be a tenable contention there must be some material to show that was the position and there is none here. The contention that in inducing the Second Defendant's alleged breaches of the ICA the Fourth and Fifth Defendants were acting as directors of the First Defendant is speculative at best. Even against the background of the Claimant's limited ability to know the internal workings of the First - Third Defendants this allegation is properly to be seen as Micawberism. It is an allegation in respect of which the Claimant is waiting for something to turn up in circumstances where there are no grounds of any substance for believing that the necessary material to substantiate the claim will come to light. Such a claim does not amount to one with a real prospect of success.

46. The short point in respect of this and the preceding element of the pleading is that there is simply no realistic prospect of the Claimant showing that these Defendants were acting other than in their capacities as directors of the Second Defendant when giving direction or instruction to the Second Defendant and/or making a request to it.

A Qualification in respect of the Position of the Fourth Defendant.

47. The preceding conclusions in relation to the contentions that the Defendants were acting personally or as officers of the First Defendant are on the footing that the Claimant's allegations relate to a time when both the Fourth Defendant and the Fifth Defendant were directors of the Second Defendant. That is the way in which the Claimant's case appears from the Amended Particulars of Claim. In particular [10] sets out that status and [33] does not allege actions by these Defendants in different capacities at different times but appears to put forward a single set or series of actions in respect of which the Defendants could be said to have been acting in different capacities.

48. It is clear that the case against the Fifth Defendant is put on that basis because he was a director of the Second Defendant from 5th July 2013. However, the Fourth Defendant was only a director of the Second Defendant from 2nd December 2015. In so far as the claim against him relates to an earlier period the reasoning above would not apply because he would have been acting at a time when he was not a director of the Second Defendant. However, if the case were to be put on that basis then it would have had to be set out in clear terms differentiating the Fourth Defendant's position from that of the Fifth Defendant and identifying the actions which were said to have been undertaken in a different capacity and when they were said to have taken place. I do not understand the Claimant's case to be put in that way and I am satisfied that it is not open to the Claimant to put the case in that way on the current pleadings. The Amended Particulars of Claim are short on detail in respect of the acts of these Defendants which are said to have amounted to the direction, instruction, or requesting of the Second Defendant. There is scope for an inference that there were such actions at the time when the Fourth

and Fifth Defendants were directors of the Second Defendant. There is no scope for such an inference against the Fourth Defendant at a time when he was not an officer of the Second Defendant and to the extent that the Claimant is seeking to make such a contention in the Amended Particulars of Claim then the pleading falls to be struck out under either Pt 3.4(2)(a) or (b).

Paragraphs 33 and 34 of the Amended Particulars of Claim: the Allegation that the Fourth and Fifth Defendants acted as Directors and Officers of the Second Defendant.

49. I turn to the allegation that the Fourth and Fifth Defendants were acting as directors of the Second Defendant when they induced it to breach the ICA. The effect of the *Said v Butt* principle is that these Defendants can only be liable for inducing the Second Defendant's breach of contract in those circumstances if they are shown to have been acting in bad faith or outside the scope of their authority as directors.

50. As I have already explained a party alleging that such a director is liable for inducing a breach of contract by the company of which he is a director must plead in terms that the director acted in bad faith or outside the scope of his authority and must set out the factual basis on which that allegation is made. There is no suggestion of such a pleading let alone a particularisation of the factual basis for such a contention in the Amended Particulars of Claim, the Further Information, or the Reply nor is the point addressed in Miss. Vernon's witness statement. The first time that such a contention was advanced on the Claimant's behalf was in the skeleton argument of Mr Lavy and Mr Shirazi.

51. In those circumstances the claim against the Fourth and Fifth Defendants as currently pleaded falls to be struck out. I have to consider whether to allow time for the Claimant to re-amend to remedy this deficiency. In doing so I bear in mind that it is only at the eleventh hour that the Claimant has sought to put its case on a proper footing and also that there is even now no draft amended pleading. However, I also have regard to the Overriding Objective and to the fact that the matters on which Mr Lavy relies as showing that the Fourth and Fifth Defendants were acting in bad faith and/or outside the scope of their authority are in reality conclusions which are said to follow from the facts already pleaded. In my judgement the appropriate course is to consider whether if properly pleaded the points which Mr Lavy now advances would have a real prospect of succeeding and of establishing that the Fourth and Fifth Defendants had acted in bad faith and/or outside the scope of their authority such as to displace the general rule flowing from *Said v Butt*. If considering those points the Claimant has a claim with a real prospect of success it will be appropriate to give permission for re-amendment of the Particulars of Claim so that the Claimant can advance that claim. In reaching that view I take into account the fact that although it is only at the eleventh hour in respect of the current application that the Claimant has asserted that the actions of the Fourth and Fifth Defendants take them outside the scope of the *Said v Butt* principle the case itself is at an early stage.

52. Mr Lavy says that the application and scope of the *Said v Butt* principle is a developing area of the kind where it is not generally appropriate to strike out a claim (see per Coulson LJ in *Begum v Maran* [2012] EWCA Civ 326 at [23]). The point is not strictly applicable here because the Claimant's pleading as it stands falls to be struck out here on the basis of established principles and clear law as a consequence of the decision in *Holding Oil*. However, if Mr Lavy were to be right to say that the law as to the application of *Said v Butt* is a developing and unclear area of law then that would clearly

be relevant to whether it could be said that the Claimant's case as articulated in his skeleton argument has no real prospect of success such as to be liable to summary judgment.

53. I do not accept the proposition that this is a developing area of law where it is as a consequence not generally appropriate for claims to be struck out or for summary judgment to be granted. The principle flowing from *Said v Butt* is well-established and not in issue. Moreover, the test as to whether a director is acting in bad faith and/or without authority so as to become potentially liable for inducing a breach of contract by the company in question is also now clear. It is apparent that both Waller J and Lane J took the view that the matter has to be approached by reference to the director's duties to the company with the test of bad faith being whether the director was acting in breach of his duties to the company (as opposed to any question of bad faith towards the other party to the relevant contract). This approach is also reflective of that taken by Gloster J in *Crystalens*.

54. The authorities do show that care is needed in determining in a particular case whether the alleged breach of duty on the part of the director is such as to amount to bad faith for these purposes. As Lane J said in *Antuzis* at [122] "whether such a breach has these effects will… depend on the circumstances of the particular case". The position is not one of a developing area of law of the kind which Coulson LJ had in mind in *Begum v Maran* rather it is a matter of courts applying an established rule to differing factual circumstances. It is apparent that regard must be had to the nature of the duty alleged to have been broken; the motivation of the director alleged to have been in breach of duty (see for example the points made in *Crystalens* as to the reasons why the director acted as he did); the nature of the contract alleged to have been broken; and the consequences of the breach. The latter aspects are relevant because of the effects which they may or will have on the company and their consequent relevance to the assessment of whether and to what extent the director was acting in good faith in the interests of the company.

55. In the light of that I come back to the question of whether the Claimant has a real prospect of succeeding at trial in establishing that in causing the Second Defendant to breach the ICA the Fourth and Fifth Defendants were acting in bad faith and/or outside the scope of their authority such as to be in breach of their duties to the extent that the *Said v Butt* principle does not apply.

56. Mr Lavy relies on two points. First, he says that the SDM is the First – Third Defendants' only way of making money and that it depends on customers being able to trust that it was legitimately developed. He contends that if the Claimant is correct and the SDM was developed through breaches of the ICA that would destroy the First - Third Defendants' business and expose them as pariahs. The second point is really the same assertion seen from a different angle, namely that success for the Claimant at trial would be likely to lead to an injunction preventing further sales of the SDM which would destroy the business of the First - Third Defendants. Mr Lavy seeks to be permitted to re-amend the Claimant's case to allege that in those circumstances it was a breach of the Fourth and Fifth Defendants' duties under section 172 for them to induce the Second Defendant to breach the ICA and that this took them outside the protection of the rule in *Said v Butt*. It is of note that Mr Lavy referred here to the business of the First – Third Defendants and for current purposes the focus must be on the Second Defendant and the effects on the Second Defendant although I bear in mind the

Claimant's point that the interrelation between the companies means that they cannot be seen in isolation.

57. I note that it is not suggested that the Fourth and Fifth Defendants were acting for their own benefit nor that the actions of the Second Defendant were in breach of relevant legislative provisions (both of which were significant features influencing Lane J's approach on the facts in *Antuzis*). The contention is that the breach of the ICA meant that the entire operation of the Second Defendant was premised on a breach of contract with the consequence that it was an illegitimate operation. It is said that a director who causes the company of which he or she is a director to act in such a way cannot be acting in accord with the duties imposed by section 172.

58. I remind myself that for a claim to have a real prospect of success it has to be more than merely arguable and there has to be some real substance but that it does not have to be a claim which is more likely to succeed than to fail let alone one which will necessarily succeed. The line of argument which Mr Lavy seeks to advance to take the claim against the Fourth and Fifth Defendants outside the scope of the rule in *Said v Butt* is far from compelling but it is a legitimate argument and it cannot be said that it does not have a real prospect of success. A great deal will depend on the evidence as it develops at trial but the argument is not mere Micawberism. That is because at the very least there are legitimate grounds for believing, first, that the evidence at trial will justify the conclusion sought as to the nature of the Second Defendant's operation and, second, that if such a conclusion is reached then it is reasonably arguable that a director who caused the Second Defendant to act in that way was in breach of his or her section 172 duties. In those circumstances I am persuaded, albeit by a narrow margin, that the argument advanced by Mr Lavy shows a claim with a real prospect of success.

59. That assessment having been made it is not appropriate to strike out this aspect of the claim nor to grant summary judgment in respect of it. Instead the Claimant is to be given an opportunity to re-amend its claim to advance the case as intimated by Mr Lavy. I will hear the parties' submissions as to the time to be allowed for this and the restrictions which should be put on the re-amendment. Subject to submissions I am minded to impose a short time limit for submission of a re-amended pleading with provision for the claim against the Fourth and Fifth Defendants to be struck out in the event that the time limit is not met. I am also minded to confine the re-amendment to an allegation based on the nature of the Second Defendant's operation and its alleged illegitimacy in the light of the dependence on wrongful use of the IBM Mainframe Software with the contention that as a consequence to cause the Second Defendant to engage in such conduct was a breach of the Fourth and Fifth Defendants' section 172 duty.

Other Compelling Reasons.

60. Mr Lavy sought to argue that even if summary judgment was otherwise appropriate in respect of the claim against the Fourth and Fifth Defendants this was a case where there were other compelling reasons for the case against them to proceed to trial. I disagree and none of the matters advanced by the Claimant as compelling reasons warrant the matter going to trial to the extent that summary judgment is otherwise appropriate.

61. The first reason asserted was that the actions of the Fourth and Fifth Defendants would in any event be the subject of evidence and consideration at trial because of their

relevance to the case against the First – Third Defendants. The Fourth and Fifth Defendants are private individuals. The case against them should only go to trial on those matters where the claim in respect of them as private individuals has a real prospect of success. The fact that evidence of their actions will be relevant to the claim against others and will be heard at trial is not a compelling reason for the claim against them proceeding to trial in the absence of real prospects of that claim succeeding.

62. The next point is that the Defendants' knowledge of their internal dealings and the Claimant's inevitable ignorance of those matters means that the case has to be pleaded by way of inference and so the Claimant cannot at this stage particularise the precise acts by which the Fourth and Fifth Defendants procured the Second Defendant's breach of contract. That does not advance matters. I have already explained why I am satisfied that there is no real prospect of the claim against these Defendants acting personally or as officers of the First Defendant succeeding. That is not just because of the sketchiness of the case as pleaded but also because of the intrinsic unlikelihood and the highly speculative nature of the allegation. In respect of the Fourth and Fifth Defendants' actions as directors of the Second Defendant it is right to say that the circumstances are such as to give rise to the inference that they caused the Second Defendant to act in breach of the ICA. However, if there were not a tenable argument that these Defendants fall outside the scope of the *Said v Butt* protection then this would not be a compelling reason for the matter proceeding to trial. If I had found that the case could not be taken outside the scope of that rule then the fact that fuller information will come to light in due course would not have been a compelling reason for the matter proceeding to trial.

63. Finally, it was said that the liability of directors for procuring breaches of contract by the companies of which they are directors is a developing area of law where summary judgment is not appropriate. I have already explained my reasons for concluding that this is not a developing area of law of the kind where Coulson LJ's warning against the striking out of claim or the grant of summary judgment comes into play.

Conclusion.

64. It follows that [11] and [12] of the Amended Particulars of Claim are to be struck out and that the Fourth and Fifth Defendants are to be given summary judgment to the extent that the case against them is put otherwise than in their capacity as directors of the Second Defendant. However, the claim against them in that capacity will not be struck out nor be the subject of summary judgment to the extent that a re-amended pleading is served in the time I will direct.