Neutral Citation Number: [2023] EWHC 1703 (Ch)

Case No: BL-2022-001142

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 7 July 2023

Before:

MASTER MCQUAIL

- -

Between:

(1) Jak Trude	**Claimants**
- and -	
(1) Christopher Rajendran Hyman **(2) Valcura Limited**	**Defendants**

- -

Marc Beaumont (direct access) for the **Claimant**
Lesley Anderson KC (instructed by **Gunnercooke**) for the **Defendants**

Hearing dates: 4 May 2023

- -

Approved Judgment

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MASTER McQUAIL

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Master McQuail:

1. On 4 May 2023 I heard two applications in these proceedings. The application of the first defendant dated 20 October 2022 to strike out or for reverse summary judgment on the claim against him and the application of the claimant dated 27 January 2023 for permission to amend his particulars of claim.

2. The proceedings concern an agreement made between the claimant and the second defendant (**the Company**) dated 26 April 2018 (**the Agreement**) by which the Company engaged the claimant to provide property project management consultancy services. The first defendant was the sole director and shareholder of the Company at all material times.

3. By clause 4.1 of the Agreement the claimant was to be remunerated for his services at £4,000 per month plus VAT for 2/3 days' work a week. By clause 4.2 of the Agreement he was also to receive a 5% share of the "Net Profit before tax (subject to audit) on the projects completed within the duration of the agreement." The meaning of clause 4.2 is not something which I need to consider in this judgment.

4. The claimant identified and was instrumental in negotiating the purchase of a potential development site in Chertsey (**the Property**). The Property was acquired by Chertsey Property Limited (**CPL**) on 2 April 2019. CPL was a special purpose vehicle set up to acquire the Property and the first defendant was its sole director and shareholder.

5. The project to develop the Property was not successful.

6. On 21 October 2019 the Company's solicitors sent a letter to the claimant terminating the Agreement. The claimant says that the termination was unlawful and asserts that the Agreement only ended when he accepted the Company's wrongful termination as a repudiatory breach on 4 May 2022.

7. The first defendant sold his shareholding in CPL in two tranches in 2020 and 2021 and resigned as a director on 22 December 2021. CPL still owns the Property.

8. The claimant issued these proceedings on 14 July 2022.

9. The claim is brought against the Company in contract and the claimant claims to be entitled to damages for loss of profit and/or unpaid commission and seeks all necessary accounts and inquiries in relation to that claim.

10. The claim brought against the first defendant is one in tort for inducing or procuring the Company's alleged breach or breaches of contract. The damages claim against the first defendant is not formulated in a separate way to the damages claim against the Company.

11. The Company denies any breach of contract. The first defendant denies that he is or could be liable to the claimant as alleged or at all.

12. The first defendant's application is supported by his witness statement dated 20 October 2022. The claimant's witness statement dated 27 January 2023 was made in response to that of the first defendant.

The Pleadings

13. The Particulars of Claim (**POC**) at [15] pleads that "the Defendants" terminated the Agreement, although [17] makes clear that the claimant's issue is with the Company's termination of the Agreement.

14. The POC at [25] claims that the first defendant "rendered it impossible" for the Company to comply with clause 4.2 of the Agreement "by procuring the diversion of all trading activity and/or more particularly the Property and/or the business opportunity to develop it, to CPL, that company not being subject to the terms of the Agreement and/or by ceding control of CPL by resigning as a director."

15. The POC at [26] claims that the first defendant "appears to have assisted" the Company to take steps to avoid performing the Agreement and at [27] that the first defendant thereby "intentionally or recklessly engineered the Second Defendant's breach of contract."

16. The POC at [28] pleads "Such behaviour on the part of the first defendant constituted the tort of inducing or procuring the Second Defendant's breach of its contract with the Claimant."

17. The Defence pleads at [33.3]:

> "… at all times until the termination of the Agreement, the First Defendant was sole director of the Second Defendant. When causing the Second Defendant to act or refrain from acting, the First Defendant at all times acted bona fide and within his powers as director. He did not as a matter or [sic] fact or law procure or induce anything done or not done by the Second Defendant."

18. The Defence pleads at [33.4]:

> "The allegation that the First Defendant acted "intentionally or recklessly" is inadequately particularised. So far as the Defendants can respond, they deny that the First Defendant intended the Second Defendant to breach the Agreement in the respect alleged or acted recklessly as to whether the Second Defendant was breaching or might breach the Agreement."

19. The Defence pleads at [33.5]:

> "Further it is denied, if so alleged, that the First Defendant knew that he was inducing a breach of the Agreement by the Second Defendant. He did not believe that the Second Defendant had any liability to the Claimant under cl. 4.2."

20. The Reply pleads at [20]:

> "(d) the First Defendant, as the Second Defendant's sole director and the directing mind and will of the Second Defendant, procured and/or induced the Second Defendant's inability to perform its contract with the Claimant, as pleaded at paragraphs 25 to 28 of the Particulars of Claim and/or thereby procured or induced the Second Defendant to be in breach of its implied contractual duty to act with good faith towards the Claimant;"

21. The Reply pleads at [20]:

"(l) the First Defendant is put to strict proof of the averment of bona fides. … The First Defendant's own actions in apparently intentionally, or at least recklessly, subverting the ability of his company to perform its contractual obligations, were liable to bring the Second Defendant into disrepute. Therefore, the First Defendant's actions were not bona fide within the legitimate scope of his authority as director of this particular company given its clear commitment to high standards of corporate integrity. If on the contrary, it had no such commitment, its purported reasons for termination of the agreement were completely spurious;

22. The Reply pleads at [20]:

"(n) the First Defendant is put to strict proof that, as is pleaded at sub-paragraph 33.5 of the Defence, when he procured the transfer of the property and the benefit of the development project directly to the SPV, he did not believe that the Second Defendant could be liable in due course to the Claimant under the agreement."

23, The Reply pleads at [20]:

"(q) It is admitted that the Second Defendant did not convey the property to the SPV, CPL. Instead, for reasons unknown, the First Defendant arranged for a direct conveyance as between the vendor local authority and CPL as the SPV. That appears to have been a diversion by a director of an asset away from the company to which he owed fiduciary duties. In doing that, the First Defendant placed the Second Defendant in breach of the implied duty of good faith it owed to the Claimant. By arranging for a direct conveyance of the new property, paid for by the Second Defendant, to CPL, the First Defendant did not act bona fide and/or within the scope of his authority as a director. His duty was to promote the success of the Second Defendant pursuant to section 172 of the Companies Act 2006, not to give away a substantial asset paid for by the Second Defendant. In the premises, the rule in *Said v Butt* [1920] 3 KB 497 does not apply."

24. The POC at [32] asserts that "the Defendants and each of them are liable to the Claimant in damages for loss of profit and/or unpaid commission."

Law

Strike Out

25. CPR Pt 3.4(2)(a) provides that a statement of case may be struck out if it "discloses no reasonable grounds for bringing or defending a claim". The approach to be taken is for the court to look to the pleading and then, proceeding on the footing that the facts alleged are capable of being established at trial, consider whether a sustainable cause of action is shown.

Summary Judgment

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

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;
> "ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];
> "iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;
> "iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];
> "v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;
> "vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in

> argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

Amendment

27. In considering an application to amend a statement of case the court will apply the summary judgment test and will only allow an amendment which has a real as opposed to fanciful prospect of success.

Procuring Breach of Contract

28. The ingredients of the tort of procuring or inducing a breach of contract were restated by the House of Lords in *OBG Ltd Allan* [2007] UKHL 21 and authoritatively distinguished from the tort of intentionally causing loss by unlawful means. The speeches of Lord Hoffmann and Lord Nicholls make clear that the tort is one of accessory liability.

29. The parties were in agreement as to the elements of the tort. They are as summarised by Lord Hodge in in *Global Resources Group v Mackay* [2008] CSOH 148 and recently set out by Popplewell LJ in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [21]:

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

In deciding the applications before me I am concerned with elements (2), (3) and (4).

30. The Court of Appeal reviewed the judgments of Lords Hoffmann and Nicholls and Popplewell LJ explained three aspects of the statements of principle of importance in the *Kawasaki* case at [32-4]:

> "…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 be at least the means to an end, rather than simply the foreseen or intended consequence of the tortious conduct."

31. As *Clerk & Lindsell on Torts* (23rd edition) points out at [23-39]:

> "Establishing whether or not a case is one of direct inducement can give rise to particular difficulties first where the alleged inducer is an employee of the contracting party which is in breach, and secondly where either the alleged inducer or the contracting party which is the object of the inducement is a company or some other corporate body. An employee acting bona fide and within the scope of his authority is not liable for procuring a breach of contract made between his employer and a third party for he is treated as the alter ego of his employer. A director or officer of the company may be personally liable if he has assumed a clear personal responsibility for what has been done by or for the company or is manifestly a separate joint participant with the company…. Where directors of a company in a board meeting cause a breach of contract by the company they normally cannot be sued in tort for procuring the breach, but the directors could be held liable for a conspiracy before the meeting to induce the board as a whole to break the contract. Moreover, if a director has ordered or procured the breach by the company he may be liable in tort given that he possesses the requisite knowledge and intention."

Rule in Said v Butt

32. The parties were in agreement that the application of the rule in *Said v Butt* [1920] KB [497] is relevant here. In *Said v Butt* the plaintiff sued the chairman and managing director of the company which operated the Palace Theatre for inducing the company to breach a contract arising from the purchase of a ticket. The judge expressed the principle at 506:

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

33. The rule was stated by Gloster J in *Crystalens Ltd v White* [2006] EWHC 3356 (Comm) in more modern language and in the context of a corporate entity with limited liability:

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

34. In the recent case of *IBM United Kingdom Limited v LZLABS GmbH [2022] EWHC 884 (TCC)* Eyre J explained at [28] that it was for the party alleging such liability to plead not only the allegation that a 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. He rejected the submission of counsel that that approach, which was set out by the Court of Appeal in the case of *Holding Oil Finance Inc v Marc Rich & Co AG & others* (1996) was affected by the *OBG* decision.

35. In *Antuzis & others v DJ Houghton Catching Services Ltd & others* [2019] EWHC 843 (QB), [2019] Bus LR 1532 Lane J concluded at [114], that it is the director's conduct and intention in relation to his duties towards the company - not towards the third party - that provide the focus of the "bona fide" enquiry to be undertaken pursuant to the rule in *Said v Butt*. In the following paragraph Lane J explained that the nature of the breach of contract between the company and third party may directly inform whether the director has breached his or her duties towards the company. On the facts, he concluded that two defendants, respectively the sole director of a company and its company secretary, were liable for having induced the company's breaches of its contracts with the claimants, who were employed by the company to catch chickens. The breaches of contract involved breaches of statutory duty such that

causing the company to act as they did amounted to breaches of duties of good faith to promote the company's success.

36. Mr Beaumont placed reliance upon the case of *Palmer Birch v Lloyd* [2018] 4 WLR 164. In *Palmer Birch* the court was concerned with facts with some similarity to those here. A debtor construction partnership claimed recovery of money from a director and shadow director of a limited company, even though the directors were not personally party to the contract. The shadow director was found to be liable for inducing the company to breach its contract, when he paid funds, which he was not obliged to make available to the contracting company but the Judge found that he should have paid to that company, to a successor company and procured the liquidation of the contracting company. HHJ Russen KC pointed out the fine line between prevention and inducement. The line in that case was crossed when the conduct amounted not merely to depriving the contract-breaker of funding but amounted to dissipating assets or funds away from that party, see [166] and [171].

37. In *Kawasaki* a parent company formed a joint venture which took business away from a subsidiary preventing the subsidiary from performing contractual obligations owed to the claimant. The claimant was held not to have an arguable claim against the parent company for inducing a breach of contract. At [51] Popplewell LJ distinguished *Palmer Birch* on the basis that the defendant in *Kawasaki* was under no obligation to direct business to its subsidiary.

Review of the POC

Paragraph 15

38. The allegation made in [15] that "the Defendants" plural were in breach of contract by terminating it is not sustainable against the first defendant who was not a party to the Agreement and should be struck out against him.

Breach of Contract

39. The starting point in considering the case against the first defendant is to identify the breach of contract by the Company which the first defendant is said to have procured. It is that the Company's compliance with clause 4.2 of the Agreement was rendered impossible, as set out in [25], by:

> "the diversion of the Property to CPL and the sale of the first defendant's shares to CPL rendering it impossible for the Company to comply with/perform the Contract with the intention of avoiding paying the claimant his profit share."

Procuring Breach of the Agreement

40. The complaint is that the Company was prevented from performing the Agreement. Subject to the conduct complained of crossing the line from prevention to inducement as identified in *Palmer Birch*, conduct cannot qualify as inducement if it amounts to no more than preventing performance as is made clear by *OBG* itself and the *Kawasaki* case. Here the line would seem only potentially to be crossed if the first defendant was under some obligation to the Company to route the acquisition of the Property to the Company, such that a failure to do that amounted to a dissipation.

41. The relevant pleading directed at the first defendant is at [28] POC which pleads that "such behaviour", that is the behaviour alleged:

> (i) in [25] of rendering compliance with clause 4.2 of the Agreement impossible;
> (ii) in [26] of apparently assisting the avoidance of performance of the Agreement; and
> (iii) in [27] of thereby intentionally or recklessly engineering a breach of the Agreement.

constitutes the tort of inducing or procuring the Company's breach of contract.

42. These paragraphs refer to actions taken by the first defendant as director of the Company. The claimant has not pleaded in the POC any want of bona fides or authority and has not identified any actions which were not taken bona fide and within the first defendant's powers as a director of the Company. The claimant has not pleaded any facts or matters that indicate the first defendant was acting personally or as a separate joint participant.

43. There is no plea of and no evidential basis to support the averment of inducing or procuring by the first defendant by persuading, encouraging or assisting. The claimant's case is that the alleged breach of Agreement follows from the Company's actions in transferring the Property and so on. It does not involve the assertion that something the first defendant did amounted to encouragement or persuasion capable of

influencing the Company to breach the Agreement. There can have been no inducement because, if the first defendant chose to organise the Company's affairs as he did, any consequent breach was inevitable; there was no question of the Company's mind or will being operated upon.

44. There is no plea that the first defendant owed any obligation to the Company to structure the Property acquisition in any particular way so that a crossing of the line from prevention to inducement, as identified in *Palmer Birch,* occurred.

45. Plainly the first defendant knew of the Agreement, but there is no plea that the first defendant appreciated that his actions would place the Company in breach of the Agreement.

46. Paragraph 27 includes a bare plea of intention, albeit wholly unparticularised, and not sustainable unless the first defendant knew his actions would result in a breach of contract.

47. In the absence of, at least, a plea of an action that was not bona fide and outside his authority it is difficult to see how the first defendant could be said to have done anything which joined in with or assisted the Company in a breach of contract making him an accessory.

48. As they stand paragraphs [25] to [28] of the PoC do not contain a viable plea of the tort of procuring or inducing a breach of contract against the first defendant and therefore should be struck out against the first defendant.

Damages

49. Even if the claim in tort were fully pleaded in the POC against the first defendant, the plea at [32] that "the Defendants and each of them are liable to the Claimant in damages for loss of profit and/or unpaid commission" is not sustainable against the first defendant who was not a party to the Agreement. The correct measure of damages against him, if a tortfeasor, would be the sum to put him in the position he would have been if no tort had been committed. Accordingly, paragraph [32] of the POC should be struck out as against the first defendant.

Is there material in the Reply and the Proposed Amendments to the POC that would allow a viable case to be pleaded against the first defendant?

The Reply

50. By [20(d)] of the Reply the first defendant is alleged to have procured or induced a breach by the Company of its alleged duty to act in good faith to the claimant.

51. By [20(l)] of the Reply the first defendant is put to proof of his bona fides, it being said that his actions were liable to bring the Company into disrepute and so not within his authority as a director

52. By [20(n)] of the Reply the first defendant is put to strict proof that he did not believe that the Company could be liable in due course to the claimant under the Agreement;

53. By [20(q)] of the Reply it is pleaded that the direct conveyance to CPL appears to have been a diversion by a director of an asset away from the company to which he owed fiduciary duties such that the first defendant was not acting bona fide and/or within the scope of his authority as a director, because this was not in accordance with his duty under section 172 of the Companies Act 2006 to promote the success of the Company.

54. [20(q)] of the Reply pleads that the first defendant placed the Company in breach of an implied duty of good faith it owed to the claimant.

The Proposed Amendments to the POC

55. The proposed amendments to [22], [23] and [25] are part of the breach of contract claim and do not add anything to the tort claim against the first defendant personally. I do not understand them to be objected to.

56. The proposed amendment to [26] would add the word "thereby" to the first sentence, linking the allegation of assistance to the matters pleaded in [25]. It would also add the following:

> "In doing so, he did not act bona fide and/or in the interests of the Second Defendant, as the Second Defendant was alone entitled to complete the transaction, but that entitlement was assumed by CPL at the direction of the First Defendant, without arranging that any consideration be paid by CPL to the Second Defendant that the first defendant did not act bona fide in the interests of the Company.

57. The proposed amendment to [27] would replace "or" by "and/or" and add "actually and/or on an anticipatory basis" before "engineered".

58. The Defendants do not object to the amendment to add "and/". They do object to the balance of the amendment on the basis that they say it is incomprehensible.

59. The proposed amendment to [28] would replace "contract with" with the words "express payment obligations towards".

60. The proposed amendment to [30] would add details of the alleged implied contractual duty of trust and confidence as between the claimant and the Company. The defendants deny the existence of any such duty in circumstances where the contractual relationship between the claimant and the Company was not one between employer and employee and was not a fiduciary relationship. Even if there were such a duty any breach would clearly be a breach of the contract between the claimant and the Company.

61. Mr Beaumont relies upon the case of *Yam Seng Pte Limited v International Trade Corp Ltd* [2013] as authority for the proposition that a court might be prepared to imply a duty of good faith into a "relational" contract if it were necessary to give effect to the intention of the parties.

62. The proposed paragraph [30A] adds a new plea against the first defendant that his actions amounted to committing the tort of inducing the Company's alleged breach of the alleged duty of trust and confidence. The first defendant complains that the proposed amendment fails to set out how the first defendant is said to have induced or procured the alleged breach and fails to plead that the first defendant knew his conduct

would have the effect of breaching such a duty. It also fails to plead any relevant intention on the part of the first defendant to breach the duty.

63. The proposed amendment to [31] is a plea against the Company only and is not objected to.

Analysis

64. The Reply puts the first defendant to strict proof as to his bona fides and pleads that the first defendant appears to have acted in a way that was not bona fide or was outside his authority as a director. It also puts the first defendant to strict proof that he did not believe the Company could be liable to the claimant under the Agreement. Further it refers to the alleged breach of duty to promote the success of the company pursuant to section 172 of the Companies Act 2006.

65. The additional words proposed to be added to [26] of the POC refer to the first defendant not acting bona fide and/or in the interests of the Company and plead that the first defendant re-directed the Company's entitlement to purchase the Property to CPL without payment of consideration.

66. The additional words proposed to be added to [27] do not appear to add anything to the meaning of that paragraph. It remains a bare assertion of intentional or reckless engineering of the Company's breach of contract but without any pleading that the first defendant knew that would result.

67. The alternative words proposed to be inserted in [28] plead a different breach of contract. The reformulation again fails to plead that the first defendant knew that the Company would have a liability to the claimant under clause 4.2 of the Agreement.

68. The new [30A] is a new plea of inducing a breach of the newly pleaded alleged breach of the alleged duty of trust and confidence owed by the Company to the claimant.

69. It was only in response to the first defendant's application that the claimant sought to put on a proper footing its case that the first defendant as a director of the Company could have procured a breach of contract because he acted in a manner that was not

bona fide and without authority to take him outside the rule in *Said v Butt*. However, the current version of the amended pleading is still deficient as it does not plead the relevant knowledge on the part of the first defendant that his actions would result in a breach of contract, plead the breach of section 172, which is only referred to in the Reply, or plead how it is said that the first defendant was under an obligation to the Company to route the acquisition of the Property to the Company to come within *Palmer Birch*.

70. I must consider whether to allow the claimant to put forward a further version of a proposed amended POC to remedy the identified deficiencies.

71. I must consider the overriding objective and that what the claimant wants to advance, using Mr Beaumont's word, is a case that the claimant was "conned" by the manner in which the first defendant structured the purchase of the Property by CPL and that until disclosure the claimant has limited knowledge of the first defendant's actions. The key matter on which Mr Beaumont relies as showing that the first defendant was acting in bad faith and/or outside the scope of his authority is to be inferred from the facts as to the structure of the transaction already pleaded.

72. The authorities indicate that care is needed in deciding whether an alleged breach of duty on the part of a director is such as to amount to bad faith. As Lane J said in *Antuzis* at [122] "whether such a breach has these effects will… depend on the circumstances of the particular case". Those circumstances include the nature of the duty alleged to have been broken, the motivation of the director alleged to have been in breach of duty, the nature of the contract alleged to have been broken; and the consequences of the breach. The effects the contract breaking will have on the company will be relevant to the question whether the director was acting in good faith in the company's interests. It is therefore not a matter easily susceptible to summary determination.

73. Although the application to amend was made as a late response to the application to strike out, the case is at an early stage and the Reply had already raised the *Said v Butt* point and alleged breach of the section 172 duty.

74. The decision in *Palmer Birch* appears to give the claimant scope to argue that the original tort alleged against the first defendant is viable notwithstanding that the original breach alleged amounted to prevention of performance of the contract, provided a relevant obligation of the first defendant to the Company is pleaded and can be established.

75. The new tort alleged against the first defendant of procuring the breach of the Company's alleged duty of trust and confidence owed to the claimant is not a prevention of performance allegation. However, to plead the tort completely the claimant must plead the first defendant's knowledge that his conduct would result in such a breach and that the first defendant had that intention, which are matters not presently pleaded.

76. For a claim to have a real prospect of success it has to be more than merely arguable, there has to be some substance, but it does not have to be a claim which is more likely to succeed than to fail.

77. Mr Beaumont's line of argument that a sole director and shareholder of a company who caused the Company to divert the acquisition of a property to another was in breach of his section 172 duties and thus induced or procured a breach of the company's contract with another is not compelling but it is a legitimate argument and is not merely fanciful. I am persuaded, narrowly, that the argument has a real prospect of success.

78. Accordingly it is neither appropriate to strike out the claim that the first defendant induced or procured the Company's breach of clause 4.2 of the Agreement nor to grant summary judgment in respect of it. Instead the claimant is to have the opportunity to amend its claim to properly advance that case and to plead the further tort of inducing or procuring the Company's breach of the alleged duty of good faith.

79. I am minded to impose a short time limit for submission of a re-amended pleading from the claimant with provision for the claim against the first defendant to be struck out in the event that the time limit is not met.

80. This judgment will be handed down remotely and without attendance at 2:00 pm on 7 July 2023. If it is not possible for the parties to agree consequential matters they will be dealt with on the papers.