THE HIGH COURT

[2024] IEHC 532

Record No. 2024/3335P

BETWEEN

CONOR DURNIN

PLAINTIFF

AND

HORSE'S MOUTH LIMITED T/A SPORTCALLER

DEFENDANT

JUDGMENT of Ms. Justice Stack delivered on the 19th day of August, 2024.

Introduction

1. This is an application for an interlocutory injunction restraining the defendant from taking any steps to progress any purported termination of the employment of the plaintiff or from treating the plaintiff as having been dismissed from his employment, together with related interlocutory relief including an order compelling the defendant to pay the plaintiff his salary, emoluments and contractual entitlements as they fall due, and an order directing the defendant to forthwith facilitate the plaintiff's resumption of his duties as head of business to business ("B2B") of the defendant and his return to the workplace.

2. The plaintiff has the benefit of an interim Order made on 28 June, 2024, by this Court (Nolan J.), which restrains the defendant from treating the plaintiff as having been dismissed

and which requires the payment of his salary, emoluments and contractual entitlements as they fall due. This Order has been continued from time to time until the hearing of the interlocutory injunction which took place on 31 July, 2024. It should be noted that the interlocutory relief goes beyond the interim relief and seeks to restore the plaintiff to his employment on an interlocutory basis.

Background

3. The plaintiff has said on affidavit that he is *"a well-known figure within the software development gaming industry who has cultivated long standing professional relationships with major clients within that industry"*. That seems to be borne out by the evidence at interlocutory stage and does not appear to be seriously in dispute.

4. In or about 2016, after already developing what appears to be a significant level of expertise in the area, the plaintiff and another individual set up a company, D.C. Rock Digital Limited t/a The Unit, the business of which was the design and development of free-to-play ("F2P") games, together with related marketing and project management services. These games were then, in effect, handed over to companies (of which the defendant is one) who would license them to well-known betting companies. F2P games are interactive games or quizzes which keep the customer interested in and engaged with the betting company's platform. Part of the business of the defendant was to license those games to the betting companies in question. However, the games themselves were developed by The Unit who would then, in effect, hand over the game to the defendant.

5. The defendant was founded by Mr. Cillian Barry in or about 2010. He remained a director of the defendant until 20 March, 2024, at which point he was removed as part of the sequence of events giving rise to these proceedings. In 2017, he recruited the plaintiff to take

up employment with the defendant, the plaintiff having provided consultancy services to the defendant from at least 2016.

6. The plaintiff and his co-founder of The Unit each held a 50% shareholding in D.C. Rock Digital Limited and were directors of it from the outset. Over time, D.C. Rock Digital Limited concentrated more on marketing services and software development services were provided by another company trading as The Code Factory, which apparently operated as part of a joint venture with The Unit, although this arrangement has since ceased.

7. When Mr. Barry proposed to the plaintiff that he would come to work for the defendant, the plaintiff informed Mr. Barry of his interest in The Unit and Mr. Barry thought there would be no difficulty with the plaintiff coming to work for the defendant and that it could in fact be beneficial to the defendant as The Unit would provide necessary services to the defendant to enable it to deliver for its clients. A key issue in these proceedings is that the plaintiff maintained his directorship and shareholding of both companies in The Unit throughout his employment with the defendant.

8. On 5 February, 2021, Bally's Corporation ("Bally's"), a major international online betting company and casino operator which is based in the United States, bought the defendant by way of share purchase through its wholly owned subsidiary Premier Entertainment Sub, LLC. Around this time, the plaintiff, who had signed a contract of employment with the defendant in 2017, signed a fresh contract of employment in largely similar terms (albeit with some modifications reflecting the fact that the defendant was now part of the Bally's Group).

9. In July 2022, The Code Factory appears to have ceased trading and the plaintiff and his co-founder of The Unit incorporated another company, The Unit Digital Service Limited. The plaintiff and his co-founder of this new company were directors and 38.7% shareholders and this, in effect, provided software development services, trading under the business name of The Unit. The reduced shareholding was accounted for by the fact that two investors, one of whom

was Mr. Barry, each loaned monies to The Unit Digital Service Limited and received a 10% shareholding in return. Another individual holds a 2.5% shareholding. I am going to refer to the overall business conducted by these companies by reference to their trading name, The Unit, but it will be necessary to refer specifically to the individual companies from time to time.

10. The plaintiff was summarily suspended from his employment on 21 March, 2024, essentially on the basis that The Unit appeared to be a competitor of the defendant, and it appears to have been thought that the plaintiff was using his position as employee of the defendant to poach staff from the defendant and to direct business to The Unit, to the detriment of the defendant's business. Although the defendant maintained at the hearing of the interlocutory application that The Unit is a competitor of the defendant, in fact this appears not to be the case, and the findings of Mr. Federico Milanetti, Director of Human Resources with Bally's ("the Investigator"), who was appointed by the defendant to investigate the plaintiff's role in The Unit appear to reject that finding. (I discuss those findings in more detail below.) In addition, the outcome of the disciplinary process which led to the plaintiff's dismissal contains no findings against the plaintiff on the basis that The Unit was a competitor business, the disciplinary findings being based on other issues relating to the plaintiff's status as director and shareholder in The Unit, including potential conflicts of interest issues.

11. Notwithstanding the apparent acknowledgement by the Investigator that The Unit was not in competition with the plaintiff and that the plaintiff had not been poaching employees for The Unit from the defendant, the Investigator nevertheless found that the plaintiff had a case to answer in several respects. In essence, he thought the plaintiff might be in breach of Clauses 5.6, 18 and 19 of his contract of employment with the defendant. The alleged breach of Clause 19 related to Clause 19.9 of the plaintiff's contract which, somewhat confusingly, requires the plaintiff to comply with the Group's Code of Conduct policy but also provides that this policy *"does not have contractual effect"*.

12. The defendant appointed Ms. Emma Hodgkiss of Bally's London office to conduct the disciplinary process which followed the conclusion of the investigation and after a disciplinary hearing on 19 June, 2024, conducted over Teams, she notified the plaintiff by letter dated 21 June, 2024, of a decision to dismiss him for gross misconduct. That decision took effect on the same day.

13. The basis for this decision was that he had breached Clauses 5.6, 18 and 19 of his contract, the breach of Clause 19.9 consisting of a failure to comply with the Bally's Code of Conduct policy on ethics and professional standards, as well as a failure to correctly answer certain questions in the Quarterly Related Party Questionnaire in the form issued by Bally's to employees of the defendant from the time of the share purchase in 2021, and which the plaintiff had completed in July, 2022, immediately after the incorporation of The Unit Digital Services Limited.

14. Given the findings which led to the plaintiff's summary dismissal, it should be noted by way of background that payments to The Unit were generally relatively small up to 2022, but from 2023 the defendant's spend via The Unit increased significantly. It would appear this occurred largely because the defendant had to obtain outsourced software developer services in 2023, and the services of an additional product owner from early 2024. These additional personnel appear to have been recruited on an agency basis from another company but this was arranged through The Unit. It is noted in the outcome letter of 21 June, 2024, that the monthly payments made to this third party company were about €5,500 per month and that The Unit charged a management fee which the plaintiff estimated at €100-200 per month, although it is not clear whether this was in relation to each outsourced worker or both.

15. The value of the services provided by The Unit to the defendant is material to several of the findings contained in the outcome letter of the disciplinary process, so it is useful to set out the amounts invoiced as deposed to on affidavit by Mr. Danzak on behalf of the defendant.

In 2019, which appears to be the first year for which two invoices were raised, one in September and one in December, in the total amount of €30,627.00. In 2020, two separate invoices raised in April and June of that year resulted in a total payment of €19,680 for the entire year. In 2021, the sum was €14,071.10 comprised of two invoices, one in January and another in December.

16. It is particularly material to the outcome of the disciplinary hearing that only one invoice was raised for the entire of 2022, in January of that year, and for the sum of €14,022.

17. D.C. Rock Digital Limited raised only two invoices in 2023, one in January and one in March, totalling €12,951.90. All subsequent invoices in 2023 and 2024 were raised by The Unit Digital Services Limited.

18. In 2023, The Unit Digital Services Limited raised ten invoices in total, though one of these was for the sum of €0.20 which seems to be a correction of sums invoiced in earlier invoices. In May and November, it raised invoices each for the sum of €6,974.10, and it invoiced in the sum of €6,794.10 in April (though this may be a typographical error created in preparing the exhibited schedule of payments). In the months of July, August (twice), October (twice) and December, it raised invoices each for the sum of €7,306.20. The total sum paid by the defendant to The Unit in 2023 was €77,531.60, with €64,579.70 of this going to The Unit Digital Services Limited during the second, third and fourth quarters.

19. In 2024, the sums increased with invoices raised in January, February (twice), March, April and May, in amounts ranging from €14,378.70 to €16,265.52, and the total spend up to May 2024 being €91,910.52.

20. According to the defendant, it was not appreciated within Bally's until September, 2023, when it came to the attention of an unidentified person within the Bally's corporate structure that the plaintiff — who by this time was Head of Business to Business ("B2B") within the defendant — was a co-founder of The Unit, with whom the defendant was

transacting business. It appears that no further steps were taken at this time and that it was only in March, 2024, that Mr. Danzak was instructed to investigate further and it was discovered that the plaintiff was a substantial shareholder and director of The Unit. Mr. Danzak does not say who instructed him to do this or whether there was any particular catalyst for investigating the matter further at that time. The plaintiff was suspended on 21 March, 2024, on the basis that preliminary investigation showed that he was involved in another business in breach of his employment contract.

21. For the record, the plaintiff says that the real reason for his suspension was that he and Mr. Barry had been attempting, in early 2024, to buy back the B2B part of the defendant's business, in which the plaintiff says Bally's had taken no interest. He says that his suspension, the process which followed, and his purported dismissal are all designed to damage his reputation and to prevent him from establishing a rival business. However, I do not have to decide any of these issues in this application and I am merely setting out the position of the plaintiff.

22. The plaintiff challenges the lawfulness of both his suspension and his ultimate dismissal, and I will first consider the issues raised in relation to his suspension on 21 March, 2024.

Suspension of the plaintiff

23. On 21 March, 2024, the plaintiff received a WhatsApp from a Mr. Brett Calapp, a senior executive within Bally's, inviting him to a meeting. That meeting took place the same day and the plaintiff was informed that he was being suspended from his employment with immediate effect. He was handed a letter of 21 March, 2024, formally advising him of this fact. As the terms of this letter are important I will set out its terms in some detail:-

"Allegations

We recently became aware of your involvement in another business, The Unit Digital Services Limited ("The Unit"). Having considered this further, we now understand that you are both Co-Founder of and shareholder in that business, and it appears to be competitive with the [defendant]. The [defendant] considers that this is a clear breach of your employment contract. We now intend to carry out an investigation in order to assess the severity of these breaches, the risk to the [defendant] and determine whether disciplinary action is required.

…

Investigation process"

The purpose of the investigation is to gather all relevant facts and evidence to assess the nature and extent of your involvement in The Unit and the risks of such involvement to the [defendant]."

The plaintiff was also told that he should return his laptop and would not have access to the defendant company's email or I.T. systems while his suspension was in place, he was told to contact a human resources representative in Bally's in order to acquire an alternative email address at which he could be contacted during the period of his suspension.

24. By letter of the same date, the Investigator wrote to the plaintiff by email which he confirmed that the basis of the suspension was the plaintiff's involvement in The Unit, a company which appeared to be competitive with the company. He enclosed with that letter the Bally's *"ROI: Disciplinary Policy"* which is dated 21 March, 2024. Mr. Milanetti was appointed to investigate, in accordance with the procedures set out in the Bally's ROI Disciplinary Policy, the involvement of the plaintiff with The Unit in accordance with Terms of Reference drawn up for that purpose.

25. These Terms of Reference were provided to the plaintiff along with the letter of 21 March, 2024, commencing the formal investigative process and are in more detailed terms than the letter. At para. 2.1 of those Terms of Reference, it was stated:-

> *"The investigation will establish the level of involvement of [the plaintiff] into a 3rd party company, The Unit Digital Services Limited ("The Unit") where he is listed as Co-Founder of and shareholder and whether this amounts to a breach of his contract of employment. The investigation may include questions regarding the operation, finances and accounts of the SportCaller business and, where appropriate any relationship (directly or indirectly) with The Unit including (i) About SportCaller's significantly worse than expected financial results for 2023 (ii) that former employees of SportCaller have joined The Unit (iii) That SportCaller and another Bally's entity (Monkey Knife Fight were customers of The Unit and (iv) That SportCaller and The Unit may be competitors.*

26. At para. 2.2 it was confirmed that the purpose of the investigation was for the Investigator to make findings of fact. At para 6 it was provided that the Investigator, having duly considered all the evidence and representations submitted, would produce a written report to the Chairman of the defendant setting out the findings of the investigation and para. 7 provided that the outcome of the investigation should include one of the following findings:

(A) That, on the balance of probability, the complaint is upheld for reasons which are stated; or

(B) That, on the balance of probability, the complaint if not upheld for reasons which are stated (cases where there was insufficient evidence to decide the complaint are included in this category); or

(C) The Investigator might, depending on the circumstances, make a finding of *"no case to answer"* where the complaint is withdrawn prior to conclusion of the investigation.

27. It will be noted that para. 7 refers to *"the complaint"* and this is not specifically defined in the Terms of Reference. However, in my view, on a fair interpretation of those Terms of Reference, the complaint being referred to are the matters set out at para. 2.1, above.

28. As I understand it, the plaintiff makes five objections to the lawfulness of the suspension:

i. He says that the matters at sub-paragraphs (i) to (iv) of the Terms of Reference were the sole matters to be investigated but ultimately it turned into a roving investigation which he says rendered his suspension unlawful and/or was a breach of fair procedures;

ii. He says the investigation was pre-judged as the letter of 21 March, 2024, notifying him of his suspension contains a conclusion that he was in breach of his contract and that the purpose of the investigation was merely to enquire into the severity of those breaches;

iii. His contract of employment did not provide for suspension at all or in the circumstances which arose, and reliance was instead placed on the Bally's ROI Disciplinary Policy which had not been previously notified to him and which did not form part of his contract of employment;

iv. Even if the Disciplinary Policy applied to him, it required that the suspension would be brief and that it would be subject to review, but it was not reviewed and it was not brief; and

v. The decision to suspend the plaintiff was made by Bally's rather than the defendant and was made in the interests of Bally's rather than the defendant.

i. Whether the Investigator exceeded the Terms of Reference

29. As this is an interlocutory application only, I propose to deal with this as briefly as possible. Throughout the investigative and disciplinary process, the plaintiff took objection to the investigation of matters other than the four sub-paragraphs of para. 2.1 which are quite specific and which, in general, seem to be directed at whether The Unit was a competitor of the defendant. It should be noted however that sub-para (iii) refers to the fact that the defendant is a customer of The Unit.

30. Notwithstanding the stance taken by Mr. Danzak in his replying affidavit that the Unit was such a competitor, which was maintained at hearing, I think it is quite clear that the Investigator did not find that The Unit was a competitor of the defendant and did not find any case to answer on this point. Furthermore, Ms. Hodgkiss did not consider this issue as part of the disciplinary process.

31. In fact, there is no evidence before me of any specific consideration by the Investigator of SportCaller's results for 2023 nor is there any reference to Monkey Knife Fight. It is not clear where his own review of the relevant records satisfied him that there was no case to answer on these points or whether they were simply never investigated all. Either way, they do not feature in the notes of the two disciplinary meetings on 16 and 19 April, 2024, nor are they referred to in the Investigator's Report of 29 May, 2024.

32. I would add, however, that while there was no explicit consideration of the defendant's results for 2023, there was a finding (quoted below) that there had been no material loss of business from the defendant to The Unit. This could possibly be regarded as falling within sub-para (i) of the Terms of Reference.

33. Questions were asked of the plaintiff in the course of the investigation about a single employee who left the defendant and some time later went to work for The Unit. The plaintiff replied that there was no connection, that the employee left the defendant's employment to go travelling, and more than six months later, joined The Unit. The Investigator appears to have been satisfied with that because, other than a finding that there was no evidence of any breach of the Restrictive Covenants set out at Clause 15 of the plaintiff's contract, referred to in more detail below and arguably (at Clause 15.1.2) covering the poaching of employees, he makes no findings on that particular issue.

34. Sub-para. (iv) refers to the general issue of whether The Unit was in competition with the plaintiff. On this point, the material findings of the Investigator as set out in his Final Report were as follows:

> *"Having reviewed the evidence on record, it appears that the two companies are players in the same industry (sport betting) and the description of the business process overlaps. However, how they generate revenue differ and they appear to have a different client base.*
>
> *There is no evidence of a material loss of business from SportCaller towards The Unit at this stage.*
>
> *...*
>
> *There is no evidence so far to suggest that [the plaintiff] has breach (sic) the Restrictive Covenants in his Contract"*

35. The reference to Restrictive Covenants is a reference to Clause 15 of the plaintiff's contract of employment, which provides:

> *"**15. Restrictive Covenants***

15.1 For the duration of your employment and for a period of six (6) months following the Termination Date, without the prior written consent of the Company, you will not Directly or Indirectly within the Restricted Area

15.1.1 canvass, solicit or approach or cause to be canvassed, solicited or approached for orders any Person who at any time during the six months immediately preceding the Termination Date is or was in negotiation for the supply of goods or services with the Company; a client or customer of the Company; or in the habit of dealing with the Company where the orders relate to goods and/or services which are competitive with or of the type supplied by the Company and in respect of whom you or one of your subordinates acting in the course of your duties dealt or had contact with that Person during the six months immediately preceding the Termination Date;

15.1.2 solicit or entice or endeavour to solicit or entice away from the Company or employ any person who was employed in an executive capacity by the Company at any time during the six months preceding the Termination Date and in respect of whom you are acting in the course of your duties dealt or had contact with during the six months immediately preceding the Termination Date; or

15.1.3 be engaged, concerned, or interested in any Person who is a client of customer of the Company if such engagement, concern or interest causes or would cause the client or customer to cease or materially to reduce its orders or contracts with, or the volume of goods and services received from the Company."

36. Clause 15.1.1 appears to be directed at actions in competition with the business of the defendant and Clause 15.1.2 relates to the poaching of the defendant's employees, both of which overlap in fact with the sub-paragraphs of the Terms of Reference insofar as they refer to involvement in a competitor company and the possible poaching of the defendant's employees.

37. A fair reading of the Report indicates, therefore, that the Investigator did not make any finding of a case to answer on three of the four sub-paras. of para. 2.1, and did not seem to consider any issues relating to Monkey Knife Fight. Other than noting that the defendant seemed not to have lost business to The Unit, neither did the Investigator consider the financial results of the defendant for 2023 or the reasons why they were disappointing. However, sub-para. (iii) does refer to the fact that the defendant was a customer of The Unit and the potential conflict of interest arising out of this formed a significant part of the Investigator's Final Report and of the outcome of the disciplinary process, so I do not think that the plaintiff's submission that the investigation strayed beyond these four sub-paragraphs is in fact correct.

38. Furthermore, the introductory portion of para. 2.1 of the Terms of Reference refers in a more general way to whether the plaintiff's involvement in The Unit amounted to a breach of his contract of employment. I think it is fair to say that all of the bases upon which Ms. Hodgkiss ultimately decided that the plaintiff should be dismissed fall within this general scope of the investigation.

39. Therefore, insofar as the plaintiff makes a general complaint about the roving nature of the investigation and whether this is permitted, it is my view that the introductory paragraph of para. 2.1 of the Terms of Reference and the reference at sub-para. (iii) to the fact that the defendant was a customer of The Unit encompasses the matters on which the Investigator found there was a case to answer and which ultimately formed the basis of the decision to dismiss.

40. It is of course the case that the requirement of fair procedures applies to the introduction of new or specific matters which could not be reasonably foreseen from those general Terms of Reference, but no strong case of any breach of fair procedures was made at hearing. There was a generalised complaint that the plaintiff did not know the case against him but he did not point to anything in the findings which was not addressed in the meetings with him in the course of the investigation or disciplinary process and it does not appear on a reading of the notes of those meetings, which are admittedly not verbatim, that the matters which formed the basis of the findings ultimately made against him were not addressed with him at those meetings. It seems he was given an opportunity to comment on these matters.

41. In particular, it is clear from the notes of the meeting with the Investigator on 16 April 2024, that the investigation had started to address matters relating to The Unit other than the fact that it had been thought to be a competitor of the defendant. For example, the plaintiff was asked about the Quarterly Reporting. I will return to this reporting later in the judgment but it will be seen that these Questionnaires were completed by the plaintiff after Bally's bought the defendant. In the course of this and the subsequent meeting on 19 April, 2024, the questioning moved to potential conflicts of interest between the plaintiff in his role in the defendant company and his role in The Unit. He was asked about whether the relationship between The Unit and the defendant was underpinned by any legal agreement, about the invoicing of the defendant by The Unit, and whether The Unit obtained a markup when arranging for the services of outsourced staff in 2023 and 2024. These are all matters which formed part of the ultimate basis for which the plaintiff was dismissed.

42. Similarly, the plaintiff was asked about who he had informed about his involvement in The Unit. Leaving aside the rationality or lawfulness of the conclusions ultimately reached, this gave the plaintiff an opportunity to address the steps he had taken to meet his obligations under Clause 18 of his contract. He was also asked about various emails which were ultimately

relied upon by the Investigator for finding that he had a case to answer as to whether he had complied with Clause 5.6 of his contract. Although, as set out below, I think there is a strong case for saying that the decision to dismiss was unlawful having regard to the provisions in his contract of employment relating to serious misconduct and the entitlement of the defendant to dismiss him without prior warning, the plaintiff appears to have been afforded an opportunity to comment on the matters being considered.

43. In those circumstances, I am not satisfied that the plaintiff has shown a strong case, likely to succeed at trial, that the defendant conducted a roving investigation, outside of the terms of reference. Insofar as specific issues arose during the investigation, the plaintiff was afforded fair procedures.

ii. Whether the terms of the letter of 21 March, 2024, are evidence of pre-judgment

44. It is true that the letter notifying the plaintiff of his suspension refers to the fact that he has been found to be in breach of contract and the only matter being investigated is the severity of the breaches in question.

45. However, the Investigator ultimately found there was a case to answer on several breaches of contract but indicated in relation to the alleged breach of Clause 5.6 that it was a *"limited occurrence"*. Furthermore, although finding that the Bally's Code of Conduct might have been breached, he highlighted the fact that that Code of Conduct was non-contractual in its effect. He also concluded that there was no breach of any of the restrictive covenants in the contract which, from the nature of the specific sub-paragraphs in para. 2.1 of the Terms of Reference, appear to have been the contractual clauses of most initial concern.

46. This does not demonstrate an intention to find breaches of contract at all costs such that I could conclude from the letter of 21 March, 2024, alone that there was a strong case for saying

that the matter had been pre-judged. The letter is not carefully drafted but it's apparent conclusion that the plaintiff had already been found to be in breach of contract does not seem to have been one which influenced the Investigator who found that there was a case to answer in relation to various matters but, at least insofar as Clause 5.6 and the Group Code of Conduct were concerned, expressed doubt as to the seriousness of the former and as to the contractual status of the latter. I do not think that constitutes a strong case which would justify the grant of mandatory interlocutory relief.

iii. Whether the suspension of the plaintiff was lawful having regard to his contract of employment

47. The basis for suspending the plaintiff appears to be section 7 of the Bally's ROI Disciplinary Policy. However, this was issued on 21 March, 2024, the date of the plaintiff's suspension and does not appear to have been in existence prior to that date. The plaintiff says that it does not apply to him.

48. This document identifies its scope as applying to *"ROI employees and includes any and all subsidiaries and entities of Bally's."* One of the principles stated in it is that an employee *"will not be dismissed for the first breach of conduct (sic) except in the case of gross misconduct."* The Bally's ROI Disciplinary Policy contrasts with the plaintiff's contract of employment in two ways that are significant for this application.

49. First, as regards suspension, section 7 of the Bally's Disciplinary Policy provides that suspension will only take place in *"cases involving suspected gross misconduct, where relationships have broken down or where it is considered that there are risks for example, commercial risk, risk to our property or responsibilities to other parties."* Section 7 also states:

"Suspension should only be imposed after careful consideration and should be reviewed to ensure it is not unnecessarily prolonged."

50. This contrasts with the plaintiff's contract of employment which only provides for suspension where either party serves a notice of termination or where the plaintiff resigns: see Clause 17.

51. Although the plaintiff's contract of employment does not provide for suspension in the circumstances in which it was imposed in this case, Clause 23.2 of the plaintiff's contract of employment provides that: *"Disciplinary matters will be dealt with in accordance with the Company's Disciplinary Procedure which will be provided to you under separate cover. Such procedure does not have contractual effect."* Clause 1.1 of the plaintiff's contract defines *"Company"* as being the defendant, as opposed to the *"Group"* and the *"Associates"* of the defendant as defined elsewhere in Clause 1.1. However, I do not think it is unlawful for a subsidiary to supply an employee with a Disciplinary Policy used throughout the corporate group of which the employer is part.

52. The plaintiff merely says in his affidavit that the defendant does not appear to have an applicable disciplinary procedure, and he objects to being provided with the Bally's policy. However, insofar as procedural matters are concerned, I do not see anything unreasonable about setting out in writing the procedures which will be followed and they do not in fact appear to be particularly unusual. The plaintiff's argument is based on a technical distinction between his employer and its parent but does not say why his employer cannot simply adopt the parent's disciplinary procedures. In these circumstances, I do not think that the plaintiff has met the threshold required to obtain interlocutory relief on this point.

53. However, it should be noted that the policy did not have contractual effect and therefore, I am satisfied that the plaintiff has a strong case for saying that it cannot override the substantive terms of the plaintiff's contract. This is the second point of contrast between the

Bally's ROI Disciplinary Policy and the plaintiff's contract of employment as the former purports to define any breach of the Group Code of Conduct as being *"gross misconduct"*, whereas Clause 16 of the plaintiff's contract of employment does not include breaches of any code of conduct (which in any event, as pointed out by the Investigator, do not have any contractual effect) as *"serious misconduct"*, the phrase used in the contract of employment.

54. This conflict between the Code of Conduct and the contract is relevant to the lawfulness of the decision to dismiss the plaintiff, discussed further below.

iv. Whether the plaintiff's suspension was unduly prolonged and/or should have been reviewed

55. In my view, the plaintiff cannot show a strong case, likely to succeed at trial, for the proposition that his suspension was unduly prolonged or ought to have been reviewed at an earlier time. The written Resolution of the defendant's directors (who were now Mr. Rowland-Jones and Mr. Craig) of 20 March, 2024, which records the decision to suspend the plaintiff identifies the basis for that suspension as being that Bally's, of which the defendant was a subsidiary, had *"reason to believe that the [plaintiff and Mr. Barry] have been involved in another business, The Unit Digital Services Limited, in breach of their respective employment contracts."*

56. While the suspicion that The Unit was in competition with the defendant (referred to in the notification of suspension dated 21 March, 2024) was not the subject of any adverse finding by the Investigator (who, it will be recalled, specifically found no evidence of any breach of Clause 15.1.1, or of any material loss of the defendant's business to The Unit, which he acknowledged had a different revenue stream and client base), more general issues as to how the plaintiff had dealt with his interest in The Unit while in the defendant's employment were

very much a focus of the investigation and the subsequent disciplinary procedures, and these fall within the basis upon which the plaintiff was suspended, both as recorded in the Resolution of 20 March, 2024, and the Terms of Reference supplied to the Investigator.

57. In those circumstances, I do not think there is a strong case for saying that the basis for suspension had entirely fallen away, and I do not therefore think that the continued suspension of the plaintiff required to be reviewed at a time prior to the conclusion of the disciplinary process. Neither do I think the timeline of the suspension, which is approximately three months from suspension to final disciplinary decision, is one which could be regarded as so clearly prolonged as to merit the grant of interlocutory relief.

v. Whether the directors of the defendant breached their duty to the defendant in recommending the plaintiff's suspension

58. A key basis on which this is alleged is that an initial investigation which led to the plaintiff's suspension was apparently conducted by Bally's rather than the defendant, who was the plaintiff's employer.

59. The more specific point is made that, insofar as the Resolution of 20 March, 2024, purports to say that the defendant, as employer, formed the view necessary to the initial investigation — this is not borne out by the facts. In particular, the plaintiff points to the fact that Mr. Barry remained a director of the defendant until 20 March, 2023, and he knew nothing about any initial investigation.

60. I do not think this point is of the strength required to ground an application for interlocutory relief. Bally's is the ultimate owner of the defendant through two wholly owned subsidiaries. As such, a decision of Bally's constitutes a decision of the sole shareholder in the defendant. It is a general principle of company law that the shareholders acting unanimously

can act on behalf of a company even without a formal resolution, provided the act in question is *intra vires* the company and is honest: see *Buchanan, Ltd. and Another v. McVey* [1954] I.R. 89. That being the case, I do not see how a decision made on behalf of the sole shareholder can be said not to bind the company, particularly where one of the directors was also the subject of the decision to investigate.

61. Various objections to the actions of the directors of defendant after 20 March, 2023 are made, essentially on the basis that they did not exercise their duties in the interests of the defendant company but rather in the interests of Bally's.

62. First, it should be noted that directors generally owe their duties to the company, and not to any employee, and therefore it appears to be the defendant rather than plaintiff which would enjoy a cause of action on that ground.

63. Secondly, as Bally's was, through its subsidiaries, the sole shareholder in the defendant, I find it difficult to see how it was not entitled to pursue its interests in the defendant as its wholly owned subsidiary.

64. As a result, I do not think that the *Maha Lingham* test has been met so far as the challenge to the plaintiff's suspension is concerned.

Lawfulness of the dismissal of the plaintiff

65. The plaintiff was ultimately dismissed for alleged breaches of Clauses 5.6 and 18 of his contract, together with alleged breaches of the Group Code of Conduct which were said to constitute a breach of Clause 19.9 of his contract. It is common case that the plaintiff never received a verbal or written warning in relation to any of these matters and had an unblemished work record.

66. On this aspect of the case, it is my view that the plaintiff has a strong case likely to succeed at trial that his dismissal was unlawful having regard to the terms of his contract of employment.

67. Before turning to the individual clauses on which the decision to dismiss the plaintiff for gross misconduct was made, I think it is necessary to highlight some important features of Clause 16 of the plaintiff's contract of employment as this deals with *"Dismissal"*. Clause 16.1 provides:

> *"Notwithstanding clause 3 of this Agreement, the Company shall be entitled to dismiss you without notice or pay in lieu of notice if you are guilty of serious misconduct or in any way fundamentally breach your employment contract with the Company."*

It then gives examples of *"conduct that may entitle the Company to terminate your employment without notice"*, which includes such matters as *"theft or fraud"* (Clause 16.1.3), *"any act or attempted act of violence or abusive behaviour towards people or property including causing deliberate damage to the property of the Company or any Associate"* (Clause 16.1.4) and other examples which are not relevant here.

68. Clauses 16.1.1 and 16.1.2 are, however, general in nature and, notwithstanding that they were not referred to at hearing, must be considered.

69. Clause 16.1.1 defines in a general way the type of serious misconduct which would justify summary dismissal:

> *"committing any act of serious misconduct serious enough to prejudice the business and reputation of the Company or the Group and to damage the working relationship between you and the Company or the Group or gross incompetence or other repudiatory breach of contract"*

70. Clause 16.1.2 sets out when a breach of contract will amount to misconduct serious enough to justify summary dismissal, as follows:

"without reasonable excuse and after prior written warning, repeating or continuing any breach of contract or misconduct (not falling within 15.1.1 above)."

As already seen, the Investigator found that there was no evidence of any breach of the Restrictive Covenants (which include Clause 15.1.1) and the breaches of contract identified by the Investigator as being ones in respect of which there was a case to answer and which ultimately formed the basis of the decision to dismiss are therefore ones which *prima facie* fall within Clause 16.1.2. As such, a decision to dismiss on that basis required not just a consideration of whether the plaintiff had *"reasonable excuse"* for the breach but also whether it had been repeated or continued after receipt of a prior written warning. No such warning was ever issued to the plaintiff here.

71. It is notable that Clause 16 of the plaintiff's contract of employment is not referred to at all in either the Final Report of the Investigator or the letter setting out the outcome of the disciplinary procedure.

72. Beyond saying at this point that the Final Report of the Investigator concluded that the plaintiff had a case to answer as to whether he was in breach of contract, and that the Report seems to have identified these as possible breaches of Clauses 5.6, 18 and 19 of his contract of employment, and to breaches of the Group Code of Conduct, I do not think it is necessary to refer in detail to the contents of that Report for the purposes of deciding the application to interlocutory relief.

Disciplinary process and outcome

73. At the outset of the disciplinary hearing on 19 June, 2024, Ms. Hodgkiss recited the terms of letter inviting the plaintiff to the disciplinary hearing, which apparently referred to breaches of Clauses 5.6, 18 and 19 of his contract *"and the group's code of conduct"*. It also

referred to an issue as to whether the shareholding in The Unit was ever *"disclosed to anyone within Bally's or in the Quarterly Reports within Bally's"* and questioned why the plaintiff *"allowed yourself to be in a position where you are approving contractually binding agreements with a third party which you yourself had a financial interest in"*. These issues were drawn from the conclusions of the Investigator's Report.

74. At this point, the nature and status of the quarterly reports, which were essentially questionnaires completed by the plaintiff each quarter and the completion of which was first referred to at the meeting with the Investigator on 16 April, 2024, needs to be considered.

75. Two types of questionnaire are referred to in the Investigator's report and form part of the consideration at disciplinary stage. The first of these is the Quarterly Related Party Questionnaire and the second is the Quarterly Code of Conduct and Business Ethics Report. These were apparently signed by the plaintiff on a quarterly basis after Bally's had acquired the defendant.

76. As it forms the basis of an adverse finding in the outcome letter, I will use the Quarterly Related Party Questionnaire completed by the plaintiff on 19 July 2022 by way of DocuSign as an example. This consists of four questions (I to IV), designed, in the case of Question I to elicit information as to whether the plaintiff had any direct or indirect financial interests in transactions or series of transactions concluded by the defendant since the beginning of the most recently completed fiscal quarter where the value of that transaction or series of transactions exceeded $50,000. Question II relates to transactions in which the employee or any family member had a direct or indirect interest in a transaction or series of transactions involving indebtedness or guarantees of indebtedness and in which Bally's or any of its subsidiaries was a participant, where the value of that transaction or series of transactions exceeded $50,000. Question III simply asks if the plaintiff had answered '*No'* to any of the previous questions solely by reason of the fact that the required value threshold had not been

exceeded. In the Questionnaire completed on 19 July, 2022, and, as I understand it in all other such Questionnaires, the plaintiff answered *'No'* to all four questions.

77. The other Questionnaire is the Quarterly Code of Conduct and Business Ethics Report. Four such questionnaires, completed by the plaintiff in 2023 and 2024, have been exhibited. The plaintiff in each case answered '*No'* to nine questions. Although raised by the Investigator and suggested that the plaintiff should have referred to his role in The Unit in these Questionnaires, they were not ultimately relied upon to dismiss the plaintiff as Ms. Hodgkiss makes no reference to them in her report.

78. I would note in passing that, notwithstanding this, Mr. Danzak asserts in his affidavit that the plaintiff should have answered '*Yes'* to Questions 1, 3 and 4 of this latter Questionnaire. It is not at all clear that this is so, and Question 4 in particular seems to be completely irrelevant as it relates to gifts received from someone who does or is seeking to do business with the defendant. It has never been suggested at any point that the plaintiff has been in receipt of such gifts, and it is very unclear why Mr. Danzak highlights this in his affidavit.

79. However, the key point is that Ms. Hodgkiss (I think correctly) did not rely on this Questionnaire at all, notwithstanding its introduction into the process by the Investigator, presumably because she did not think it was relevant. Indeed, she appears to have accepted that the plaintiff was instructed (it appears by someone within the parent group, though this is not entirely clear on the evidence) that there was no need to report relationships previously reported.

80. As a consequence of that acceptance, she made adverse findings only by reason of the failure of the plaintiff, in completing the Quarterly Related Party Questionnaire on 19 July, 2022, to report the incorporation of The Unit Digital Services Limited in July 2022, and his appointment as director of that company the same month. She therefore appears to have

implicitly accepted that the disclosure requirement in the Questionnaires related only to the immediately preceding quarter.

81. I will now turn to consider the findings of Ms. Hodgkiss and whether the plaintiff has made out a strong case, likely to succeed at trial, that these are unlawful.

The outcome of the disciplinary process

82. The letter setting out the outcome of the disciplinary process is dated the 21 June, 2024. I propose to set out the individual findings and the lawfulness of each in turn.

i. Questionnaire July 2022

83. The first finding was that the plaintiff's new directorship of The Unit Digital Services Limited and a loan to The Unit from two investors should have elicited a *'Yes'* response to Questions II and/or III in the Quarterly Related Party Questionnaire for Q2, 2022, which the plaintiff completed on 19 July, 2022, a matter of days after he had been appointed director of the new company.

84. There was some confusion at hearing as to precisely which question in the Questionnaire should have been answered. However, as the only findings made related to Questions II and III of the Quarterly Related Party Questionnaire dated 19 July, 2022, just five days after the plaintiff was registered as a director of The Unit Digital Services Limited, I do not think it is open to the defendant now to seek to rely either on Questionnaires completed on other dates or on questions not cited by the decision-maker.

85. While it was not relied upon by Ms. Hodgkiss, Question I was the subject of submissions at hearing and it is worth noting its contents. It concerns to transactions,

arrangements and relationships with related persons and requests disclosure in the following circumstances:-

> *"If you or a member of your immediate family had (or will have) a direct or indirect interest in any transaction or series of similar transactions (which includes, but is not limited to, any chargeable contribution, financial transaction and any similar transaction, arrangement or relationship, other than indebtedness) since the beginning of the Company's most recently completed fiscal quarter, or any currently proposed transaction, in which the Company or any of its subsidiaries was or is to be a participant, please describe below such transactions where the amount involved exceeds $50,000".*

86. Footnote 2 clarifies that direct or indirect interests in a transaction include, for example interests that the employee or an immediate family member held through the ownership of an equity interest in another entity, the employee's role as an executive officer of another entity, or his or her participation as a general partner in another entity, that is involved in a transaction with the Company or any of its subsidiaries. I pause here to note that *"company"* is defined as Bally's and not the defendant. That being the case the plaintiff, as a shareholder in another entity who was entering into a transaction with a subsidiary of Bally's, had an indirect interest in any transaction occurring in the previous fiscal quarter which met the required value threshold.

87. However, as pointed out by counsel for the plaintiff at the hearing, there is no evidence of any transaction or series of transactions in any fiscal quarter which exceeded $50,000. Ms. Hodgkiss makes no such finding, and the schedule of payments exhibited to the affidavit of Mr. Danzak makes it clear that there was no such transaction in 2022 other than in January, 2022, which was not within the fiscal quarter to which the Questionnaire completed by the plaintiff on 19 July, 2022, applies.

88. Also, very significantly given the reliance by Ms. Hodgkiss on the directorship of the plaintiff of The Unit Digital Services Limited, it should be noted that footnote 2 clarifies:-

> *"You do not have an indirect interest where your relationship with a firm, corporation or other entity that engages in a transaction with the Company arise* only *from your position as a director of another corporation or entity that is a party to the transaction."*

It therefore seems clear the Ms. Hodgkiss misread the Questionnaire to include directorships, as she stresses the directorship of the plaintiff of this new company and not his shareholding.

89. However, even if one were to regard the Questionnaire as being relevant by reason of the plaintiff's undoubted 38.7% shareholding in this company, there is no evidence whatsoever of transaction or series of transactions between the defendant and The Unit in the relevant fiscal quarter. As such, none of the questions appear to be relevant.

90. Ms. Hodgkiss relied on Question III which requests disclosure of *"any other transactions, relationships or arrangements that you would have disclosed under Questions I or II that you did not disclose because of the $50,000 limitation in those questions".* The plaintiff also answered *'No'* to this.

91. This ultimately, after some confusion as to which question was relevant, was relied upon at the interlocutory hearing as the relevant question. However, the schedule of payments exhibited to the affidavit of Mr. Danzak makes it clear that the only payment to The Unit at any point in 2022 was a payment invoice on the 10 January, 2022 in the sum of €14,022.00. Clearly the Questionnaire completed in July 2022, which related to Q2 2022, related to the period April to June inclusive, and not January, and consequently there was no such transaction to disclose.

92. The plaintiff in the course of the investigation said that the Questionnaires were quite technical and that he had received no training in how to answer them. While he was criticised

by the Investigator for this approach, and indeed Ms. Hodgkiss suggested to him that he should have sought out training himself, in my view his position was entirely reasonable. The Questionnaires ask a series of detailed, technical questions and Ms. Hodgkiss herself seems not to have applied them correctly. This is particularly important in view of the fact that a failure to make disclosures in response to the Questionnaires was relied on as a basis for summarily dismissing the plaintiff. There is no evidence that the plaintiff was ever informed that errors in completing these Questionnaires would be regarded as *"gross misconduct"* within the meaning of the relevant disciplinary policy (which appears not to have been furnished to him until he had already been suspended) and that he could be summarily dismissed on that basis.

93. I have already pointed out that Question III was relied upon by Ms. Hodgkiss in circumstances where the plaintiff appears to have answered it correctly. She also relied on Question II which is headed *"indebtedness of management"* but she does not explain how this Question could be relevant. The apparent reason why this was relied on was because two investors, including Mr. Barry, loaned money to The Unit Digital Services Limited at the time of its incorporation and received a 10% shareholding in return. Neither the defendant nor its parent company was a party to these loans at all. As a result, the plaintiff does not seem to have been under any obligation to answer *'Yes'* to Question II which is in the following terms:-

> *"If you or a member of your immediate family had (or will have) a direct or indirect interest in any transaction or series of similar transactions (which includes, but is not limited to, any chargeable contribution, financial transaction and any similar transaction, arrangement or relationship) that involved indebtedness or a guarantee of indebtedness since the beginning of the Company's most recently completed fiscal quarter, or during the current fiscal quarter, or any currently proposed transaction, in which the Company or any of its subsidiaries was or is to be a participant, please describe below such transactions where the amount involved exceeds $50,000".*

94. There is no mention anywhere of the plaintiff or any member of his immediate family having a direct or indirect interest in any loan to or from the defendant (or indeed Bally's) or any guarantee of any such loan and I simply cannot see the relevance of this.

95. In the circumstances, it seems to me that the plaintiff has a very strong case for saying that reliance by Ms Hodgkiss on the replies to the Q2 2022 Quarterly Related Party Questionnaire was erroneous and could not have been relied upon to justify a finding of gross misconduct so as to lead to his summary dismissal.

ii. Alleged breach of Clause 5.6

96. Clause 5.6 of the plaintiff's contract of employment is in the following terms:

> *"You will at all times during your employment use your best endeavours to promote the interests and reputation of the Group and devote the whole of your time, attention and abilities to the Group's business."*

97. The Investigator had pointed to a series of emails on which the plaintiff was cc'd which he said demonstrated that the plaintiff was pursing his business interests with The Unit while ostensibly working for the defendant. However, he explicitly noted that this was a *"limited occurrence"*.

98. Ms. Hodgkiss seems not to have agreed with the findings of the Investigator on the basis that the plaintiff was in fact only cc'd on the emails referred to by the Investigator and took no part in the substantive exchanges. She therefore appears to have deemed them to be insufficient to make any finding against the plaintiff.

99. However, she found that because he sent an email at 9.11a.m. on Tuesday, 6 September, 2022, which appeared to be on behalf of The Unit, and as this was during his working hours

for the plaintiff, this was a breach of Clause 5.6. Unlike the Investigator who, though pointing to a series of emails, clearly did not regard the alleged misconduct as serious, Ms. Hodgkiss gave no consideration whatsoever to the proportionality of regarding the sending of a single email during working hours as a breach of contract. Neither did she consider or make any reference to the evidence of the plaintiff that he frequently worked outside business hours and well in excess of the hours stipulated in his contract on behalf of the plaintiff. He gave repeated evidence both at the disciplinary stage and to the Investigator that he devoted himself fulltime to the affairs of the defendant and really took no active part in The Unit at all.

100. Ms. Hodgkiss certainly did not consider whether, as a breach of a clause of the employment contract to which Clause 16.1.2 applied, she could move to dismiss the plaintiff for this even though it appears to have been trivial in nature and had never attracted any previous warning. As such, Clause 16.1.2 would appear to provide quite clearly that it could not constitute *"serious misconduct"* so as to justify dismissal.

101. In my view, there is a strong case, likely to succeed at trial, that to categorise the sending of this single email as a breach of contract which was sufficiently serious to be regarded as *"serious misconduct"* within the meaning of the plaintiff's contract of employment and so as to justify summary dismissal, was not within the range of responses open to a reasonable employer.

iii. Alleged breach of Clause 18

102. The finding that the plaintiff had breached Clause 18 of his contract formed the basis of much of the argument at hearing. It provides:

*"**18. Other Business Interests***

> *During the continuance of your employment hereunder you shall use your best endeavours to promote the interests, business and welfare of the Group and shall not, without first obtaining the consent of the Board in writing, either solely or jointly with or as director of manager or agent of any other person or persons, firm or corporation or in any other capacity directly or indirectly carry on or be engaged or (save as the holder or beneficial owner for investment purposes or not more than 3% in nominal value of any class of securities of any company quoted on any recognised securities exchange) be concerned or interested in any trade, business or occupation other than that of the Group."*

103. The essence of the dispute between the parties is that the plaintiff says that Mr. Barry was at all times aware of his involvement in The Unit and that it must therefore have been the case that the defendant was aware. He also says that, insofar as Clause 18 requires him to have the prior written consent of the Board, the defendant is now estopped from insisting on strict reliance on this requirement given that it was never previously applied to him.

104. The background context to this is that Clause 18 is in like terms as Clause 17 of his original contract of employment with the defendant and it appears that he did not receive prior written consent of the Board of the defendant as constituted at the time of his initial employment in 2017 either. He at all times relied on the actual knowledge of Mr. Barry, which he asserted was sufficient to ensure that the defendant had corporate knowledge of the fact that he was involved in The Unit, and the practice of the defendant in not insisting on the formalities which appeared to be required by either contract of employment.

105. By contrast, the defendant argued that the signing of the new contract of employment in 2021 triggered a new obligation on the plaintiff to formally notify the defendant of his involvement in The Unit. It was also argued that the plaintiff should have notified Bally's rather than the board of the defendant itself.

106. If these were the bases upon which Ms. Hodgkiss had decided to dismiss the plaintiff, I would have very strong reservations about the lawfulness of her decision, to say the least. Clause 18 requires the *"prior"* written consent of the Board of the defendant. It is difficult to see how the signing of a fresh contract of employment with the defendant in 2021 could trigger an obligation to notify something which had been ongoing for several years (the plaintiff's directorship and shareholding in D.C. Rock Digital Limited) and of which its Managing Director was well aware. Indeed, there is no evidence before me nor does either the Investigator or Ms. Hodgkiss have considered whether the directors of the defendant (and it should be noted that various people served as directors over the years) knew of the plaintiff's involvement in The Unit. But, in any event, though this argument was heavily relied upon at hearing, it does not form part of the basis of the decision to dismiss the plaintiff and therefore I will not consider it further.

107. Similarly, the contention that Clause 18 required the plaintiff to inform Bally's or any entity other than the Board of the defendant itself was not relied upon by Ms. Hodgkiss who accurately cited the definition of *"Board"* in the employment contract, and this clearly refers to the Board of the defendant only. Her finding related to a failure to notify the Board of the defendant, and she did not place any reliance on a failure to notify Bally's. In doing so, in my view, she correctly interpreted the plaintiff's contractual obligations. (She also, in taking this approach, departed from the approach of the Investigator who considered whether the plaintiff had notified anyone in Bally's of his directorship and shareholding in The Unit, notwithstanding that he was not under any obligation by reason of Clause 18 to do so.)

108. The fact that Bally's had acquired the shareholding in the defendant does not affect the proper interpretation of the contract of employment. Indeed, it is notable that the 2021 contract of employment was issued on Bally's stationery and it presumably would have been open to them to seek to insert a contractual provision which would have obliged employees in the

defendant to notify Bally's or the Board of Bally's of their other business interests, but they did not do so or, if they did, the plaintiff never agreed to such a term as the obligation in Clause 18 relates to the Board of the defendant, and not Bally's.

109. Turning to the lawfulness of what was in fact relied upon to dismiss the plaintiff, it seems that he never obtained formal written consent from the Board of the defendant to his involvement in The Unit and relied on the day to day knowledge of Mr. Barry, who was the Managing Director of the defendant, and who was obviously well aware of that involvement as it had in fact been drawn specifically to his attention prior to the plaintiff commencing employment with the defendant at all.

110. However, it does not follow from the fact that the plaintiff relied on communication with Mr. Barry that the remaining directors of the defendant from time to time were unaware of the plaintiff's role within The Unit. His position was that it followed from the Managing Director's knowledge that the defendant had corporate knowledge of his involvement with The Unit. There was really no investigation of the state of knowledge of any of the other directors at any time.

111. Ms. Hodgkiss accepted that the plaintiff had at all times advised Mr. Barry but said *"there is no evidence ([and the plaintiff] has not suggested) that any other member of the Board was aware".* I have to say, I do not think that this is a correct characterisation of the plaintiff's position which was that, in telling the Managing Director of the defendant, he understood from this that the company as a whole would be aware of his involvement with The Unit.

112. In any event, it should be noted that Ms. Hodgkiss appears to have confined her finding in this respect — it is not entirely clear — to the circumstances arising in July, 2022, when The Unit Digital Services Limited was formed. She found that the plaintiff had breached Clause 18 as he had not informed or gained further consent from the Board of the defendant at this stage.

113. It seems clear from the evidence that, in 2022, the plaintiff continued as he had before, making full disclosure to Mr. Barry as Managing Director. Indeed, Mr. Barry, as an investor in the new company, must have been well aware of the plaintiff's involvement in this new corporate entity also. There was nothing secret about the plaintiff's involvement in The Unit, which was plain to anyone who took an interest in the matter. The only issue was whether he got formal written consent of the Board in 2022 and it appears that he did not. However, he had proceeded for many years without apparently complying with the strict terms of Clause 17 of his 2017 contract and, should the defendant wish to suddenly hold the plaintiff to the letter of his contract, there is in my view a strong case for saying that he should at least have been given an opportunity to obtain formal consent rather than being dismissed two years later for failing to obtain a consent in writing.

114. The plaintiff also relied on *Bank of Ireland v. Reilly* [2015] IEHC 241 for the proposition that, after many years of non-reliance on the strict terms of the plaintiff's contract, insofar as formal written consent was concerned, some period of notice would be required before the strict terms of Clause 18 could be enforced against the plaintiff.

115. In circumstances where the evidence is that the plaintiff's involvement in The Unit was entirely open, and was known to Mr. Barry in his capacity as Managing Director of the plaintiff and in all probability to anyone involved in the day to day affairs of the defendant, I am satisfied that there is a strong case likely to succeed at trial for saying that failure to adhere to the formalities required by the contract after many years where this was not required, and in circumstances where the plaintiff was at all times in fact entirely open about his involvement in The Unit, could not constitute a lawful ground for dismissal.

116. Furthermore, though not argued at hearing, Clause 16.1.2 would appear to prevent summary dismissal for a breach of the formalities required by Clause 18. In substance, this requires the reasonableness of the plaintiff's excuse for not having formal written consent of

the defendant's Board to his continued involvement in The Unit and the incorporation of The Unit Digital Services Limited in 2022. In addition, dismissal was not the appropriate sanction unless preceded by a prior written warning, which clearly has not been given.

117. I would add that there is also a strong case for saying that Clause 16.1.1, which is the only other basis for summarily dismissing the plaintiff which might be applicable in this case, does not apply. The investigation seems to have found no damage to the business of the defendant or the Group, and there is no suggestion of any *"gross incompetence"* or *"other repudiatory breach of contract"*. Neither do I think that Bally's can rely on their own misinterpretation of the plaintiff's obligations under his contract for the proposition that he has been guilty of *"serious misconduct serious enough to … damage the working relationship between [the plaintiff] and … the Group"*.

118. It is therefore my view that there is a strong case, likely to succeed at trial, for saying that any misconduct in these circumstances falls to be dealt with under Clause 16.1.2 rather than Clause 16.1.1, and that, in effect, the defendant has acted precipitously in moving to summarily dismiss the plaintiff on these grounds.

119. In addition to all of that, as pointed out at hearing, the Bally's Interactive Code of Conduct (which was exhibited by Mr. Danzak but appears to be separate from the Bally's Code of Conduct and Ethical Business Practices on which Ms. Hodgkiss relied in her decision), only requires that an employee inform their line manager of any other business interest. That, of course, was Mr. Barry, who was informed.

120. In my view, all of these matters mean that the plaintiff has raised a strong case, likely to succeed at trial, that the finding of a breach of Clause 18 was such as to warrant his summary dismissal was a breach of the plaintiff's contractual entitlements.

iv. Alleged breach of Clause 19.9

121. Ms. Hodgkiss then found that the reference to Clause 19 in the Investigator's report must have been a reference to Clause 19.9 which required compliance with the group's Code of Conduct. She then made the finding, first, that the plaintiff was in breach of section II of the Code of Conduct and Ethical Business Practices. She said that as an employee he must exclude consideration of personal advantage, or which might otherwise be or appear to be inappropriate and inconsistent with the company's interest. She said a conflict of interest existed where a person's private interest interfered in any way with the interests of the company. It is notable that Ms. Hodgkiss made no detailed findings as to how this conflict of interest was said to rise or how it had been breached.

122. I am also concerned about the statement by Ms. Hodgkiss that the plaintiff as head of B2B increased the spend after the signing of the Framework Consultancy Agreement in January 2023 and proposed that The Unit would procure the services of an outsourced software developer and product owner for which it had charged a management fee. She does not mention the management fee charged by The Unit for arranging for these two individuals to provide work – I assume on a contract basis of some kind – which was approximately €100 to €200 per month. She made a finding that the plaintiff *"did not consider the on-cost to [the defendant]"* which is presumably a reference to the cost of going through The Unit, but does not mention or make any finding on or indeed the consider the amount that was actually involved, which appears to have been a management fee of a minimal amount, possibly amounting to as little as €1,200 in any calendar year.

123. Finally, and perhaps most importantly, she fails to recognise that all of the actions taken by the plaintiff as employee which related to The Unit, including the putting in place of the Framework Consultancy Agreement in 2023 and the subsequent use of The Unit to procure the

services of outsourced staff, were approved by the defendant's then Managing Director and were not decisions made by the plaintiff on his own authority.

124. I would like to clearly state the detail of the transactions with The Unit, their precise value, and the role of the plaintiff, are really matters for the internal decision-maker. However, given the terms of Clause 16.1.2, it was incumbent on Ms. Hodgkiss to consider the granular detail of these matters before proceeding to dismiss the plaintiff without notice. Unfortunately, she did not do this.

125. I would add also that it should not be forgotten, and indeed was highlighted by the Investigator, that the Code of Conduct does not, according to Clause 19.9 itself, have contractual effect. This was nowhere considered by Ms. Hodgkiss, despite the seriousness of her decision.

126. Insofar as it is sought to rely on the Bally's ROI Disciplinary Policy for the proposition that a breach of the Code of Conduct is considered to be *"gross misconduct"*, I am satisfied to the requisite *Maha Lingham* standard that the plaintiff will demonstrate at trial that that aspect of the policy is inapplicable to him, given the status of the policy as *"non-contractual"* and its conflict with Clause 16 which nowhere states that breach of a Group Code of Conduct would constitute such serious misconduct as to justify summary dismissal.

127. In my view, there is a strong case, likely to succeed at trial, that the attempt to elevate the significance of the Group Code of Conduct from its non-contractual status in the plaintiff's contract of employment, to one of such importance that any breach of it would be regarded as *"gross misconduct"* which could lead to immediate dismissal was unlawful as it constituted an attempt to unilaterally alter the plaintiff's contract of employment.

128. Alternatively, if the alleged breaches of the Code of Conduct were sufficiently serious to render Clause 16.1.1 applicable, that should have been stated and the reasons given.

Conclusion

129. In conclusion, it is my view that no basis for interlocutory relief relating to the lawfulness of the initial suspension of the plaintiff has been established. While it may well be that the initial suspicion was that The Unit was in competition with the plaintiff, the investigation was established on the basis that the entire question of whether the plaintiff's involvement with The Unit was a breach of his contract of employment would be considered. It did not stray outside that broader issue and, insofar as specific issues emerged in the course of the investigation – such as the responses to the Questionnaires or the putting in place of the Framework Consultancy Agreement with The Unit in 2023 – the plaintiff was given an opportunity to address them.

130. However, as regards the decision to dismiss, the plaintiff has met the *Maha Lingham* standard as each of the reasons given by Ms. Hodgkiss are likely to be found at trial to have been unlawfully made.

131. The ultimate findings in the letter notifying the plaintiff of the outcome of the disciplinary process were based on alleged breaches of Clauses 5.6 and 18 of the plaintiff's contract of employment which could not, having regard to Clause 16.1.2 of the contract of employment, have justified summary dismissal but would instead have led, at a minimum, to the issuing of a written warning (although consideration of *"reasonable excuse"* would be required prior to issuing any such warning).

132. The remaining bases for dismissal were portions of the Group Code of Conduct which were said to be a breach of Clause 19.9 of the plaintiff's contract of employment. This is notwithstanding that Clause 19.9 pointed out that the Group Code of Conduct did not have contractual effect, nor is breach of it identified in Clause 16 of the plaintiff's contract of employment as *"serious misconduct"* which would justify immediate dismissal.

133. Furthermore, there is a strong case, likely to succeed at trial, that reliance on the July 2022 Quarterly Related Party Questionnaire was erroneous.

134. For all of those reasons, there is a strong case likely to succeed at trial, that the decision to dismiss was unlawful, and that the matters arising out of the Investigator's report will have to be reconsidered by another decision-maker.

Relief to be granted and balance of convenience

135. The only further issue arising is whether, in light of that conclusion, the plaintiff should be restored to the workplace. He makes a compelling argument that shutting him out of contact with his clients, with whom he has established good relationships over the years, means that he must now be given access to his emails and allowed to contact his clients.

136. This question really turns on whether the grounds for suspension in section 7 of the Bally's ROI Disciplinary Policy can be said to be satisfied such as to continue the suspension for reasons narrower than those which originally justified it. The main basis on which those grounds could be said now to exist is the alleged damage to the relationship between the plaintiff and the Group.

137. However, I have very significant concerns about the basis for the alleged damage to the relationship, as set out by Mr Danzak in his affidavit. For example, at para. 26 of his affidavit, he says that *"[a]t no point did the plaintiff disclose his interest in The Unit Digital Services Limited during the negotiation of [the Framework Consultancy Agreement]."* Although conflicts of fact cannot be resolved on affidavit, least of all at interlocutory stage, neither can bare assertions be accepted. It is, frankly, perfectly obvious that the plaintiff at all times disclosed his involvement in The Unit to the Managing Director of the defendant, and it is simply incorrect to say that *"at no point did the plaintiff disclose his interest"*. If this is meant

to be a reference to failure to disclose directly to Bally's, then Mr. Danzak has not, in my view, identified the basis for that obligation.

138. Mr. Danzak similarly relies on the Questionnaires and the plaintiff's failure to disclose matters relating to The Unit, but does not explain why these Questionnaires are relevant or why they should have elicited a positive response from the plaintiff.

139. However, Mr. Danzak makes a stronger point that the plaintiff has not acknowledged even that there is a potential conflict of interest between his position with the defendant and his involvement with The Unit. The plaintiff took the position at hearing that he received no remuneration from The Unit and therefore that there was, in effect, no conflict of interest. This appears to me to be an unsustainable approach to this issue. As against that, there is no evidence of concealment of the plaintiff's role in The Unit which was plain to see for anyone taking an interest in the day-to-day affairs of the defendant, and the amounts by which The Unit potentially benefitted seem to be small. In this regard, the general averment of Mr. Danzak at para. 15 of his affidavit, that significant sums of money were paid to The Unit from 2019 to 2024, does not seem to accord with the reality that many of these payments were in fact going directly to a third party company which was supplying the defendant with badly needed staff on an agency basis and The Unit was receiving only a nominal management fee. It further appears that the defendant, ever since the suspension of Mr. Barry and the plaintiff on 21 March, 2024, and the appointment of a replacement director, has continued to trade with The Unit.

140. In essence, the position of the defendant is really based on a view taken at the level of the parent company, Bally's, that it should have been notified directly of the plaintiff's involvement in The Unit. Unfortunately, it was for Bally's to achieve that by insisting on an appropriate clause to that effect in the plaintiff's contract of employment, but this did not happen. Instead, they rely on the Group Code of Conduct but it was presumably on their request

that this Code of Conduct was also stated not to have contractual effect. It also needs to be noted that the Codes of Conduct exhibited by Mr. Danzak seem to be contradictory as to whom any apparent conflict of interest should be disclosed.

141. The assessment of where the balance of convenience lies is not an exact science. I must take into account, on the one hand, the failure of the plaintiff to acknowledge the conflicts of interest that seem to arise from his position. Bally's are perfectly entitled to be concerned about this.

142. However, balancing this against the relatively small values involved and the fact that the Managing Director of the day was at all times fully aware of the plaintiff's involvement in The Unit, and taking into account the potential damage to the plaintiff's reputation, it is my view that the balance of convenience favours the plaintiff being allowed to return to work immediately, to take up such duties as he may be assigned, and to allow him access to his emails so that he can maintain his longstanding relationships with his clients. Should he not be allowed to do this, his reputation may suffer irreparable harm which is not capable of being compensated by an award of damages.

143. However, strict deadlines for pleadings will now have to be set in order to permit this case to come to trial as soon possible.

144. In those circumstances, I propose to make a suite of interlocutory orders along the following general lines:

i. Restraining the defendant from treating the plaintiff as having been dismissed;

ii. Restoring the plaintiff to his position as Head of B2B with the Defendant, including restoring his access to his work emails;

iii. Compelling the defendant to pay to the plaintiff his salary, emoluments and other benefits pending the determination of the within proceedings.

I will, however, hear counsel on the precise form of Orders to be made.

Postscript

145. After hearing counsel on 27 August, 2024, during which I was referred to the position of an employee dismissed with notice in accordance with Clause 17.1, and the obligation on such a person to attend work, Orders in terms of para. 144, sub-paras. i. and iii. above were made, together with:

ii. An Order lifting the suspension of the plaintiff and permitting the plaintiff to carry out such duties as he may be assigned, consistent with his position, but the plaintiff will not be required to attend work unless specifically required to do so in accordance with the procedures set out in Clause 17.1 of his contract of employment of 2021.