Neutral Citation Number: [2024] CA (Bda) 16 Civ

Civil Appeal No. 35 of 2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. JUSTICE SHADE SUBAIR WILLIAMS
CASE NUMBER 2021: No. 080

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 13/09/2024

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL IAN KAWALEY

- - - - - - - - - - - - - - - - - - - -

Between:

(1) WAKEFIELD QUIN LIMITED
(2) JOHANN OOSTHUIZEN

Appellants

- and -

MEXICO INFRASTRUCTURE FINANCE LLC

Respondent

Michael Pooles KC and Laura Williamson of Kennedys Chudleigh Ltd, for the Appellants
Keith Robinson and Sam Stevens of Carey Olsen Bermuda Limited, for the Respondent

Hearing dates: 13-14 March 2024
Draft Judgment circulated: 20 August 2024
Supplementary Submissions: May 2024
Date of Judgment: 13 September 2024

- - - - - - - - - - - - - - - - - - - -

JUDGMENT

BELL JA:

Introduction

1. This is an appeal from a ruling ("the Ruling") made by Subair Williams J ("the Judge") dated 22 May 2023, in which the Judge declined to strike out the writ and statement of claim in the proceedings described below, subject to ordering that two aspects of the claim should be expressly pleaded. So while the background set out below relates to the proceedings generally, it should be remembered that the appeal is taken from the Judge's ruling in relation to a strike out application. The Judge granted leave to appeal on 12 July 2023.

2. The first appellant ("WQ") is a Bermuda law firm, and the second appellant ("Mr Oosthuizen") was at all material times an attorney employed by WQ. I shall refer to WQ and Mr Oosthuizen together as the Appellants. The Corporation of Hamilton ("the Corporation") had wished to procure the development of a new hotel within the city of Hamilton, and for this purpose entered into a development agreement and an agreement for a lease dated 11 April 2012 with a company named Par-La-Ville Hotel & Residences Ltd ("PLV"), concerning a property within the city known as the Par-La-Ville Car Park ("the Property").

3. The respondent to this appeal ("MIF" or "the Respondent") took proceedings against WQ and Mr Oosthuizen by writ dated 12 March 2021, and the statement of claim ("the SoC") is dated 3 March 2022. The first cause of action pleaded in the writ was made against Mr Oosthuizen, acting as the servant or agent of WQ, for "inducing and/or procuring" PLV to breach the terms of a credit agreement ("the Credit Agreement") made between MIF and PLV, and an escrow agreement ("the Escrow Agreement") made between MIF, PLV, the Bank of New York Mellon ("Mellon") and the Corporation, both documents being dated 9 July 2014. The breaches were said to have occurred in or about October and November 2014. The second cause of action, said to have occurred within the same timeframe, and similarly said to have been committed by Mr Oosthuizen as the servant or agent of WQ, was "dishonestly assisting the directors of PLV" to breach their duties of trust and their fiduciary duties, owed to PLV, to act honestly and in good faith with a view to the best interests of PLV and to exercise the care, diligence and skill that a reasonable person would exercise in comparable circumstances. The acts of Mr Oosthuizen and WQ were said to have resulted in the improper release of escrow funds held by Mellon, thereby causing loss to MIF.

4. The SoC pleaded that PLV had retained WQ to advise it in relation to the development of a luxury hotel on the Property ("the Project"). The directors of PLV were Michael Maclean and his wife Yasmin Maclean. Using WQ, Mr Maclean had established a Bermuda trust known as the Skyline Trust, of which he and his wife were the beneficiaries, and after their deaths, their children and remoter issue.

5. The full arrangements for the financing of the Project were complex, and involved the release of funds held in escrow pursuant to the Escrow Agreement. As well as the Credit Agreement, there was also in existence a promissory note which evidenced a bridging loan of $18 million, and on 14 July 2014, MIF had deposited the net proceeds of the bridging loan into the escrow account (from which the total interest payable and a reserve sum had been deducted). In theory, PLV was then to find a permanent lender, and the loan from that lender would enable the bridging loan to be repaid. To this end Mr Maclean had entered into negotiations with a Gibraltar company named Argyle Limited ("Argyle"), which company was apparently intended to be the permanent lender.

6. As a yet further complication to an already complex arrangement, Mr Maclean negotiated a so-called Trade and Profit Share Agreement between PLV and Argyle ("the TPSA") which would enable Argyle to trade in sophisticated financial markets, and the first $18 million of the anticipated profits to be generated from such trading were to be paid by Argyle to the trustees of the Skyline Trust. Mr Maclean provided Mr Oosthuizen with drafts of the TPSA, to which Mr Oosthuizen made amendments.

7. Pursuant to the TPSA, the trustees of the Skyline Trust agreed to pay Argyle a fee of $12.5 million, in return for which Argyle agreed to utilise a credit facility, purportedly in the sum of $125 million. Instead of the escrow funds being released to PLV as required under the Escrow Agreement, Mr Oosthuizen wrote to Mellon on PLV's behalf, asking that the escrow funds be released to an account at the Clarien Bank in the names of Mr and Mrs Maclean ("the Maclean Joint Account"), rather than to PLV. Mellon did release the escrow funds to that account. Mr Oosthuizen was said to have assisted the release of funds from the Maclean Joint Account, by resolving questions which Clarien Bank had raised regarding the structure of the transaction with Argyle. Once released, the majority of the funds ($11.5 million) found their way to an account at EFG Bank in the name of Argyle UAE Limited, and two payments of $500,000 each were made, purportedly to Argyle's trading platform.

8. On the maturity date, PLV failed to repay the bridging loan to MIF, and eventually PLV was wound up. MIF was said to have suffered loss because the bridging loan remained outstanding.

9. So it can be seen that the claims against Mr Oosthuizen and, through him against WQ, were, first, based on allegations of tortious conduct in inducing or procuring what were said to be breaches of contract on the part of PLV in relation to the Credit

Agreement and the Escrow Agreement, and, secondly, dishonestly assisting breaches of duties of trust and fiduciary duties on the part of Mr and Mrs Maclean, in their capacity as directors of PLV. As the Judge recorded in her summary of counsel's arguments, the case for WQ and Mr Oosthuizen on the strike out application was that MIF had failed to distinguish between a case of negligence and one of dishonesty. But put slightly differently, one of the underlying complaints was in respect of breach of duty on the part of the Macleans, rather than fraud, and yet the attorney who acted for those committing the acts in question was said to have acted dishonestly.

The Ruling

10. In setting out the background facts, the Judge dealt fully with the conditions which needed to be satisfied before the funds in escrow could be drawn down. Specifically, there was a requirement that all conditions precedent had been satisfied for the funding of a permanent loan, as envisaged. This required that an officer of PLV provide certification to that effect, that copies of the documents evidencing the permanent loan were to be delivered to the Corporation, and that PLV and the Corporation would provide Mellon with a joint written notice to confirm that the certification and delivery conditions had been met, and to authorise the disbursement of the escrow funds. The Judge set out MIF's case concerning the involvement of Mr Oosthuizen in the process, which included drafting a purported funding approval notice which was sent to Mellon on 24 October 2014. After the escrow funds had been paid into the Maclean Joint Account, Mr Oosthuizen had assisted in effecting the payment to Argyle UAE. The Judge had referred to the pleaded claim that Mr Oosthuizen had told a Mr Gonzales of MIF that PLV had engaged a reputable project finance company, in circumstances where Mr Oosthuizen had no grounds for knowing whether that statement was true or false. The Judge then referred to PLV's default and MIF's claim that it had suffered loss and damage since the distributions from the escrow funds constituted breaches of the Credit Agreement and the Escrow Agreement, and that Mr Oosthuizen (and through him WQ) had induced and/or procured those breaches and/or dishonestly assisted in breaches of trust and fiduciary duty owed by the Macleans to PLV.

11. The Judge then turned to the arguments made before her. For the Appellants, it was argued that any duty owed by the Macleans, whether as directors or for breach of trust, was owed only to PLV, and not to MIF. It was argued that MIF had failed to plead that Mr Oosthuizen had actually intended to interfere with the performance of the contract, and the mere act of drafting a legal document (which document had facilitated the breach of contract) did not of itself amount to procuring a breach of contract, citing *OBG Ltd v Allan* [2007] UKHL 21 at paragraph 39. In relation to the dishonest assistance plea, it was argued that the pleaded facts sketched out allegations of inadvertent negligence rather than dishonesty. Counsel noted that MIF had pleaded that Mr Oosthuizen had advised PLV that it would be irresponsible to enter into any financing structure that did not secure the obligation to repay the

bridging loan, something that was said to be inconsistent with MIF's case of dishonest assistance.

12. For MIF it was argued that the application was premature. And as to the absence of a pleading of the element of intention in relation to the procuring or inducing, the absence of the word "intended" was not fatal, since the pleading, read as a whole, supported an intention on Mr Oosthuizen's part to procure a breach of contract on the part of the Macleans. Particularly, it was urged that the case law established that "turning a blind eye" would also amount to an intention, relying on what Lord Denning had said in *Emerald Construction Co Ltd v Lowthian* [1996] 1 WLR 691, cited in *OBG v Allan*. But I pause to note that what is required for turning a blind eye is a conscious decision not to enquire into the existence of a particular fact (in this case the intention on the part of the Macleans to breach their contract and duties), and Lord Hoffmann in his speech in *OBG v Allan* (paragraph 42) had referred to the need to distinguish between ends, means and consequences, noting that if the breach of contract is neither an end in itself, nor a means to an end, but merely a foreseeable consequence, that cannot for this purpose be said to have been intended. Lord Hoffmann's comments in relation to the case of *Millar v Bassey* [1994] EMLR 44 are on point. Miss Bassey had broken her contract to perform for a recording company, and it was a foreseeable consequence of that breach that the recording company would have to break its contracts with the accompanying musicians, but those breaches of contract were neither an end desired by Miss Bassey, nor a means of achieving that end.

13. Before the Judge, Mr Robinson for MIF had argued that whether the drafting or provision of a legal document demonstrated inducement or procurement was a question to be determined at trial, and that MIF's case on dishonest assistance complied with the requirements set out by Mussenden J, as he then was, in the case of *Doctoroff v Crown Global Life Insurance Ltd* [2021] SC (Bda) 44 Comm. And Mr Robinson also prayed equity in aid, referring to the case of *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

14. The Judge then noted that there was no real dispute before her as to the applicable legal principles. She held, on the basis of *Royal Brunei Airlines v Tan*, that there was an arguable legal point worthy of being tried and tested.

15. It should be noted that the Judge did find that the Appellants' complaint (that intention on the part of Mr Oosthuizen had not been expressly pleaded) had some merit, but that the defect was curable by amendment, and accordingly gave leave for there to be an express pleading to that effect. On the issue of dishonesty, the Judge noted that this was fact sensitive, but took the view that where MIF had meant to assert that Mr Oosthuizen had "wilfully turned a blind eye" to the breaches of duty committed by the Macleans, that should be expressly pleaded, and again gave leave in that regard.

16. With their skeleton argument in reply, MIF filed an amended SoC in which (after a plea in paragraph 59 that Mr Oosthuizen knew of various matters) substituted the words "or wilfully turned a blind eye to the fact" instead of "ought to have known", as an alternative to actual knowledge of the matters in question. And in the following paragraph the pleading was amended so that instead of pleading that Mr Oosthuizen had procured PLV's breach of the Escrow Agreement, it now read that he had intended to and did so procure the breach, with the same change from "ought to have known" to "turned a blind eye" in relation to Mr Oosthuizen's knowledge of PLV's obligations under the Escrow Agreement. The same change was made in paragraph 65 in relation to the plea as to his knowledge of the facts previously pleaded, and the fact that the directors owed fiduciary duties and duties as trustees to PLV.

The grounds of appeal

17. The first ground of appeal started with the Judge's failure to analyse the pleaded case for MIF, and the argument before her that the necessary components of inducing / procuring breaches of contract as a cause of action could not be made out on the facts pleaded. The ground set out various matters which, it was said, could not constitute a breach of contract, or the procurement of a breach. These were the trustees' entry into the TPSA, the procuring of the Argyle payment from Clarien Bank (when the money in the bank belonged to the account holders), failing to provide certain advice to the PLV directors, and the simple drafting of documents which in appropriate circumstances could be used properly.

18. The second ground was that because of the Judge's failure to analyse the pleaded case for MIF and the necessary components of dishonest assistance of breach(es) of fiduciary duty as a cause of action, she had failed adequately to consider the Appellants' submissions that as a matter of law the cause of action could not be made out on the facts pleaded. The Judge had failed to consider (and had failed to address in the Ruling) the submission that as a matter of law MIF's pleaded case was flawed, in circumstances where the allegation of dishonest assistance was founded upon the existence of directors' fiduciary duties owed to PLV; there had been an elision between the pleaded case of the duty to act honestly and in good faith (palpably a fiduciary duty) with the duty to exercise care, diligence and skill (which is not). While MIF sought to rely upon the existence of fiduciary duties, it did not exclusively plead in the SoC duties that were fiduciary in nature. The Judge had dismissed without proper analysis the Appellants' submission that the pleaded cause of action was not available to MIF in circumstances where no fiduciary duties were owed to it or breached by the directors of PLV. The Judge had incorrectly relied on the case of *Royal Brunei Airlines v Tan* to dismiss this submission despite that case not being relevant to the point in issue.

19. The third ground was that had the Judge fully considered the Appellants' submissions to her, and carried out a proper analysis of the pleaded case and the

causes of action relied upon, she would have been bound to conclude that MIF had no viable claim either for dishonest assistance of breaches of fiduciary duty or for inducing and/or procuring breaches of contract, and consequently the claim should be struck out.

20. The fourth ground focused on the Judge's decision to allow the claims to proceed with only very minor amendments, noting that no attempt had been made to formulate any amendment before the hearing, particularly when MIF had been on notice of the defects in its pleading for a considerable period of time. And the very minor amendments which the Judge had ordered were not sufficient to rectify the deficiencies in the pleading in any event.

The skeleton arguments before this Court

21. For the Appellants, the Court was first reminded that the Respondent's case had been advanced on two bases; first, inducing or procuring PLV's breach of the credit agreement between PLV and MIF, and, secondly, dishonest assistance to the directors of PLV to act in breach of trust and their fiduciary duties to PLV. The submission below, now repeated to this Court, was that MIF's writ and the SoC disclosed no reasonable cause of action in either respect.

22. The Judge's reasoning for the dismissal of the application began at paragraph 30 of the Ruling, and at paragraph 33 she had referred to the Overriding Objective contained in Order 1A of the Rules of the Supreme Court 1985, saying that she was bound to pay particular regard to the amount of money involved in the action, the importance of the case and the complexity of the issues. This statement involves a mis-statement of the rule; the requirement is to deal with the case in ways which are proportionate to the three matters mentioned (the first being the amount of money at stake), and a fourth which has no relevance in this case. The way that the Appellants put it was that the Overriding Objective required the expeditious disposal of cases which are pleaded in such a way as to be unarguable and clearly bound to fail. Applications may be the subject of a response whereby the party with an inadequate pleading seeks to make good its deficiencies by seeking to amend, pointing out that no such application had been made in the present case.

23. It was submitted that the issue was not whether MIF would be unable to prove its causes of action at trial, because the legal or factual basis upon which they were brought was unarguable; the application was made on the basis that the matters pleaded did not support the causes of action alleged. The Judge had failed to analyse the pleaded case by reference to the necessary constituents of the relevant causes of action. At paragraph 38 of the Ruling, she appeared to have elided the two causes of action, insofar as the dishonest assistance was referred to as being assistance in the carrying out of the contractual breaches relating to the breach of the terms of the Credit and Escrow Agreements made between PLV and MIF; the dishonest assistance claim was in fact made in the context of assistance to the PLV directors

to act in breach of trust and of their fiduciary duties to PLV. And at paragraph 39 the Judge referred to the application being an invitation to the court to find that the MIF could not succeed at trial, when the issue was whether the pleaded assertions could support a positive conclusion in respect of each of the asserted causes of action.

24. Both sides had referred to the case of *OBG Ltd v Allan*, and the relevant paragraphs in relation to what was required to establish liability for inducing breach of contract were paragraphs 39 to 41 of Lord Hoffmann's speech. What is required is a deliberate inducement with knowledge that that inducement is to breach a contract. It was submitted that negligence could never be enough to found this cause of action, and reference was made to a number of steps which a lawyer was perfectly entitled to undertake on behalf of a client so as to produce documents which could and should have been utilised for a lawful purpose. Particular reference was made to paragraph 48 of the SoC, and the provision of information by Mr Oosthuizen to Mr Gonzalez of MIF, and the fact that such provision of information provided by a client did not, save in the most exceptional cases, warrant its accuracy.

25. Then reference was made to paragraph 58 of the SoC, and the use of the word "facilitating" at the start of the paragraph, which, it was said, neither induces nor procures a breach. The Judge did not grapple with this fundamental flaw in the pleaded case. In the particulars which followed, some of which were asserted to be matters which Mr Oosthuizen "knew or ought to have known", said to be the language of the tort of negligence, it was submitted that in any event the knowledge of such facts proved neither inducement nor procurement of any breach of contract on the part of the client. What MIF's allegation boiled down to was to be found at paragraph 61 of the SoC, where what was alleged was a failure to advise. (In fact, paragraph 61 of the SoC is concerned with facilitating and encouraging actions on the part of PLV and/or the trustees of the Skyline Trust which Mr Oosthuizen knew or ought to have known, using the original language, to have been inconsistent with and/or contrary to PLV's obligations under the Escrow Agreement. Paragraph 62 pleaded the failure to advise). But a failure to advise could neither induce nor procure a breach of contract. It was said that the Judge had failed to address the question of how proof of any of the matters alleged could amount to inducing or procuring a breach of contract.

26. In relation to the allegation of dishonest assistance, the fundamental flaw was to be found at paragraph 68 of the SoC, since the assertion was that the breach of fiduciary duty caused loss to PLV, in respect of which MIF had no cause of action. And the Judge's reliance on the *Royal Brunei Airlines* case added nothing to the debate, because in this case the holder of the cause of action could only be the company to which the directors owed their duties.

27. The skeleton then addressed the "knew or ought to have known" point, which it was said could never found an assertion of dishonesty, relying on the judgment of Millett LJ, as he then was, in *Paragon Finance plc v DB Thakerar* [1999] 1 All ER 400,

and *Grayken v Grayken* [2011] Bda LR 15, an authority of this Court, which expressly approved that judgment. The words used in the pleading were the terminology of negligence and never that of dishonesty. And the amendments directed by the Judge did not cure the deficiencies of the pleading.

28. For the Respondent, it was said that it had pleaded legitimate causes of action against the Appellants, and their arguments did not meet the high bar required for strike out. They did not accept that their amendments failed to cure the deficiencies identified by the Judge.

29. The Respondent's skeleton then moved on to the legal principles applicable to strike out, which are no doubt uncontroversial, and then addressed the Appellants' argument, which was characterised as being that a lawyer cannot induce or procure any conduct by a client merely by undertaking work which is legitimate in and of itself. The argument was that the Appellants' position elided the strength of the Respondent's pleaded cause of action with the existence of those causes of action. Whether a particular fact or failure on Mr Oosthuizen's part ultimately induced or procured PLV's breaches of the relevant contracts would be a central factual issue at trial. The argument that the use of the word "facilitates" meant that the outcome cannot be said to have induced or procured was rejected, with reliance placed on the case of *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 (which I will refer to as *KKK*), citing Lord Nicholls in *OBG v Allan*. It was suggested that there was no difference between facilitating an outcome and assisting the same, referencing paragraph 62 of the SoC. That may be said to have missed the point made by Popplewell LJ in *KKK*, referring to the manner in which Lord Templeman (in *CBS Songs v Amstrad Consumer Electronics plc* [1998] AC 1013) had distinguished between inducement, incitement or persuasion on the one hand and merely facilitating the doing of an act on the other. The fact that facilitating and assisting may be regarded as one and the same does not mean that they cannot both be distinguished from inducement, incitement or persuasion.

30. In summary, it was said that the Appellants were effectively asking the court to determine the merits of the action on a strike out application, without any consideration of their defence, cross-examination of witnesses or findings of fact.

31. And in relation to the Appellants' complaint that the SoC had failed to plead intention, it was said that the pleading, read as a whole, made it abundantly clear that the complaints were of intentional conduct, and the fact that the word "intended" did not appear in terms could not be regarded as fatal. The pleading disclosed a reasonable cause of action which could not legitimately be said to be bound to fail, and in those circumstances the Respondent was entitled to continue to prosecute the claim.

32. The skeleton then turned to the dishonest assistance claim, and the Appellants' argument that the duties alleged to have been breached had been owed to PLV and not MIF. It was submitted that dishonest assistance was an equitable remedy, and a

type of accessory liability, and the touchstone of accessory liability in equity was the dishonesty of the relevant third party, citing *Royal Brunei Airlines*. That case is helpful in terms of how it defines dishonesty, including in the case of a solicitor who carries through the transaction in question. But in addressing the conclusion that dishonesty is a necessary ingredient of accessory liability, Lord Nicholls did not suggest that it did not matter if the breach of trust or fiduciary obligation was not owed to the person claiming to have suffered loss.

33. Having prayed equity in aid, the skeleton suggested that the Appellants' skeleton had sought to persuade the court that a claim of dishonest assistance should be imbued with the rigid characteristics of a common law action. The facts were set out in clear terms in the pleading, and the skeleton highlighted the salient pleaded facts, which it said led to the conclusion that MIF was the party which had ultimately suffered the loss flowing from the actions complained of. The pleading addressed the objective standard of dishonesty, and the Respondent's case was that Mr Oosthuizen knew the facts set out in paragraphs 63 to 65 of the SoC (or was wilfully blind regarding those facts).

Oral submissions

34. Mr Pooles KC for the Appellants largely followed the skeleton argument in his oral presentation. In relation to the payment from Mellon, Mr Pooles noted that Mr Oosthuizen had not been involved in the matters of which complaint was made at paragraph 50 or paragraph 52 of the SoC. It was important to distinguish between what was objectionable and what was not, in which regard he stressed that the objectionable transfer of funds occurred when the loan proceeds were forwarded as set out in paragraph 50 of the SoC, to the account at Argyle UAE and the payment to Rational, Argyle's purported trading platform. He stressed the use of the word "facilitating" at paragraphs 58 and 61 of the SoC, and said that paragraph 62 demonstrated the fundamental flaw in the pleading which was not remediable by adding the word "intention". The pleading showed that the directors of PLV were on a frolic of their own.

35. Regarding dishonesty, Mr Pooles stressed that the equitable claim was not available to third parties, referring to paragraph 16 of the Respondent's skeleton. He denied that the Appellants were seeking to determine the merits of the Respondent's cause of action on a strike out application, as set out in paragraph 18 of the Respondent's skeleton, stressed that the PLV directors' duties were owed to PLV, and said that the contents of paragraph 27 were true but irrelevant.

36. Mr Robinson for MIF indicated that the problem started when Mellon paid out funds to the Maclean Joint Account in breach of the terms of the Escrow Agreement. It should be noted that this payment was a breach on the part of Mellon, and while it is pleaded (paragraph 44 of the SoC) that Mr Oosthuizen wrote to Mellon on PLV's behalf to request the release of the escrowed funds to the Maclean Joint Account

rather than to PLV, the claim that is made is that PLV was not entitled to a drawdown of the escrow funds, not that Mr Oosthuizen induced or procured Mellon to breach the terms of the Escrow Agreement. Accordingly, the claim made in paragraph 58 of the SoC is that Mr Oosthuizen induced and/or procured PLV's breach, not Mellon's breach.

37. Similarly, paragraph 61 of the SoC focused on PLV's breaches of the Escrow Agreement, although the claim made against Mr Oosthuizen is that he facilitated or encouraged those actions on the part of PLV. That, submitted Mr Robinson, came within the terms of paragraph 21(2) of *KKK*, i.e. the second of the five ingredients of the tort of inducing breach of contract identified by Lord Hodge in the case of *Global Resources Group v Mackay* [2008] SLT 104, that "*A must induce B to break his contract with C by persuading, encouraging or assisting him to do so*". It seems to me that there is some tension between what Lord Hodge said in *Global Resources Group v Mackay*, and what Lord Templeman said in *CBS Songs v Amstrad*, where he distinguished facilitating the doing of an act from "inducement, incitement or persuasion". Persuasion is used in both cases, and while it might be said that there is little difference between encouragement and persuasion, there may be some, and assistance seems to me to be further down the scale of involvement; it might also be said that facilitating does not go as far as assisting. Rather it involves providing the means to achieve a given end, as opposed to assisting, which involves adding one's own efforts to those of another. Perhaps one ought to concentrate on the meaning of the word "*inducement*".

38. Mr Robinson conceded that paragraph 62 of the SoC involved a double negative. It also involves in the first sub-paragraph a complaint of a failure to give the advice set out in paragraphs 57 and 60, and in the second, a complaint that had Mr Oosthuizen declined to facilitate the actions of the PLV directors, they would not have been "*enabled and encouraged*" to proceed in breach of contract and not then able to pay away the escrow funds to Argyle. It is hard to remove the double negative and make sense of the pleading. Certainly, one cannot properly turn the wording of a failure to act into any actual act said to have occurred on Mr Oosthuizen's part. Mr Robinson said that the pleading equated to Mr Oosthuizen enabling and encouraging PLV's breaches, but that is not what it says.

39. Mr Robinson then turned to knowledge, and the third of Lord Hodge's five ingredients of the tort of inducing a breach a contract. Despite the fact that the amended pleading, allowed by the Judge, substituted "*wilfully turned a blind eye to the fact*" for "*ought to have known*", Mr Robinson insisted that the two terms could be equated. While I have no doubt that the two terms do have different meanings, that debate is now pointless since the amendment has been made, and MIF has the benefit of the term "*blind eye knowledge*".

40. Mr Robinson then turned to the meaning of "*end*", said by Lord Hodge to be an intention on the part of the inducer to "procure the breach of contract either as an end in itself or as the means by which he achieves some further end", the fourth

ingredient of the tort. And when asked what was Mr Oosthuizen's end, Mr Robinson's response was that it was "to get the deal done", (something that does not appear from the pleading), even though completion of the deal does not, on its face, seem to be something which Mr Oosthuizen, as opposed to his client, would have an interest in achieving. So, he submitted, the SoC should not be struck out in relation to the pleading regarding inducement.

41. Mr Robinson referred next to the claim for dishonest assistance. He accepted that the directors' duties were owed to PLV, and when asked how MIF could in those circumstances take proceedings in respect of a breach of those duties, advised that he had no authority in support of his position, but relied on equity.

42. In reply, Mr Pooles said that intention was not properly particularised in the existing pleading, and submitted that paragraph 61 of the amended pleading did not address the *KKK* decision regarding the use of the word "facilitate". As to Lord Hodge's ingredients for the tort of inducement, he said that the third ingredient could not be satisfied because it was necessary for the Corporation to submit its documents before funds could be released. Mr Oosthuizen could do all the acts alleged against him and still not bring about a breach. And the fact that a solicitor produced a document which, if misused by his client, would bring about a breach of contract, did not make the solicitor's conduct an inducement to breach the contract.

Findings

43. In relation to inducement of breach of contract, it seems to me that the key can be found in paragraph 42 of Lord Hoffmann's speech in *OBG*, where he distinguished between ends, means and consequences. And as Lord Hoffmann pointed out, people seldom cause loss by unlawful means out of simple disinterested malice; it is usually to achieve the further end of securing some economic advantage for themselves. I would reject Mr Robinson's assertion that Mr Oosthuizen's end in procuring the breach of contract by PLV was "to get the deal done". There was no assertion that "getting the deal done" would generate any financial advantage for Mr Oosthuizen, who was an employee at WQ. That inevitably leads to the conclusion that the fourth of Lord Hodge's ingredients (that 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) is not satisfied on the facts of this case. I also see merit in Mr Pooles' submission that the third of Lord Hodge's ingredients cannot be satisfied, in circumstances where the breach of contract could not occur without the Corporation submitting its documents to Mellon, and it was not asserted that Mr Oosthuizen's conduct would procure the breach of contract on its own.

44. As mentioned in paragraph 37 above, there is some tension between Lord Hodge's stated ingredients for the tort in *Global Resources Group v Mackay*, and what Lord Templeman said in *CBS Songs v Amstrad*. Particularly, I find the use of the word 'assisting' in the second of Lord Hodge's five ingredients in *Global Resources* to

be inconsistent with what Lord Templeman said in *CBS Songs* as not being sufficient to attract accessory liability, when he distinguished facilitating from inducement, incitement or persuasion. And the tort is one of inducing a breach of contract, a word which to my mind is quite different from assisting one.

45. As referenced by Clarke P below, Toulson LJ, as he then was, said in *Meretz Investments NV v ACP Ltd* [2008] Ch 244 at paragraph 177, that the tort of inducing breach of contract "requires the defendant's conduct to have operated on the will of the contracting party". There is no suggestion in the pleading that this ever occurred. Suffice to say that I prefer to be guided by Lord Templeman's judgment in *CBS Songs v Amstrad*, and hold that what is required to establish the tort of inducement of breach of contract is the procuring of a breach by inducement, incitement or persuasion, and these acts are to be distinguished from either assisting or facilitating a breach.

46. I would therefore conclude that the requisite elements of the tort of inducement of breach of contract have not been made out. Mr Oosthuizen was acting as an attorney, to use Bermuda parlance, in a corporate transaction where the steps that he took on behalf of his clients could as easily be used for the legitimate purpose of completing the contract as they could for effecting a breach of that contract. The breach was the intention of the Macleans, and was not Mr Oosthuizen's intention, or end. And he cannot in my view be said to have induced or procured that breach. While it may be said that his drafting of documents facilitated the breach, I agree with Mr Pooles that facilitating a breach by the drafting of a document which could be used for legitimate or illegitimate purposes is to be distinguished from inducing a breach, per Lord Templeman in *CBS Songs v Amstrad*. And I pause to note that that judgment is in practical terms of the greatest persuasive authority on this Court, per *Crockwell v Haley* [1993] Bda LR 7.

47. As to dishonest assistance in relation to the PLV directors' breaches of duty, I do not see that MIF can benefit from Mr Oosthuizen's alleged role in relation to those breaches, when no duty was owed to it by either the PLV directors or Mr Oosthuizen. It is not enough to pray equity in aid in the absence of a duty being owed to MIF.

48. I would, therefore, allow the appeal and strike out the pleading, as sought by the Appellants, on the basis that the pleadings do not support the causes of action alleged against Mr Oosthuizen and WQ.

KAWALEY, JA

49. I agree that the appeal of WQ and Mr Oosthuizen should be allowed in respect of the dishonest assistance claim in full and that MIF's claim should in that respect be struck-out. I have nothing to add to the Judgments of Bell JA above and the President below in that regard.

Inducing/procuring a breach of contract

Overview

50. As regards the claim for inducing or procuring a breach contract, while I concur with much of the reasoning of my brother Judges in their Judgments set out above and below, I would like to set out a few observations of my own.

51. The central averments in support of this claim are that Mr Oosthuizen, a lawyer employed by WQ and acting on behalf of PLV, facilitated the transfer of funds from Mellon to the account of the Macleans, PLV's directors, at Clarien Bank rather than to PLV itself. The specific steps he is alleged to have taken are described in further detail by Bell JA above and by the President below. There is no suggestion that he did anything more than act as a lawyer in accordance with his clients' instructions. In the Amended Statement of Claim at paragraph 60, it is crucially averred that Mr Oosthuizen "*intended to, and did, procure, PLV's breach of the Escrow Agreement by facilitating and encouraging actions by PLV and/or the Trustees for and on behalf of PLV which he knew to be inconsistent with and/or contrary to PLV's obligations under the Escrow Agreement*". The critical question is whether that plea sets out, or is supported by, sufficient particulars to disclose a reasonable cause of action.

52. As a matter of initial impression, the proposition that a lawyer assisting a client to complete a transaction which to their knowledge entails a breach of one of their client's contracts constitutes the tort of inducing or procuring a breach of contract seemed to me a surprising one. It is therefore necessary to undertake more than a superficial survey of what is for me a somewhat unfamiliar area of the law.

53. What I draw, not without some difficulty, from the extensive array of authorities placed before this Court is that the tort has three elements to it:

    (a) the tort imposes liability on an accessory who is neither the contract-breaker nor someone acting on their behalf;

    (b) the accessory must intend to achieve the breach of contract concerned either for their own ends or as an end in itself; and

    (c) the accessory must take some action to facilitate the breach of contract concerned and must either:

        (i) persuade an unwilling contracting party to breach their contract; or

        (ii) assist a willing contract-breaker to effectuate the relevant contractual breach (in which case the "inducement" element need not operate on the will of the contract-breaker in the same persuasive manner).

54. The critical element in the present case, correctly identified by the Judge, was the intention element of the tort. However, she did not receive the benefit of the depth of argument from counsel which this Court received, with the initial arguments of counsel fortified by supplementary submissions. In the result, it became clear that the intention element of the tort had not been adequately addressed by the amendments made to the Statement of Claim after the conclusion of the strike-out application before the Supreme Court.

55. This was, in my judgment, largely because the first element of the tort, the accessory element, was not adequately explored at all. Had it been more clearly addressed the true parameters of the intention element would have been better understood.

The accessory element

56. The leading case on the tort is *OBG Limited-v-Allan* [2007] UKHL 21. Early in his leading judgment, Lord Hoffman explained the origins of the tort as follows:

> "*3. Liability for inducing breach of contract was established by the famous case of Lumley v Gye (1853) 2 E & B 216. The court based its decision on the general principle that a person who procures another to commit a wrong incurs liability as an accessory. As Erle J put it (at p 232):*
>
> > *'It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.'*
>
> *4. For a court in 1853, the difficulty about applying this principle to procuring a breach of contract was that the appropriate action for the wrong committed by the contracting party lay in contract but no such action would lie against the procurer. Only a party to the contract could be sued for breach of contract. The answer, said the court, was to allow the procurer to be sued in tort, by an action on the case. There was a precedent for this mixing and matching of the forms of action in the old action on the case for enticing away someone else's servant: see Gareth Jones 'Per Quod Servitium Amisit' (1958) 74 LQR 39. Some lawyers regarded that action as a quaint anomaly, but the court in Lumley v Gye treated it as a remedy of general application.*
>
> *5. The forms of action no longer trouble us. But the important point to bear in mind about Lumley v Gye is that the person procuring the breach of contract was held liable as accessory to the liability of the contracting party…*"

57. The need to adequately plead why an agent or servant is alleged to have been acting otherwise than in good faith in the course their duties as such was established by

the case of *Said-v-Butt* [1920] 3 KB 492. I gratefully adopt the reasoning of the President on this issue. The inducing a breach of contract claim here failed to allege that the Defendants were not acting in good faith in the course of their duties as PLV's agent in facilitating the alleged breaches of contract committed by their client, PLV.

58. The fact that accessory liability lies at the core of the tort explains the way in which the intention element has been formulated. It also explains why if, exceptionally, the agent or servant of the contract-breaker is sued as an accessory, it is necessary to allege that they are not at the material time acting in good faith on behalf of their principal/employer. While this has, correctly, been judicially articulated as a distinct principle forming part of the accessory element of the tort, it is in my judgment in practical terms a requirement which largely overlaps with the intention element which I consider below.

The intention element

59. The intention requirement is most fundamental to the claim. As regards the intention element, Lord Hoffman opined as follows in *OBG*:

> "*42. The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. Mr Gye would very likely have preferred to be able to obtain Miss Wagner's services without her having to break her contract. But that did not matter. Again, people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves. As I said earlier, the Dunlop employees who took off the tyres in GWK Ltd v Dunlop Rubber Co Ltd (1926) 42 TLR 376 intended to advance the interests of the Dunlop company.*
>
> *43. On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been 'targeted' or 'aimed at'. In my opinion the majority of the Court of Appeal was wrong to have allowed the action in Millar v Bassey [1994] EMLR 44 to proceed. Miss Bassey had broken her contract to perform for the recording company and it was a foreseeable consequence that the recording company would have to break its contracts with the accompanying musicians, but those breaches of contract were neither an end desired by Miss Bassey nor a means of achieving that end.*" [Emphasis added]

60. Lord Nicholls did not disagree with this reasoning although he did point out that a "*desire to injure the claimant is not an essential ingredient of this tort*" (at paragraph 192). Lord Walker understood Lord Hoffman and Lord Nicholls to be agreed on the tort of inducing a breach of contract, and he did not differ from their reasoning.

61. If Lord Hoffman's formulation of the requirement of intention is accepted, and I see no reason for rejecting it, then it follows that the Respondent's pleading even as amended (pursuant to leave granted by the Judge) is deficient. Bell JA was entirely correct to reach this conclusion in comparatively summary terms.

62. The Respondent's pleading makes no or no sufficient allegation that the Appellants intended the breach of contract either as an end in itself or as a means to an end. A sustainable plea of intention must set out averments explaining:

    (a) whether, and if so for what reason, the Appellants intended PLV to breach its contract with the Respondent as an end in itself; or

    (b) alternatively, whether, and if so for what end, the Appellants intended PLV to breach its contract as a means to an end.

63. It is hopefully readily apparent that the intention element of the tort is informed by the accessory element which lies at the heart of the tort. In the exceptional cases where it is felt appropriate to sue the contract-breaker's agent or servant as an accessory, an adequate pleading of intention will almost inevitably explain why it is alleged that the agent or servant was, in effect, on a 'frolic of their own' rather than duly carrying out their duties on the contract-breaker's behalf.

The inducement element

64. The reason why the intention requirement is framed in this way is closely connected with the inducement or procurement requirement of this tort. It is necessary to consider this limb distinctly from the intention requirement in the interests of legal clarity. The name of the tort reflects the general rule which was considered in *OBG*. The present case falls into a subsidiary category. Lord Nicholls explained it in this way:

> "*168. The other tort requiring consideration is the tort of inducing a breach of contract. This tort is known by various names, reflecting differing views about its scope. At its inception in 1853 this tort was concerned with a simple tripartite situation of a non-party to a contract inducing a contracting party to break her contract. Did the other party to the contract have a cause of action against the non-party?*
>
> *169. The facts in Lumley v Gye 2 E & B 216 are familiar to every law student. The well-known opera singer Johanna Wagner had contracted with Mr Lumley to perform exclusively at the Queen's Theatre. Mr Gye, the owner of Her*

Majesty's Theatre, 'enticed and procured' Miss Wagner to break her contract. The action came before the court on a plea of demurrer. The question was whether the counts disclosed a cause of action against Mr Gye. The court, by a majority, held they did.

170. The reasoning of the judges differed in its generality. It was established law that a person who knowingly procured a servant to leave his master's service committed an actionable wrong. Crompton J saw no reason to confine this principle to contracts for services of any particular description. Erle J reasoned more widely. He said, at page 232, that the principle underlying the master and servant cases is that procurement of the violation of a right is a cause of action: 'It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.' (emphasis added) This principle, of liability for procurement of a wrong, applies to a breach of contract as well as an actionable wrong: page 233. Wightman J expressed himself similarly, at page 238: 'It was undoubtedly prima facie an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant [knowingly] to procure her to do so.' (emphasis added)

171. This 'procurement' analysis commended itself to Lord Watson in Allen v Flood [1898] AC 1. Lord Watson approved Erle J's reasoning as quoted above, and continued, at pages 106-107: 'These statements embody an intelligible and a salutary principle, and they contain a full explanation of the law upon which the case [Lumley v Gye] was decided. He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held responsible for the wrong which he procured.'

172. Thus understood, the rationale and the ingredients of the 'inducement' tort differ from those of the 'unlawful interference' tort. With the inducement tort the defendant is responsible for the third party's breach of contract which he procured. In that circumstance this tort provides a claimant with an additional cause of action. The third party who breached his contract is liable for breach of contract. The person who persuaded him to break his contract is also liable, in his case in tort. Hence this tort is an example of civil liability which is secondary in the sense that it is secondary, or supplemental, to that of the third party who committed a breach of his contract. It is a form of accessory liability." [Emphasis added]

65. The essence of the original concept of procurement or inducement was the idea that the inducer or procurer is acting as an *agent provocateur*, not as an agent in the at least notionally passive, legal sense. Lord Nicholls' identification of the historical

origins of the tort as being the wrong of inducing a servant to leave their master's service is particularly illuminating in this respect.

66. However, this general rule is modified in appropriate contexts to require "*causative participation*". This occurs where (as here) the contract-breaker is a willing participant who needs no persuasion. What constitutes "causative participation" is a fact-sensitive inquiry which cannot be determined at the strike-out stage, no matter how weak the claimant's case may appear to be. Popplewell LJ in *KKK-v- JKL* [2021] EWCA Civ 33 (Henderson LJ and Richards LJ concurring) observed that the impugned conduct must "*have the character of causative participation required for accessory liability*" (at paragraph 47). He then referred to *Lictor Anstalt v Mir Steel* [2011] EWHC 3310 (Ch), a decision of David Richards J (as he then was) by way of illustration of this requirement.

67. Richards J concluded that where the contract-breaker was a willing participant in the breach, it mattered not that no persuasion took place. He accordingly found, *inter alia*, that there was an arguable case of procuring a breach of contract on the grounds that the defendant was an active participant in dealings which constituted a breach of contract. The cases relied upon to support this proposition all concerned active commercial participants in the impugned transaction itself. In other words, the procurer had materially caused the breach of contract through dealings which assisted the willing contract-breaker to do so. In the *Lictor* case, the material facts were these:

> "52…*Not only did Mir Steel agree to purchase the equipment as part of the assets of the business for a very substantial price which it paid with funds advanced to it by Libala, it also undertook significant and continuing obligations. These included, for example, the obligation contained in clause 9.5 that it would be responsible for settling any claim made against it by the claimant in respect of the hot strip mill. The agreement by Mir Steel to purchase the equipment and other assets on the terms of the hive down agreement is in my judgment, consistently with the authorities on which Mr Boyle relied, at least arguably sufficient to constitute acts required for liability in tort for inducing a breach of contract.*"

68. Mr Robinson was to this extent correct to submit that assistance may in some cases be sufficient. In the circumstances of the present case, it is impossible to fairly conclude at this stage that the level of participation alleged on the part of the Appellants in the impugned transaction does <u>not</u> arguably amount to inducement in the requisite legal sense. The "inducement" element of the claim was adequately pleaded.

Summary

69. In summary, the pleading as presently drafted is liable to be struck-out because it fails to set out a sustainable plea that the Appellants intended to procure a breach by PLV of its contractual obligations to MIF either:

(a) as an end in itself or as a means to another end; and/or

(b) while acting otherwise than in good faith in the course of their duties as PLV's agents.

70. The need to address these issues was not identified in the Supreme Court, and the Judge was in my view correct to afford MIF an opportunity to address the defects which were identified by way of amendment. I would grant the Respondent an opportunity to apply for leave to re-amend its Statement of Claim, if so advised, to deal with these deficiencies if it can.

SIR CHRISTOPHER CLARKE, P

Dishonest assistance

71. In relation to the claim for dishonest assistance it seems to me that no tenable case is pleaded. Law and Equity have different types of accessory liability. If A has a contract with B and C induces a breach of it by B, C is liable to A. If A is a trustee for B, or owes him a fiduciary duty, and is guilty of a breach of trust or fiduciary duty, A will be liable to B, as will C, if C provides dishonest assistance to A in relation to the breach of trust. But there can be no basis upon which C can be liable for dishonest assistance to someone – D - who is not a beneficiary of the trust or fiduciary duty. There is no liability to D for breach of trust or fiduciary duty to which C can be accessory.

72. Mr Robinson cited to us various statements as to the breadth of Equity's reach. But none of them came close to establishing that MIF has a claim for dishonest assistance against the Appellants, even if PLV acted in breach of their fiduciary duties.

Inducement or procurement of a breach of contract

Factual background

73. The course of argument in the present case has taken an unusual course. In the written and oral arguments before us in March 2024 no mention was made of the case of *Said v Butt* [1920] 3 KB 492. In the course of drafting my judgment, it seemed to me that it was necessary to consider the potential impact of that case. We, therefore, invited submissions on the point. In its written submission of 15 May 2024 the Respondent submitted that what it described as the "Said Principle" (that a servant or agent acting within the scope of his authority is not liable for inducing a breach of contract by his master or principal) did not and should not apply to claims against lawyers and law firms. On the same day the Supreme Court of the United Kingdom handed down judgment in *Lifestyle Equities CV and another (Respondents) v Ahmed and another (Appellants)* [2024] UKSC 17 which

considered the application of the Said Principle. In their submissions of 22 May 2024 the Appellants relied heavily on that decision. The Respondent filed reply submissions on 3 June 2024. In those circumstances it is necessary to consider the inducement/procurement claim both on the basis that the Said Principle is inapplicable, as the Respondent contends, and on the basis that, as the Appellants submit, it is not.

The inducement/procurement claim absent any application of the Said Principle

74. In order to determine whether or not there is a maintainable pleading of inducement/procurement it is necessary to consider with some care what are the facts and matters that are pleaded in that respect. These have to be taken, for present purposes at face value. As to that the critical matters seem to me to be as follows (the numbers in brackets refer to the paragraphs in the Amended Statement of Claim).

75. Pursuant to clause 3 of the Credit Agreement of 9 July 2014 between MIF and PLV the proceeds of the Bridging Loan from MIF to PLV, made thereunder, were to be transferred to Mellon and held by them as escrow agent pursuant to an Escrow Agreement to which MIF, PLV, Mellon and the Corporation were parties [11]. On 14 July 2014 c $15.4 million was paid into the escrow account established by Mellon pursuant to the terms of the Escrow Agreement. PLV was allowed under the Escrow Agreement to draw up to $1.2 million from that account [15]. Thereafter the balance (save for $500,000) could, provided the conditions precedent set out in clauses 3.3(a)-(d) of the Escrow Agreement were met, be disbursed to a Senior Escrow account to be established by PLV, the Permanent Lender and Mellon [16].

76. Clauses 3.3(a)(i) and (ii) of the Escrow Agreement provided that it was a condition precedent to drawdown of the Escrow Funds that an officer of PLV had provided a signed written certification to the Corporation, copied to MIF, that all conditions precedent had been satisfied for the funding of a Permanent Loan (as defined) and that copies of the Permanent Loan Funding Agreement (as defined) and all duly executed ancillary documents (in form and substance reasonably acceptable to the Corporation) had been provided to the Corporation [18].

77. Clause 3.3(b) provided that it was a condition precedent to drawdown that PLV and the Corporation had provided Mellon with a joint written notice (the Joint Funding Approval Notice) (i) confirming that the documents required to be delivered to the Corporation pursuant to clause 3.3(a) of the Escrow Agreement had been delivered to (and were approved by) the Corporation and (ii) authorising the disbursement of the Escrow Funds [19].

78. The Permanent Loan was defined in clause 3.3(a)(i) of the Escrow Agreement as a:

> "*... loan of $225 million and an equity investment of $100 million or for such substantially similar financing structure from the Permanent Lender in substance reasonably acceptable to the Corporation (in any event in an amount*

no less than the aggregate of the principal, fees, costs and interest outstanding on the [Bridging Loan] plus the Corporation Expenses Payment)… to PLV" [20]

79. The directors of PLV - Michael and Yasmin Maclean ("the Directors") - began negotiations with Argyle Limited in October 2014 [26]. Mr Maclean told Mr Oosthuizen that the agreement being negotiated was intended to be the Permanent Loan Funding Agreement in respect of a Permanent Loan [27]. Mr Maclean provided him with drafts of the agreement under negotiation, which was called the Trade and Profit Share Agreement ("the TPSA") [30]. Mr Oosthuizen made amendments to drafts of the TPSA. One of them, which was not accepted by Argyle, was that Argyle would guarantee that any monies paid to it pursuant to the terms of the TPSA would be repaid before the Maturity Date. Another was that the Trustees of the Skyline Trust ("the Trustees") would be parties to the TPSA instead of PLV: [31(a)]. The Skyline Trust had been established with the assistance of Wakefield Quin. Its beneficiaries were the Directors and, after their death, their children and remoter issue [28].

80. In October 2014 Mr Oosthuizen advised Mr Maclean that it would be "irresponsible" for PLV/the Directors to enter into any financing structure that did not secure PLV's obligation to repay the Bridging Loan [33].

81. On 20 October 2014 the Directors of PLV signed a letter of Acknowledgment and Agreement addressed to themselves and the Trustees confirming the written acknowledgment and agreement of the Directors and Trustees to the appointment of the Skyline Trust as agent for PLV for the purpose of entering into the TPSA and receiving payments due to PLV pursuant to the TPSA, and the appointment of the Directors as escrow agents to receive and hold on trust all or part of the Escrow Funds for PLV, and the release to Argyle of the Escrow Funds received pursuant to the TPSA: [34]. The Trustees were a friend of Mr Maclean and Mr Maclean's brother in law [28]

82. Mr Oosthuizen facilitated the execution of the TPSA by the parties. The TPSA is purportedly dated 20 October 2014 [36]. Under it the Trustees agreed to pay Argyle a fee of $12.5 million. In exchange, Argyle agreed to utilise a credit facility, purportedly in the sum of $125 million, for 12 months in order to "*participate in the purchase and resale of bonds, or debt instruments, or any other securities (which shall include Contracts for Differences, Foreign Exchange Contracts, Derivatives, Options and other similar instruments)*" [37]. It also provided that Argyle would pay the first $18 million of profit/commission earned (net of fees and bank charges) to the Trustees and thereafter any further net profit/commission earned would be split, with 80% going to the Trustees and 20% to Argyle[38]. The TPSA did not guarantee the Trustees any return on any monies paid to Argyle nor did it contain any provision designed to secure PLV's obligations to MIF under the Credit Agreement and the promissory note [39].

83. Mr Oosthuizen drafted a purported Funding Approval Notice for and on behalf of PLV [40] which Mr Maclean signed and which was sent by PLV to Mellon on 24 October 2014. A nearly identical notice signed by the Mayor of Hamilton and the then Chief Operating Officer of the Corporation was sent by the Corporation to Mellon on the same date [41]. These notices purported to confirm that PLV had delivered to the Corporation the documents referred to in clauses 3.3(a)(i) and (ii) of the Escrow Agreement and that the Corporation had received and approved those documents; and authorised and directed Mellon to disburse the Escrow Funds into a personal account in the name of the Directors at Clarien Bank ("the Maclean Joint Account") [42].

84. Mr Oosthuizen wrote to Mellon on PLV's behalf to request the release of Escrow Funds, not to PLV, but to the Maclean Joint Account: [43]. He also drafted a resolution of the Directors of PLV approving the release of the Funds. The resolution stated that the Directors were satisfied that the conditions precedent contained in clauses 3(a)-(d) of the Escrow Agreement had been met and that the released funds were to be held by the Directors on trust for PLV and that the Directors were to apply those fund on PLV's behalf for the purpose of paying fees and expenses associated with the Permanent Loan. [44]

85. Mellon duly transferred the Escrow Funds to the Maclean Joint Account on 28 October 2014 and the funds were credited to that account on 31 October 2014: [45]. After that, representatives of the Clarien Bank raised questions with the Directors concerning the structure of the transaction with Argyle and the source and purpose of the Escrow funds. Mr Oosthuizen corresponded with those representatives in order to facilitate the release of the Escrow Funds from the Maclean Joint Account and attended, with Mr Maclean, meetings with those representative to discuss and secure the same. [48]

86. After the transfer of the funds to the Maclean Joint Account, and having secured the agreement of Clarien Bank to the release of the funds therefrom, the Directors procured that $11.5 million be transferred to an account at EFG Bank in the name of an Argyle affiliate ("the Argyle UAE payment") and two separate payments of $500,000 each were made to Rational Foreign Exchange Ltd, said to be an Argyle Trading Platform [49]. Two additional transfers were also made from the Maclean Joint Account at about the same time [51].

87. It is then necessary to consider which, if any, of the actions set out in the previous paragraphs constitutes a breach of the obligations of PLV towards MIF in the Escrow Agreement. The answer given to that in the pleading is that they are as follows (I take them in a different order to the pleading).

88. The funds in the Escrow Account were paid into an account (the Maclean Joint Account) which was not a Senior Escrow Account established by PLV, the

Permanent Lender and Mellon, as defined by clause 3.8(c) of the Escrow Agreement: [56(d)].

89. The TPSA was not a Permanent Loan Funding Agreement ("... *loan of $225 million and an equity investment of $100 million or ... substantially similar financing structure*"). It did not provide for the funding of a Permanent Loan and PLV was neither a party to it nor a beneficiary[1] of it. It was an arrangement whereby Argyle would borrow money, trade with the proceeds, and share the profits on an agreed formula. Argyle, which was not required to lend any money or make any equity investment in MIF, was not a Permanent Lender: [56(a) and (b)].

90. In those circumstances the conditions precedent for release of the funds were not satisfied since copies of the Permanent Loan Funding Agreement, the Senior Escrow Agreement (there was none) and all ancillary documents had not been provided to the Corporation; nor had any Senior Escrow Agreement ever been prepared: [56(c)-(e)].

91. It is then necessary to address the acts of Mr Oosthuizen, on behalf of Wakefield Quin, which are said in the pleading to amount to inducement/procurement. They seem to me to be as follows:

    (1) He reviewed and amended drafts of the TPSA and facilitated and encouraged its execution [31] and [36] and thereby procured the Trustees' entry into the TPSA [60(a)];

    (2) He drafted a purported funding approval notice for and on behalf of PLV which purported to confirm what could not in fact truthfully be confirmed [40]; [42]; [56(e)]; [60(b)] and this was sent to Mellon [45];

    (3) He wrote to Mellon on PLV's behalf to request the release of the funds, not to a Senior Escrow account but to the Maclean Joint Account [43];

    (4) He drafted a resolution of the directors of PLV approving the release of the Escrow funds to the Maclean Joint Account [44];

    (5) Items (2) - (4) procured the release of the funds to the Maclean Joint Account and not the Senior Escrow Account: [60(b)];

    (6) He secured Clarien Bank's agreement to release the Argyle UAE payment of $11.5 million and two separate payments of $500,000 to Rational Foreign Exchange Limited from the Maclean Joint Account: [60(c)].

[1] Since the Trust was appointed to act as PLV's agent, representative and nominee for the proposes of entering into the TPSA and receiving payments due to PLV pursuant to it, PLV would appear to have been a beneficiary of it.

92. These matters are relied on as "*actively facilitating PLV's actions*" [57], which is said to amount to inducement or procuring. It is pleaded that Mr Oosthuizen knew the terms of the Credit Agreement, the Note and the Escrow Agreement and had reviewed them when acting for PLV; and that he also knew the terms of the TPSA having reviewed it and commented on proposed changes to it: [31], [58]. And at [61] Mr Oosthuizen's actions are alleged to have "*enabled and encouraged*" PLV's breach of its contracts with MIF. I recognise that paragraph 61 is drafted in terms of what would not have happened if Mr Oosthuizen had taken certain steps; but it seems to me implicitly to state that what would not have happened had he done so was what in fact happened. Further [60] now pleads in terms that Mr Oosthuizen "*intended to, and did, procure, PLV's breach of the Escrow Agreement by facilitating and encouraging actions by PLV and/or the Trustees for and on behalf of PLV which he knew to be inconsistent with and/or contrary to PLV's obligations under the Escrow Agreement*".

93. In those circumstances Mr Oosthuizen is said to have known or wilfully turned a blind eye to the following facts:

(a) The TPSA was not a Permanent Loan Funding Agreement and Argyle was not a Permanent Lender;

(b) The Maclean Joint Account was not the Senior Escrow Account and no such account had been prepared and signed with PLV, a Permanent Lender and Mellon;

(c) PLV was not entitled to drawdown on the Escrow Funds because the conditions precedent in clause 3.3(a) of the Escrow Agreement had not been met;

(d) Any attempt to drawdown on the Escrow Funds would, in the circumstances involve PLV breaching the Escrow Agreement [59].

94. Item (1) in paragraph [91] above did not, itself, bring about a breach of the Escrow Agreement. Item (2) - the funding approval notice - was a necessary step to ensure that Mellon disbursed the funds in the Escrow Account to the Maclean Joint Account. Item (3) was a direct invitation to Mellon to make that disbursement which would amount to a breach of the Escrow Agreement on the part of PLV, and item (4) provided the confirmation that Mellon no doubt needed in order to make the payment which the Escrow Agreement did not permit. Item (6) secured the release of the Funds from the Maclean Joint Account.

95. Mr Oosthuizen and Wakefield Quin were acting for PLV. Since PLV, through its directors, were happy with the arrangements Mr Oosthuizen was presumably happy to do what PLV and the Directors wanted. However, what happened breached the

right of MIF not to have the monies in Escrow disbursed otherwise than in accordance with its terms. The importance of that was recorded in the third recital to the Escrow Agreement [13].

Discussion

96. The question that then arises is whether the matters set out above support (or could support) a claim for inducement or procurement of breach of contract. As at the date of the hearing before us in March 2024 the principal authorities in this field were *OBG Ltd v Allan* and *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd*. Both parties have relied on dicta in, or quoted in, each of those cases. After the hearing, on May 1 2024 the English Court of Appeal handed down judgment in *Northamber PLC v Genee World Limited & Ors* [2024] EWCA Civ 428, which considered the characteristics of the tort in some detail.

97. In *Kawasaki* reference was made to the decision of Lord Hodge, then sitting in the Outer House, in *Global Resources Group v Mackay* [2008] SLT 104, in which he set out the five ingredients of the tort of inducing a breach. They included (as summarised in *Kawasaki*)

    "*2 A must induce B to break his contract by persuading, encouraging* ***or assisting*** *him to do so.*

    3 A must know of the contract and know that his conduct will have that effect.

    4 A must intend to procure the breach of contract either as an end in itself or the means by which he achieves some further end."

98. In the same case reference was made [25] to Lord Hoffman's observation in *OBG v Allan* that:

    "*the real question which has to be asked ...: did the defendant's acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability.*"

99. Reference was also made to the following statements in other cases.

100. Lord Templeman in *CBS Songs v Amstrad* said that "*a defendant may procure an infringement by inducement, incitement or persuasion*", which he distinguished from merely facilitating the doing of an act, which was not sufficient to attract accessory liability.

101. Toulson LJ, as he then was, in *Meretz* said that inducing a breach required "*the defendant's `conduct to have operated on the will of the contracting party*".

102. In *OBG Ltd v Allan* Lord Hoffman said that, for the purpose of deciding what counts as an intention to procure a breach of contract, it was necessary to distinguish between ends, means and consequences and said:

"*43. On the other hand if the breach of contract is neither an end in itself nor a means to an end but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended.*"

103. The full extent of what Lord Templeman said in *CBS Songs* was as follows:
"*My Lords, I accept that a defendant who procures a breach of copyright is liable jointly and severally with the infringer for the damages suffered by the plaintiff as a result of the infringement. The defendant is a joint infringer; he intends and procures and shares a common design that infringement shall take place. A defendant may procure an infringement by inducement, incitement or persuasion. But in the present case Amstrad do not procure infringement by offering for sale a machine which may be used for lawful or unlawful copying and they do not procure infringement by advertising the attractions of their machine to any purchaser who may decide to copy unlawfully. Amstrad are not concerned to procure and cannot procure unlawful copying. The purchaser will not make unlawful copies because he has been induced or incited or persuaded to do so by Amstrad. The purchaser will make unlawful copies for his own use because he chooses to do so. Amstrad's advertisements may persuade the purchaser to buy an Amstrad machine but will not influence the purchaser's later decision to infringe copyright. Buckley L.J. observed in Belegging-en Exploitatiemaatschappij Lavender B.V. v. Witten Industrial Diamonds Ltd., at p.65, that 'facilitating the doing of an act is obviously different from procuring the doing of an act.' Sales and advertisements to the public generally of a machine which may be used for lawful or unlawful purposes, including infringement of copyright, cannot be said to 'procure' all breaches of copyright thereafter by members of the public who use the machine. Generally speaking, inducement, incitement or persuasion to infringe must be by a defendant to an individual infringer and must identifiably procure a particular infringement in order to make the defendant liable as a joint infringer.*"

104. The principles were summed up in *Kawasaki* as follows:
"*[32] First, they make clear that conduct cannot qualify as inducement if it constitutes no more than preventing B from performing the contract with C as one of its consequences. There must be some conduct by A amounting to persuasion, encouragement* ***or assistance*** *of B to break the contract with C.*

[33] Secondly, this participation by A in B's breach, must, in Lord Hoffmann's words, have 'a sufficient causal connection with the breach by the contracting party to attract accessory liability' or, in Lord Nicholls' words, so as to amount to 'causative participation'. It is because of the causative requirement that 'inducement requires the defendant's conduct to have operated on the will of the contracting party' in the words of Toulson LJ. If A's conduct is not capable of influencing a choice by B whether or not to breach the contract, it is not capable of amounting to inducement; it cannot operate on the mind or will of B so as qualify as causative participation as an accessory to his breach.

[34] Thirdly, the mental element of the tort requires that there must be an intention that the breach of the contract must at least be the means to an end,

rather than simply the foreseen or intended consequence of the tortious conduct."

105. The Respondent contends that what Mr Oosthuizen did was to encourage or assist PLV to break the Escrow Agreement and that what he did was done as a means to an end, the end being the putting into effect of the arrangement whereby the TPSA would be treated as the Permanent Loan Agreement, and the money in escrow would be transferred to the Maclean Joint Account (from which it was paid to Argyle and others) purportedly pursuant to the terms of the TPSA. These actions necessarily involved a breach of the Escrow Agreement. Mr Oosthuizen and Wakefield Quin contend that all that they did was to facilitate what turned out to be a breach and that the breach of contract was simply the consequence of what they did rather than an end or a means to an end.

106. As Bell JA has rightly observed, there is a potential tension between different expressions by different judges of the ingredients of the tort. Thus the tort is said, in different cases, to be committed by inducement, incitement, persuasion, encouragement, procurement or assistance but not by facilitation. In that context facilitation must mean doing nothing more than making something easier for someone, and assistance must be something that helps a party to breach his contract. (In a different context such assistance could be characterised as facilitation; and that is, I apprehend, the sense in which "facilitate" is used in the Statement of Claim[2]). The Appellants submit that if assistance is to count as procurement, there has to be some positive act done with the intention of bringing about a breach of contract. MIF submits that that is exactly what has been pleaded at paragraph 60 of the Amended Statement of Claim.

107. There is also room for debate as to the dividing line between ends or means to an end on the one hand, and consequences on the other. In relation to the latter the classic example is the case of *Millar v Bassey* [1994] EMLR 44, referred to by Lord Hoffman in *OBG v Allan*. There Shirley Bassey, the singer, broke her contract to perform for a recording company and it was a foreseeable consequence of her doing so that the recording company would have to break its contracts with the accompanying musicians. But, as Lord Hoffman held, such breaches were neither an end desired by Ms Bassey nor a means to any end of hers. However, in the case of an attorney who prepares a legal document it could be said that he must have some end in view or that what he does is a means to some end.

108. In my judgment what is pleaded goes further than mere facilitation in the sense in which that word can be applied to the cases referred to by Lord Templeman. In *CBS Songs v Amstrad* and in *Bassey* what was done did not amount to any form of inducement, incitement, persuasion, encouragement or assistance. All that the sale of the Amstrad machines meant was that the purchasers of the machine could use it

[2] This tallies with what Roxburgh J said in *British Motor Trade Association v Salvadori* [1949] Ch 556, 565 that "*any step taken by the defendant having knowledge of the covenant by which he facilitates a breach of that contract*" may fall within the tort of inducement.

to breach copyright if they chose. All that Ms Bassey did was to break her contract to sing, and she had no other end in view.

109. What, critically, Mr Oosthuizen is said to have done in the present case was that he requested the release of the funds from the Escrow account to an account to which they could not legitimately be transferred, and drafted a resolution approving that release. The product of those actions was the release of the funds from the Escrow Account, contrary to the terms of the Escrow Agreement. I cannot regard this as no more than drafting a document which could be used for a lawful or unlawful purpose. He also procured the release of the Escrow funds from the Maclean Joint Account.

110. The first question that then arises is whether or not what Mr Oosthuizen did could, in principle, amount to commission of the tort. As to that the tort is classically committed when A induces or persuades B to break his contract with C. But that is not, as it appears to me, the limit of its reach. B may need no persuasion to break his contract and may intend to do so. If, in those circumstances, A does something which causes B to be in breach of his contract with C, A may be liable. It is conduct "*which attracts accessory liability in the form of assistance rather than persuasion*", to use the words of Popplewell LJ in *Kawasaki*. Typically that may be when A enters into a deal with B which itself causes B to be in breach of his contract with C. Thus in *Lictor Anstalt*, the offending deal was the sale and transfer of a hot strip mill to the company that was the alleged inducer, which sale was said to produce a breach of an agreement between the seller and the claimant that it would not sell the strip. As Richards J put it at [46], the breach of the relevant agreement was integral to the transfer and not a mere consequence of it.

111. He held that the agreement to purchase the equipment was "*at least arguably sufficient to constitute acts required for liability in tort for inducing a breach of contract*": [52]. In the course of his judgment he said:

> *"[48] Mr Boyle QC for the claimant submitted, by reference to a number of authorities, that entering into an inconsistent contract is capable of constituting, and indeed will normally constitute, sufficient participation by the defendant to attract liability in tort. He accepted that there could be cases where the contract breaker has independently of the defendant decided to act in breach of the contract and is able to do so without any necessary involvement by the defendant. But in circumstances where the defendant's involvement or cooperation is necessary to the breach intended by the contract breaker, then the defendant who participates in this way with the relevant knowledge is liable. He submitted that the necessary element of causative participation was satisfied if the defendant does an act which enables the contract breaker to breach his contract and without which no breach would occur. In such circumstances the defendant is sufficiently instrumental in causing the breach to be liable. Active persuasion by the defendant is not required."*

As the Court of Appeal observed in *Northamber PLC* [50]: "*Although he did not say so in terms, it is evident that* [Richards J] *accepted counsel for the claimant's submission as to the law.*"

112. Richards J then referred to Mr Boyle's citation of the judgment of Jenkins LJ in *DC Thomson & Co. Ltd v Deakin* [1952] 1 Ch 646 at 694:

"*The breach of contract complained of must be brought about by some act of a third party (whether alone or in concert with the contract breaker), [which is in itself unlawful,] but that act need not necessarily take the form of persuasion or procurement or inducement of the contract breaker, in the sense above indicated.*

Direct persuasion or procurement or inducement applied by the third party to the contract breaker, with knowledge of the contract and the intention of bringing about its breach, is clearly to be regarded as a wrongful act in itself, and where this is shown a case of actionable interference in its primary form is made out: Lumley v. Gye.

But the contract breaker may himself be a willing party to the breach, without any persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference: see, for example British Industrial Plastics Ltd. v. Ferguson, where the necessary knowledge was held not to have been brought home to the third party; and British Motor Trade Association v. Salvadori. The inconsistent dealing between the third party and the contract breaker may, indeed, be commenced without knowledge by the third party of the contract thus broken; but, if it is continued after the third party has notice of the contract, an actionable interference has been committed by him: see, for example, De Francesco v. Barnum."

113. The position in relation to lawyers is more complicated than that of directors. The classic cases where the tort is committed are where A persuades B to break his contract with C, or where A enters into a contract with B, the entry into which is a breach of B's contract with C. But there seems to me to be no reason in principle why a lawyer should not be liable if (provided all the other conditions for liability are satisfied[3]) he does something which itself brings about the breach, or without which the breach would not have occurred. At the lowest, that would seem to me to be reasonably arguable. I would regard such cases as best described as "procurement" which does not need to act on the will of the contract breaker – if that phrase is interpreted as meaning that the procurer cannot be guilty of a tort if the contract breaker needed no persuasion. Alternatively, in such a case the procurement can be said to operate on the will of the contract breaker since, without his consent the breach could not occur.

[3] Including knowledge of the contract and the effect of what is being done, intention to induce as an end in itself or a means to achieving some further end, and an absence of justification: see *Northamber PLC* at [30].

114. I am conscious that there may be a tension between this conclusion and the second principle specified at [33] of *Kawasaki*. However, in the same case the Court referred to the fact that inducement of a breach of contract may take place by "*assistance"*; and cited a passage from Lord Hodge's decision in *Global Resources* where he said:

> "*It is clear from BMTA v Salvadori and BMTA v Gray that the tort or delict is not confined to circumstances where A has to persuade B to break his contract but can also be committed where A has dealings with B which A knows are inconsistent with the contract between B and C. In either event A induces or assists B to do something (or to refrain from doing something) which involves B breaking his contract with C.*"

And in *Northamber PLC* Arnold LJ regarded the conduct of the relevant defendant as going "*beyond merely facilitating the relevant breaches of contract. Its involvement was necessary for the breaches to occur*". The involvement in question in that case was the purchase of goods which the contract breaker had agreed to supply, exclusively, to the plaintiff. That was regarded by Arnold LJ as having a sufficient causal connection with the contract breaker's breaches to amount to causative participation in those breaches; and to operate on the will of the contract breaker.

115. On the assumption that there is no applicable Said Principle, there is, however, still a problem with the Plaintiff's Statement of Claim, even as amended. On this hypothesis I would regard it as necessary for a claimant to allege that the breach of contract was either the intended end of the defendant or the means to another end. As to that Mr Robinson has made plain that his case is that what the defendants did was a means to the end of securing the result that the client wanted. It seems to me that exactly what is said needs to be pleaded.

The Said Principle

116. I turn then to consider the applicability (or otherwise) of the principle laid down in *Said v Butt* [1920] 3 KB 492. That case holds that a director of a company can only be liable for procuring a breach of contract if the director is acting outside the scope of his authority. At page 506 of the report McCardie J set out the following principles:

> "*But the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of the employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the Lumley v Gye principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract…*
>
> *I hold that 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."

117. In *Crystalens v White* [2006] EWHC 3357 (Comm) Gloster J, as she then was, referred to:

"*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.*"

12 Likewise, a director or other agent of the company who causes the company to act in breach of its contract incurs no personal liability and is under no duty of care to the counterparties to the contract, to ensure that the company fulfils its contractual obligations. That is a basic proposition of law, which is clearly established by the judgment of Mr Justice McCardie in Said v Butt [1920] 3 KB 497 as approved by the Court of Appeal in D.C. Thompson v Deakins [1952] 1 Ch 646 at 680 to 681 and also, more recently approved by the Court of Appeal in Welsh Development Agency v Export Finance Co Limited [1992] BCLC 148 in particular pages 169 to 173, where Lord Justice Dillon said that, although he had grave reservations in relation to the reason of Mr Justice McCardie, given that the reasons and conclusions had stood for so long and had been so widely accepted, it was not for the Court of Appeal to interfere with the conclusion reached in that case.

13 That clearly must be the position of this court. It is also supported by numerous Commonwealth authorities, including Fly Pack Industries Limited v Marsh [1998] 8 New Zealand CLC 261 at 713, Sassat Practice v Goldcrest Properties Proprietary Limited (2000) 18 Australian Company Law Cases at 277 as well as in the case of Centropac Partnership v The Foreign Currency Consultants Limited [1989] 4 NZ CLC 64940.

118. The principle has been considered more recently in a number of English cases. At [68] of his judgment in *Complete Faith Facilities Solutions v Livingstone Consulting Ltd* [2023] EWHC 571 (Ch) Master McQuail said:

"*I agree with Mr Nixon's submission, which is supported by the terms of paragraph 3-042 of Civil Fraud, that as a matter of logic and consistency, this principle must also apply to an employee, such as D3, otherwise a director would receive greater protection than an employee.*"

119. At [28] in *IBM United Kingdom Limited v LZLABS GmbH* [2022] EWHC 884 Eyre J held:

"*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."

120. The authorities to which I have referred have now to be looked at in the light of the decision of the Supreme Court in *Lifestyle Equities.* In that case the claimant companies (which I will refer to as "Lifestyle") alleged that one of the defendant companies[4] - Hornby Street Ltd - had infringed Lifestyle's trademarks; that its two directors – Mr and Ms Ahmed ("the Ahmeds") – had procured the infringements; and that the infringements were committed pursuant to a common design with each other or with Hornby Street Ltd. The trial judge found the infringements established; that the Ahmeds were jointly liable on both bases; and that they must account for the profits which they had made from the infringements. He apportioned 10% of the salaries of the Ahmeds during the relevant period to such profits, and also decided that a loan made by Hornby Street Ltd to one of the Ahmeds was a profit derived from the infringements. The Court of Appeal upheld this decision, save as to the loan, which, it held, was not a profit. The Supreme Court allowed the Ahmeds' appeal on the basis that they could not be liable for procuring the infringements, or on the basis of common design, when they were unaware of the essential facts which made the use of Lifestyle's signs by Hornby Street Ltd wrongful. Further, in any event the Ahmeds could not be required to account for any profits made by Hornby Street Ltd; and, on the facts found, they had not themselves made any profits from the infringement.

121. The case thus concerned trade mark infringement, in respect of which the liability of the infringer is strict. In the course of a scholarly judgment Lord Leggatt considered the principles of accessory liability and the *Said v Butt* principle. The judgment is long but its relevant content can, I think, be summarised as follows.

122. There is no rule of company or agency law which excepts directors from the general principles of tort law: [45]. However, *Said v Butt* held that an action against the agent for procuring a breach of his master's contract cannot succeed for the reasons set out in the passage cited at [117] above [46]. The principle is not limited to directors but applies to any agent or employee who is alleged to have procured their principal or employer to act in breach of contract [47].

123. The reasoning as expressed in *Said v Butt* is flawed [52]:

"*Certainly, it would make no sense to hold a party liable in tort for wrongfully procuring a breach of their own contract. But the reason for*

[4] There was another company - Continental Shelf 28 Ltd - of which Mr Ahmed was the sole director and similar claims were made against that company and him.

that is that the tort of inducing a breach of contract can only apply in a situation involving three parties. The tort is committed by a person (A) who knowingly procures the doing of an act by another person (B) which violates a right of the claimant (C) under a contract between B and C. The primary actor (B) cannot be liable on this principle. So a party to a contract who breaks the contract cannot be liable for procuring the breach. This objection does not arise, however, where the person who procures the breach is not the contracting party but another person. Contrary to what was said by McCardie J, an employee is not the "alter ego" of their employer. As discussed above, the fact that the employee's acts "are in law the acts of his employer" does not relieve the employee of liability if the act of the employee is tortious. That is the "dis-attribution fallacy" discussed above. Thus, in my view, McCardie J's argument does not provide a valid reason for his conclusion that an employee or agent cannot be liable in damages for inducing a breach of contract by their employer or principal".

124. However:

"54 I think that the rule stated in Said v Butt is sound and that there is a good reason to distinguish between an agent who procures a breach of contract by the principal and an agent who commits or procures the commission of such torts as those mentioned by McCardie J in the passage quoted at para 49 above[5]. Essentially, it is the reason suggested by the Singapore Court of Appeal in Arthaputra for limiting the principle to breach of contract. I would explain it in this way. When parties make a contract, unless the contract is personal in nature, the general rule is that a party may employ agents to carry out its obligations. When the contracting party is a company, that is of course the only possible means of performance. If a company breaks a contract, that must be because one or more agents of the company have caused the breach. When an agent, acting as such, makes a contract, the normal understanding is that the agent assumes no liability towards the other contracting party. Only the principal does. Similarly, the normal understanding is that, if the agent causes the principal to break the contract, only the principal will incur liability to the other contracting party, and not the agent. This is, I think, a general norm or social understanding which the law should and does reflect.

55 It would be inconsistent with that understanding for the law of tort to make an agent who, acting within the scope of their authority, causes or procures a breach of contract by the principal liable to compensate the other contracting party for loss resulting from the breach. By the same token, to allow the injured party to recover

[5] These were "*assaults, trespass to property, nuisance or the like*".

> *damages from the agent would give them a free ride. That is because the same norm or understanding that, unless otherwise specifically agreed, only the contracting parties themselves will be liable in the event of a breach of the contract entails that, if a party wants a right of recourse against an agent of the other party, they must bargain for it.*
>
> …
>
> *57 It is possible to view this consequence as an instance of a wider principle which Jane Stapleton in her recent book, Three Essays on Torts (2021), ch 2, p 36, calls "tort's cooperation principle". She argues that it is a general principle of tort law that, where parties come together voluntarily to cooperate with each other on the basis of what parties in their position would reasonably understand to be a particular allocation of risk, the law will not impose obligations in tort which would circumvent that risk allocation."*

125. In those circumstances we should regard the principle in *Said v Butt* as established at the highest level, albeit on a basis different to that on which it was originally founded. The question that then arises is whether, and to what extent, the principle applies to the lawyers of the party which has broken the relevant contract. The *Said v Butt* principle is classically applicable to directors. They are beyond question the agents of their companies.

126. The position of lawyers is somewhat different. They are engaged by the company to provide legal services. They can, of course, sign agreements or execute documents (if authorised to do so) as agents for the company. But they also assist their client, typically by providing advice, reviewing and drafting documents. The Respondent contends that it is strongly arguable that in doing the latter the lawyer is not acting as an agent of the client but as an independent contractor. However, in addition, the lawyers may carry out certain acts on behalf of the client.

127. In my judgment, the critical question is whether the lawyer did acts on behalf of the client which led to the breach. If that be so he is to be regarded as an agent for the purpose of the *Said v Butt* principle. That principle rests on the basis that, in the ordinary course, it is the contract breaker alone who is responsible for the breach and not those who, acting on its behalf, in one way or another, brought the breach about. The matters which I have summarised in paragraph [91] above constitute, in my judgment, acts on behalf of the client which led to the breach. Accordingly, in my judgement, the Appellants are *prima facie* entitled to the benefit of the *Said v Butt* principle.

128. I see no reason why, as suggested by the Respondent, the *Said v Butt* principle should not apply when the agents in question are lawyers. There do not appear to be any reported cases in relation to lawyers in which the question of its application has arisen; but that does not seem to me any basis for holding that the principle is inapplicable to them. Further it is not inapposite for the principle to apply in the case of lawyers since if someone in the position of MIF can claim against the

lawyers for procurement of a breach by their client there will, or may, be problems in mounting any defence since they will not be able to disclose legally privileged documents, including their advice to their clients.

129. The Respondent has drawn to our attention a number of cases in which lawyers have been held liable for inducing breach of contract, in none of which was the *Said v Butt* principle addressed. They do not, in my view, take the matter any further.

130. In *AG Australia Holdings Ltd v Burton & Anor* [2002] NWSC 170 the lawyers in question were not the agents of the party that breached the relevant contract.

131. In *Mehta v Reid & Ors* [2006] 7 WLUK a licensee of a hotel room had been wrongfully evicted from the hotel by the previous owners. He brought a claim which included, inter alia, a claim for inducement of breach of contract against the two firms of solicitors acting for the purchaser and vendor of the hotel. The procurement was said to arise from the giving of advice to evict him from the hotel (unlawfully). The Court (Richard Southwell QC) said [29] that each of the defendants, as solicitors, should have understood from correspondence that there was a risk that the plaintiff's occupation was protected by statute, and that it could not be ended by instant eviction. The Court also noted [31] that each of the defendant solicitors appeared to have had the intention of ensuring the summary ending of Mr Mehta's contractual rights whatever they might be. The Court observed that it would only be in rare cases that solicitors acting for a party to a sale and purchase of real property would find themselves potentially liable to a third party affected by the action of the vendor and purchaser. But in that case the facts prima facie showed that solicitors gave advice which led directly to the wrongful eviction of the plaintiff before completion of the sale [31] – [32]. The claim was struck out on the basis that the claimant had already been made whole in a claim against the vendors. The first instance judgment was upheld on appeal. The Court of Appeal dealt solely with the question of loss, without consideration of whatever was in the Respondents' notices.

132. *AMT Futures Ltd v Marzillier, Dr Meier and Dr Gunther Rechtsanwaltsgesellschaft mbH* involved a challenge to the jurisdiction of the English courts. A broker claimed against a firm of German lawyers who had brought proceedings against it in Germany in breach of an exclusive English jurisdiction clause. The broker contended that the law firm had induced their client to issue the proceedings in Germany and to advance causes of action under German law, in breach of the terms of the applicable exclusive jurisdiction and choice of law clause. At first instance it was held that the English Court had jurisdiction. The decision was reversed by the Court of Appeal [2015] EWCA Civ 143; and the Supreme Court dismissed the appeal to it [2017] UKSC 13. The decisions cast no light on the issues now before us.

Non-applicability of the Said v Butt principle

133. If the *Said v Butt* principle potentially applies, the next question is: what are the circumstances in which it is not applicable? As to that, in *Crystalens v White* Gloster J said that the principle applied "*where a director is acting bona fide and within the ambit of his authority*". In *Lifestyle Equities* the principle was said to apply "*an agent who, acting within the scope of their authority, causes or procures a breach of contract".*

134. In *The "Leon"* [1991] 2 Lloyd's Rep 611 Waller J, as he then was, observed that an employee could be liable for inducing a breach of contract where the employee was himself acting unlawfully, including in breach of his own contract with his employer. He also found the use of the words "bona fide" in this context quite difficult, if they were intended to add anything to acting unlawfully. He asked whether the words contemplated that an individual who knows that what he is doing will lead to the company being in breach of contract will be someone not acting bona fide. Or do the words relate to the relationship of the individual with the company i.e. that he is seeking to force the company to do something contrary to its own interests? If it was the latter, he was not satisfied that without the action of the employee also being a breach of contract or legal duty to the employer it could found an action in tort for inducing a breach. (I have some difficulty in following how forcing a company to do something contrary to its interests would fail to be a breach of duty, at any rate if the director realised that.) On the facts of that case he found that the plaintiffs would need to establish that Dr Braithwaite (the alleged inducer) committed an act wrongful in itself which prevented the company in breach fulfilling its contract with the plaintiffs, and that it had failed to do so. It is not wholly clear to me whether by "*wrongful in itself*" the judge intended to include conduct which was a breach of the director's obligation to the company; but it seems to me that he did.

135. In circumstances where authority on this question is somewhat scant[6], I am not minded to attempt some comprehensive definition of what would place the director or agent outside the protection of *Said v Butt.* That would, I think, be the case if the director/agent acted dishonestly, or procured the company to do something that he did not in good faith regard as in its best interests in order to advance some interest other than that of the company.

136. In the case of the lawyer the question would be whether what he did was done in good faith and within the scope of his retainer. That question would arise in circumstances where the lawyer is not the decision maker for the company. What the company does is for the directors to decide; and the directors may take a different view to that of the lawyer as to what is in the company's best interests. The lawyer would, I think, lose the protection of *Said v Butt* if he acted dishonestly or put into effect a transaction that no one could, in good faith, regard as in the interests of the company.

[6] See on this topic the case of *Nerijus Antuzis v DJ Houhgton Catching Services Ltd* [2019] EWHC 843 which considers a number of Singaporean, Australian and Canadian authorities.

137. As I say, these observations are not to be regarded as comprehensive or, indeed, definitive, so far as they go, not least because we have not heard any submissions on the subject.

138. It is clear that it is for the party which seeks to avoid the application of the *Said v Butt* principle to plead that the person against whom a claim is made was acting in bad faith or outside the scope of his or her authority*: Holding Oil Finance.* No such pleading has been filed because the *Said v Butt* point was raised after the hearing.

Conclusion

139. In short, in my judgment, the Appellants are, on the facts alleged in the Amended Statement of Claim (if re-amended to plead the requisite intention), prima facie entitled to the benefit of the *Said v Butt* principle. But it would be wrong, in the unusual circumstances in which the point has arisen, to strike out the Respondent's claim without giving the Respondent the opportunity to plead that the Appellants are not entitled to avail themselves of that principle. I would, therefore give them 21 days in which to produce a Re-amended Statement of Claim which also addresses this point. When we have received it we will consider whether what it alleges affords a realistic prospect of establishing that the *Said v Butt* principle does not apply and whether to grant leave to re-amend. For that purpose we may be assisted by submissions from each side, in the light of the proposed amendment, as to the circumstances in which the *Said v Butt* principle is inapplicable.

140. Lastly, I would wish to draw attention to the decision in *Lakatamia Shipping Company v Nobu Su & Ors* [2024] EWHC 1749, handed down on 12 July 2024, which deals, inter alia, with the question as to whether there can be an inducement of breach of contract if the alleged inducer mistakenly believes that he was entitled to cause the contract breaker to break his contract – see [104] ff – and on the ambit of the defence of justification – see [109] ff.

141. Accordingly, in the light of the judgment of Kawaley JA and myself, the order that the Court will make is as follows:

(i) The claim in dishonest assistance contained in paragraphs [62]- [67] of the Re-Amended Statement of Claim is struck out;

(ii) The Respondent may, within 21 days from the handing down of this judgment, produce a draft amendment to the Amended Statement of Claim which pleads (a) the intention referred to at paragraph [69] above and (b) any plea that the Respondent seeks to make to contend that the Appellants are not entitled to rely on the *Said v Butt* principle.

142. We reserve for further consideration the question of costs.