Neutral Citation Number: [2023] EWHC 725 (Ch)

Case No: BL-2021-000577

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

The Rolls Building,
7 Rolls Buildings,
Fetter Lane,
London,
EC4A 1NL

Date: 27 January 2023

Before:

MASTER PESTER

- -

Between:

TETHYS PETROLEUM LIMITED

Claimant

- and -

(1) THE RT HON THE LORD LILLEY
(2) JULIAN HAMMOND

Defendants

- -

- -

IMRAN BENSON of Counsel (instructed by **Rosling King LLP**) appeared for the **Claimant**
BEN VALENTIN KC and **MAX KASRIEL** of Counsel (instructed by **Clyde & Co LLP**) appeared for the **Defendants**

- -

APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MASTER PESTER:

A. INTRODUCTION

1. This is my judgment on an application by the Defendants, dated 28 July 2022, to strike out or obtain reverse summary judgment in respect of the claim against them ("the Dismissal Application").

2. The Claimant is a company registered in the Cayman Islands. The Defendants were both directors of the Claimant. The Claimant company's operations are focused on Central Asia, principally in Kazakhstan. It is a publicly listed company with its primary listing on the TSX Venture Exchange. The Claimant's pleaded claim is for damages in the amount of US$3.4 million plus interest.

3. The First Defendant ("Lord Lilley") was a non-executive director of the Claimant between 26 July 2006, or possibly 8 June 2007, and 18 November 2014 and a non-executive chairman between 28 July 2012 and 10 September 2012. The Second Defendant ("Mr Hammond") was an executive director of the Claimant between 18 January 2012 and 10 June 2015. There is also an issue, to which I return below, as to whether Mr Hammond was an employee of the Claimant during the relevant period.

4. In response to the Dismissal Application, the Claimant has issued two applications, namely: (i) an application to amend the Particulars of Claim ("the Amendment Application"); and (ii) an application for permission to adduce expert evidence on what is described as "grammatical issues" ("the Expert Application") in the form of a report produced by Dr Helen Walter PhD, a linguist and grammarian at Oxford University. In addition, there are costs issues relating to the proceedings which I must decide, specifically in relation to the costs of and occasioned by the Claimant's application for an extension of time in which to serve the claim form and Particulars of Claim ("the Extension Application").

B. THE ISSUES

5. The Defendants have not filed a defence. The Dismissal Application is brought on five grounds. In summary, the Defendants say the following:

   i) First, the claims against each of the Defendants as former directors is bound to fail because of the indemnity contained in Article 133(A) of the Claimant's articles of association ("Issue 1").

   ii) The contractual claim against Mr Hammond is bound to fail because the Claimant was not a party to the services agreement on which the Claimant expressly relies against Mr Hammond and so Mr Hammond was never an employee of the Claimant. It follows that that claim should be struck out or alternatively summary judgment granted in Mr Hammond's favour ("Issue 2").

   iii) Further, the contractual claim against Mr Hammond is an abuse of process as no such claim is referred to in the claim form ("Issue 3");.

   iv) In any event, the claims against both Defendants are bound to fail because the Claimant did not sustain the relevant loss; instead, it is said that any loss as

may have been suffered was sustained by a subsidiary of the Claimant ("Issue 4").

v) Finally, whilst the claim form refers to a second claim described as the "Georgia Claim", that claim has been abandoned and the Claimant has indicated that it does not intend to pursue such claim. It follows, say the Defendants, that if the Claimant does not serve a notice of discontinuance in relation to that claim, then the Georgia Claim should in any event be struck out by the court ("Issue 5").

6. The Defendants stress that these five grounds each provides an independent basis to strike out or grant summary judgment on the claim, or at least part of it.

C. BACKGROUND

The claim

7. Turning to the claim form, this states, under the heading "Brief details of claim", the following:

> "As against the First and Second Defendants:
>
> (1) Damages for negligence and/or breaches of the duties owed by each of them to the Claimant as its former directors arising out of their acts and/or omissions in respect of
>
> (i) the entry by the Claimant's Kazakh subsidiary Tethys Aral Gas LLP into tripartite financing arrangements with Eurasia Gas Group LLP and RBK Bank JSC in 2012 and the continuing failure of the Claimant's board thereafter to monitor the risk of default by Eurasia Gas Group LLP; and
>
> (ii) the decision of the Claimant's board in June 2013 resolving to invest in oil and gas exploration blocks in Georgia. …"

8. It is important to note that the claim asserted against the Defendants is one for negligence and not fraud nor any form of conscious wrongdoing. That that is the case appears not only from the claim form, the material parts of which I have read out in full, but also from the evidence filed in response to the Dismissal Application. I note that at paragraph 20 of his witness statement William Wells, the current chairman of the board of directors of the Claimant, refers to the Defendants' negligence in causing the Claimant to enter into a loan agreement. However, this allegation appears not to be factually correct in any event (as will later appear) as it is the Claimant's subsidiary company that entered into the loan agreement referred to.

9. Further, the Claimant's solicitor, Martin Meredith, refers at paragraph 11 of his third witness statement filed in support of the Amendment Application to the Claimant's:

> "… claim in negligence and/or breaches of duties owned [sic] by each of the Defendants as its former directors at common law and in equity arising out of their acts and/or omissions in respect of a loss making transaction entered by the Claimant."

10. Turning to the Particulars of Claim, these set out the factual background to the claim. The Claimant was originally incorporated in Guernsey but later re-registered in the Cayman Islands in July 2008. As I have already explained, the Defendants at various times were directors of the Claimant. I note in passing that there is a discrepancy in the dates given for Lord Lilley's directorship in the Particulars of Claim and in the witness statement of the Claimant's current chairman of the board, Mr Wells, filed in opposition to the Dismissal Application, but nothing would seem to turn on this.

11. As pleaded in the Particulars of Claim, the claim concerns a transaction entered into by the Claimant's subsidiary in 2012 after the Claimant company's re-registration in the Cayman Islands. In summary, the Claimant's case is that:

    i) In 2012 the Claimant's Kazakh subsidiary, Tethys Aral Gas LLP ("TAG") entered into a tripartite loan agreement with Eurasia Gas Group LLP ("EGG") and a Kazakh bank, RBK Bank JSC ("RBK"), (hereafter the "Transaction"). The nature of the Transaction was that RBK would provide a loan facility of up to US$24 million to EGG which in turn EGG would make available to TAG. The loan was secured by way of pledges of TAG's assets to RBK (hereinafter "the Pledges").

    ii) A total of US$12.9 million was advanced by EGG to TAG pursuant to the Transaction.

    iii) By 14 February 2018, several years after both Defendants had resigned from their directorships of the Claimant, TAG's loan with EGG had, on the Claimant's case, been repaid in full.

12. I note in passing that this last point is disputed by the Defendants, but this is not a matter which I need to, nor indeed can, decide. In any event, the Pledges were not cancelled and remained in effect. EGG defaulted on its loan with RBK with the consequence that RBK's successor sought to enforce the Pledges. I pause here to note that RBK's successor sought to enforce the Pledges as against TAG but not against the Claimant.

13. In 2019 the Claimant and TAG settled with RBK's successor on the basis that TAG would pay approximately 1.4 billion Kazakh tenge, about US$3.4 million, to release the Pledges. TAG's payment was funded by the Claimant. It is not alleged that the Defendants had any involvement in the settlement.

14. It is then said that the Defendants each owed the Claimant a duty to exercise the reasonable care and skill to be expected of an experienced, skilled and competent director. This is not controversial as a legal proposition. It is alleged that both Defendants owed such duties as directors and that Mr Hammond also owed similar coextensive duties "as a senior employee of the Claimant".

15. The Claimant has allegedly suffered a loss caused by the breaches of duty on the parts of the Defendants. In essence, it is alleged that the Defendants acted negligently in failing to include an express and enforceable mechanism as part of the Transaction for TAG to ensure that EGG repaid its loan to RBK and release the Pledges upon payment by TAG. The Claimant further alleges that had such a mechanism been

included, the Pledges could not have been enforced and the Claimant would not have been required to pay the sum of US$3.4 million for their release.

16. As already mentioned, the claim form also refers to a claim in respect of an alleged decision of the Claimant's board in June 2013 to invest in oil and gas exploration blocks in Georgia. This is the Georgia Claim. However, no particulars of the Georgia Claim are provided in the Particulars of Claim and the Claimant has confirmed that the Georgia Claim has been abandoned, although it has not been discontinued.

Procedural background

17. The Defendants were notified of the potential claim by a preliminary notice of claim sent to both Defendants individually in June 2020. Among other matters, the preliminary notice of claim indicated that the Defendants should contact the relevant insurers, an apparent reference to the Defendants' directors and officers insurance. This was followed by two further letters, both dated 25 March 2021, warning the Defendants that the Claimant was about to claim against them "in negligence and/or for your breach of directors' duties" in respect of the Transaction, and regarding the investment in Georgia. The letters enclose a standstill agreement.

18. On 31 March 2021, the claim form was issued. The transactions of which complaint is made date back to 2012. The Claimant contends that pursuant to section 14 of the Cayman Limitation Law, 1996 Revision, which is materially identical to section 14A of the Limitation Act 1980, time only began to run on 5 April 2018. It was on this date, according to paragraph 52 of the Particulars of Claim, that the Claimant was first notified by the Kazakh bank of a potential claim under the Pledges.

19. By a consent order dated 29 June 2021, the parties agreed to stay the proceedings, including the requirement for service of the claim form, for a period of six months. The purpose of this agreed extension was to enable the parties to engage in compliance with the practice direction on pre-action conduct. The stay was further extended by order dated 21 December 2021, again by consent, this time for a period of just over three months to 23 March 2021 (sic – 23 March 2022 must have been intended) with the claim form and Particulars of Claim to be served within the remaining unexpired period, being 25 April 2022.

20. In the intervening period, the Defendants sent letters of response on 26 November 2021. On 18 March 2022, shortly before the expiry of the stay, the Claimant sought an eight week extension. This was refused by the Defendants. On 21 April 2022, the Claimant applied for an extension of time for service of the claim form until 23 May 2022 with a further 14 days thereafter in which to serve the Particulars of Claim. In the end, the Claimant's application for a further extension of time was resolved by a consent order dated 26 May 2022. However, the issue of the costs of the Claimant's Extension Application was reserved for further hearing.

D. LEGAL PRINCIPLES

Summary judgment / strike out: the applicable test

21. CPR Part 24, r. 24.2 provides that the court may grant summary judgment where the respondent to the application has no real prospect of succeeding on the claim or issue,

and there is no other compelling reason why the case or issue should be disposed of at trial.

22. Authoritative guidance on the meaning of the phrase "no real prospect of succeeding on the claim or issue" was provided in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], a decision of Lewison J, as he then was. The guidance given in that case has been followed on many occasions and approved by the Court of Appeal. I must consider whether the Claimant has a realistic, as opposed to fanciful, prospect of success. A realistic claim is one that carries some degree of conviction, being more than merely arguable.

23. For present purposes, point (vii) is perhaps particularly important and merits being set out in full:

> "(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."

24. I was also directed to *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793 at [38] regarding the overlap between an application for summary judgment and one for strike out, as follows:

> "The approach to such twin applications was summarised in *Global Asset Inc v Aabar Block SARL* [2017] 4 WLR 163 at [17]. In a case of this kind, CPR 3.4(2) and CPR 24.2 should be taken together and a common test applied. If a defendant is entitled to summary judgment because the Claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing a claim and should be struck out. The court must consider whether the Claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91. In essence, the court is determining whether or not the claim is 'bound to fail':

see *Altimo Holdings v Kyrgyz Mobil Tel Limited* [2012] 1 WLR 1804 at [80] and [82]."

25. In the course of the parties' submissions, I drew attention to *Lex Foundation v Citibank NA* [2022] EWHC 1649 (Comm) at [34] - [35], which set the proposition that where a respondent to a summary judgment application claims that there will be further evidence available at trial, they should provide some indication of what that further evidence might be, explaining at least in general terms the nature of the evidence, its source and its relevance to the issues before the court.

26. Further, where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend: *Kim v Young* [2011] EWHC 1781 (QB) (referred to in the notes to the White Book, Vol. 1, at para. 3.4.2). Of course, in this case the Claimant has already put forward a proposed amended case, so in that sense it could be said the Claimant has already had an opportunity to amend in light of the challenges made by the Defendants to the Claimant's case.

Principles of interpretation

27. As one of the key issues which I must decide is the proper construction or interpretation of Article 133(A), I set out here the proper approach to construction. Although I am construing an article in the articles of association of a company registered in the Cayman Islands, neither party submitted that the law of the Cayman Islands has any different principles of construction. It is clear that questions of construction of a contractual document governed by a foreign law may be decided summarily where the court considers that there are no reasonable grounds for considering that the position which might emerge at trial as regards any principles of construction would be materially different.

28. Over the last few decades there have been several authorities decided by the House of Lords or the Supreme Court setting out the correct approach to construction. The exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant: see *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, per Lord Clarke of Stone-cum-Ebony at [21]. In doing so, the court must have regard to all the relevant surrounding circumstances: ibid.

29. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other, ibid; and see also *Arnold v Britton* [2015] AC 1619 per Lord Neuberger at [15]. The process of construction is not simply a matter of consulting the meaning of words in the dictionary as Sir Thomas Bingham, Master of the Rolls, as he then was, said in *Arbuthnott v Fagan* [1995] CLC 1396, page 1400, and cited in *Rainy Sky v Kookmin Bank*. Instead, again per Sir Thomas Bingham, construction is thus "a composite exercise, neither uncompromisingly literal nor unswervingly purposive."

30. Further, the usual principles of contractual interpretation apply when construing a company's articles of association. However, a number of authorities, usefully summarised in Lewison, *The Interpretation of Contracts* (7th ed., 2020) at paragraph 3.176, indicate that whilst there is no absolute prohibition on considering extrinsic material for the purpose of interpreting the articles of association of a company, the admissible background is limited to what any reader of the articles would reasonably be supposed to know. Thus, because the articles of association are required to be registered, the number of readers may be large and so the amount of admissible background material is likely to be limited.

31. The Claimant submitted that in construing an indemnity clause, the court adopts a narrow construction. No authority was cited to me for this proposition. However, this seems to me uncontroversial as far as it goes. As a matter of law, the courts adopts the same principles of interpretation when construing an indemnity clause as apply when construing an exemption clause: see Lewison, paragraph 12.117. However, what one must always remember is that the scope of an indemnity clause depends on its precise terms read in the context of the contract as a whole.

E. DISCUSSION AND ANALYSIS

Issue 1: whether the Defendants can rely on the indemnity provision

32. It is common ground that the Claimant's articles of association have always contained a provision providing an indemnity to directors and former directors. Although the numbering of this provision has varied, it is currently found at Article 133(A) of the Claimant's articles. It provides in full as follows:

> "Without prejudice to any indemnity to which he may otherwise be entitled, every person who is or was a director, alternate director or secretary of the company and their respective heirs and executors shall be entitled to be indemnified (to the extent permitted by applicable law) out of the assets and profits of the company from and against all actions, expenses and liabilities which they or their respective heirs or executors may incur by reason of any contract entered into or any act in or about the execution of their respective offices or trusts except such (if any) as they may incur by or through their own wilful act, neglect or default respectively and none of them shall be answerable for the acts, receipts, neglects or defaults of the others of them or for joining in any receipt for the sake of conformity or for any bankers or other person with whom any moneys or assets of the company may be lodged or deposited for safe custody or for any bankers or other persons into whose hands any money or assets of the company may come or for any defects of title of the company to any property purchased or for insufficiency or deficiency of or defect in title of the company to any security upon which any moneys of the company shall be placed out or invested or for any loss, misfortune or damage resulting from any such cause as aforesaid or which may happen in or about the execution of

> their respective offices or trusts except should the same happen by or through their own wilful act, neglect or default."

33. Such provisions are not permitted as a matter of English law. Indeed, they have been prohibited for nearly 100 years now since the Companies Act 1929, section 152 provided, so far as material, that:

> "Any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void."

The current version of that prohibition is found in the Companies Act 2006, section 232. However, in contrast, such provisions remain permissible as a matter of Cayman law. The Cayman Islands have no equivalent to section 132 of the Companies Act 1929. That much is common ground.

34. The submission for the Defendants runs as follows:

i) The indemnity applies to both Defendants because at all material times they were each "a director… of the company" and the claim is in respect of losses alleged to have been caused by breaches of their duties as directors. The indemnity to which they are entitled is "from and against all actions, expenses and liabilities which they… may incur by reason of any contract entered into or any act in or about the execution of their respective offices…"

ii) The conduct complained of falls squarely within the scope of the indemnity provision, because the present action is concerned exclusively with liabilities the Defendants are said to have incurred by reason of acts performed in the execution of their respective offices as directors: see Particulars of Claim, paragraph 4, which pleads in terms a duty on the part of the Defendants to exercise reasonable care and skill to be expected of an experienced, skilled and competent director.

iii) There is an exception to the indemnity introduced by the words "…except such, if any, as they may incur by or through their own wilful act, neglect or default respectively". The plain meaning of the exception is that the indemnity does not apply if the defendant directors are guilty of "conscious wrongdoing", because that is the meaning of conduct which is wilful, both on a plain reading of the provision and as established in the authorities. Furthermore, the word "wilful" necessarily governs each of the words which follows it: that is act, neglect and default.

iv) Neither the original Particulars of Claim nor the proposed draft Amended Particulars of Claim properly allege conscious wrongdoing in the sense required to trigger the operation of the exception.

v) Given that the Claimant has agreed to indemnify the Defendants in respect of the matters pleaded in the Particulars of Claim and the Amended Particulars of Claim, the Claimant has no cause of action against the Defendants: see *The Viscount of the Royal Court of Jersey v Shelton* [1986] 1 WLR 985 per Lord Brightman at 991F-G. Therefore, the claim is bound to fail and can and should be struck out or summarily dismissed without trial.

35. The Claimant challenges these submissions on a number of grounds. First, the Claimant submits that the articles cannot be relied on by either Defendant, albeit for different reasons. The letter of appointment for Lord Lilley is expressly subject to Guernsey law which currently renders void the indemnity clause relied upon. As to Mr Hammond, it is submitted that there is insufficient evidence to reach a definitive conclusion that Mr Hammond was appointed on the footing of the articles.

36. I was referred to *Goodman v Cummings* (Cayman Cause No. FSD 204 of 2016, unreported, 13 September 2018), a case which considered whether articles of association had been incorporated into the terms of a director's appointment as director. Following a full citation of the relevant English and overseas authorities, the Court held, at paragraph 106, that the following legal principles applied to the issue of incorporation:

> "(1) Articles of association are not in themselves a contract between the company and its directors.
>
> (2) However, if a director is appointed or employed 'on the footing' of the articles (or particular provisions in the articles) their terms are embodied in and form part of the contract between the company and the director.
>
> (3) Where a director is engaged without any separate or special terms of engagement (ie in the form of a separate employment or service contract) the court will more readily conclude that the articles contain terms on which the director accepts appointment.
>
> (4) Comparatively little is required to satisfy the court that, in a particular case, an indemnity provision is incorporated in the contract which is made when the company appoints a director."

37. The Claimant acknowledges that Lord Lilley was appointed "on the footing" that the Claimant's articles were incorporated into his contract for services. This concession was rightly made in light of the express terms of the appointment letter of Lord Lilley. However, the Claimant contended that as the Guernsey legislature, belatedly following the English example, has prohibited indemnity clauses for directors, Lord Lilley could not rely on the indemnity, because the letter of appointment is governed by Guernsey law.

38. This argument seems to me plainly wrong. The Claimant was initially registered as a Guernsey company. Lord Lilley became a director in 2006 when he was first appointed and was subsequently then formally appointed pursuant to the appointment letter in 2007. At that time, there was no law in Guernsey invalidating director

indemnity clauses. The statute on which the Claimant now relies came into force on 1 July 2008, but with a transition period for existing directors extending to 1 January 2010. However, on 17 July 2008 the Claimant company migrated from Guernsey to the Cayman Islands and was re-registered there.

39. The Claimant's argument that because Lord Lilley's original appointment letter is governed by Guernsey law, therefore the applicable law in relation to Article 133(A) is Guernsey law even after 17 July 2008, is wrong because the Guernsey statute only applies to "a company" which plainly means, in context, a Guernsey company: see sections 87, 98 and 157(2) of the Companies (Guernsey) Law 2008. There is no suggestion that the statute has, or is intended to have, any extraterritorial effect. Given that, since 17 July 2008, the Claimant has been a Cayman, and not a Guernsey, company, and Cayman law does not prohibit granting indemnity provisions to a director, there is no legal difficulty in Lord Lilley relying on it.

40. As to Mr Hammond, the Claimant submitted to me that there was a real issue as to whether Mr Hammond had been appointed "on the footing" of the articles at all. The only documentary evidence relating to the appointment of Mr Hammond that either side has produced is found in a resolution of the Claimant's board of directors dated 17 January 2012. This provides that Mr Hammond *"is hereby appointed to the board of directors with effect from January 17, 2012 and in accordance with the Company's articles of association to serve until dissolution of the next annual meeting of the shareholders of the company unless he is reappointed at that meeting."*

41. I consider that that resolution suffices to hold that Mr Hammond was appointed "on the footing" of the Claimant's articles. The Claimant's submissions on this point, as far as I understood them, were that the reference to the company's articles was to time limits in the articles and nothing else. This makes no sense. It would make no sense and be unworkable in practice to appoint a director on the basis that only a single article applied to his appointment, certainly without a very clear indication that that was the intention of the parties. Given that the Claimant accepts that Lord Lilley was appointed on the footing that the articles applied, it would be surprising were Mr Hammond to have been appointed on a different basis from another director.

42. In any event, it has been said that relatively little may be required to incorporate articles of association by implication: see *John v Price Waterhouse* [2002] 1 WLR 953 per Ferris J at [26] - [27]; *Globalink Telecommunications v Wilmbury Ltd* [2003] BCLC 145 per Stanley Burnton J at [30] - [31]. The position may be different where the director is someone without experience or knowledge as to commercial matters, which Mr Hammond is not even on the Claimant's case: see Particulars of Claim, paragraph 50A.1. (I note that that is a paragraph in the proposed Amended Particulars of Claim; but that is a plea which I should not ignore for the purposes of considering the Claimant's case on Mr Hammond's experience or knowledge.)

43. The Claimant also pointed out that Mr Hammond himself has not filed any evidence setting out the basis on which he was appointed. Accordingly, the Claimant submitted that there was a real prospect that further documentation might become available following disclosure which would in some way tend to throw doubt on the basis on which he was appointed. I do not accept this. A respondent to a summary judgment application, if it wishes to suggest that there is or may be further material available, is obliged to give some indication of what that material might be and how it might be

relevant to the issues: see *Lex Foundation v Citibank NA* cited above. The evidence filed on behalf of the Claimant does not attempt to grapple with this point.

44. In any event, one would expect the Claimant to have access to all the documentation that might exist in relation to the terms on which directors were appointed and could reasonably be expected to have identified such document as may exist. The only document referred to in the Particulars of Claim relevant to the appointment of Mr Hammond as director is the resolution to which I have already referred.

45. I accordingly find that Mr Hammond was, just like Lord Lilley, appointed "on the footing" that the Claimant's articles applied and therefore that he is in principle entitled to invoke the indemnity provision. Accordingly, the first challenge to the Defendants' reliance on the indemnity provision fails.

46. Second, the Claimant submitted that if the Defendants could have recourse to the indemnity in principle, then nevertheless Article 133(A) did not apply to a case of this kind because:

> "the article defends Defendants against their acts when the bulk of the claim against them is for their omissions."

It will be recalled here that the operative part of the indemnity covers liability:

> "… against all actions, expenses and liabilities which they… may incur by reason of any contract entered into or any *act* in or about the execution of their respective offices…"

(emphasis added).

47. If the Claimant's submissions were correct, then the exception for wilful act, neglect or default would not have been drafted in that way as both neglect and default can more readily be seen as applying to omissions as to defaults. If the first part of the clause was limited to only positive acts, there would be no need for an exception extending to neglect and default. The submission of the Claimant seems to me to be a classic example of focusing too closely on one word and thereby failing to interpret a provision as a whole. As every pleader knows, it is often a very fine line whether an alleged wrong is characterised as an act or an omission. I do not accept that indemnity in a company's articles of association can turn on such fine distinctions, with the consequence that if the Claimant chose to plead its claim on the basis of wrongful omissions, one could in this fashion avoid the indemnity. There is also the difficulty of what would be the result if a director omitted to do something in the process of doing something else. The construction for which the Claimant now contends appears to me to be unworkable in practice and entirely uncommercial. As a matter of interpretation, I hold that the indemnity relates to an act in a wide sense and thus also covers omissions committed in or about the execution of their office. Thus, again I reject the premise of this submission.

48. At the hearing before me, counsel for the Claimant also advanced an argument, not alluded to in his skeleton argument, to the effect that the opening part of the indemnity on which the Defendants rely does not relate to claims by the company itself, but only to claims brought by third parties. Some support for this submission

may be derived from *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, where Romer J at first instance, when construing a somewhat similar (but not identically worded) article to the one I am considering[1], suggested that:

> "The earlier part of this article appears to be concerned with actions and claims against the directors brought or made by persons other than the company itself." (see at page 430).

49. Romer J's decision is certainly a (if not the) leading case on the construction of indemnity clauses in articles of association. I note however that Romer J's comments were tentative: see his use of the words "appears to be". In any event, the comments were also clearly *obiter dictum*.

50. In response, the Defendants' counsel referred to two cases, where both courts held that indemnities contained in the articles of association of the respective companies and which were in substance close to, albeit again not identical with, the provision that I am construing, provided a complete defence to the Defendants directors who were being sued by the respective companies: see *Perpetual Media Co Ltd v Enevoldsen* (CA of Guernsey, Judgment 16/2014) and in *Peterson and Ekstrom v Weavering Macro Fixed Income Fund* [2015] (1) CILR 45,

51. Counsel for the Claimant sought to bolster his submission that Article 133(A) only provided an indemnity in relation to claims by third parties and not by the company itself by suggesting that positive duties to act are typically found as a matter of substantive law only in relation to parties where there is a pre-existing legal obligation, and not to third parties more widely. In this context, he made a passing reference to *Stovin v Wise* [1996] AC 923 as authority for this proposition, which is obviously a very different case.

52. Ultimately, it is a matter for me to construe the true meaning of the article. I reject the Claimant's submission that the indemnity only applies to claims by third parties and not to actions by the company itself. Article 133(A) is drafted widely extending to:

> "…all actions, expenses and liabilities which they… may incur by reason of any contract entered into or any act in or about the execution of their respective offices or trusts."

There is no reason to read that down by inserting the words "except in relation to a claim by the company".

---

[1] The provision in question was as follows: *"The directors, auditors, secretary and other officers for the time being of the company, and the trustees (if any) for the time being acting in relation to any of the affairs of the company, and every of them, and every of their heirs, executors and administrators, shall be indemnified and secured harmless out of the assets and profits of the company from and against all actions, costs, charges, losses, damages and expenses which they or any of them their or any of their heirs, executors or administrators shall or may incur or sustain by or by reason of any act done, concurred in or omitted in or about the execution of their duty, or supposed duty, in their respective offices or trusts, except such (if any) as they shall incur or sustain by or through their own wilful neglect or default respectively and none of them shall be answerable for the acts, receipts, neglects or defaults of the other or others of them, or for joining in any receipts for the sake of conformity, or for any bankers or other persons with whom any moneys or effects belonging to the company shall or may be lodged or deposited for safe custody, or for insufficiency or deficiency of any security upon which any moneys of or belonging to the company shall be placed out or invested, or for any other loss, misfortune or damage which may happen in the execution of their respective offices or trusts, or in relation thereto, unless the same shall happen by or through their own wilful neglect or default respectively."*

53. I also note in this context that Mr Wells in his witness statement suggested various reasons why the indemnity would not be, or should not be, construed in such a way as to bar the Claimant's claim. The points were as follows:

    i) There is no reason why any company would want to provide an indemnity to its directors in respect of losses caused to the company by the director's own negligence. It seems to me this is simply a submission on the part of Mr Wells. Article 133(A) obviously provides an indemnity in favour of the Defendants at the expense of the Claimant. It is a question ultimately for the court to determine the scope of that indemnity which has to be answered (and can only be answered) by reference to the words used in their context.

    ii) English law has banned broad indemnity clauses. This seems to me wholly irrelevant, since the validity of the articles is a matter of Cayman law under which such clauses are permissible. Further, the fact that it was necessary in England to enact a statutory prohibition in the Act of 1929 shows that they are effective at common law as a matter of interpretation, because otherwise there would have been no need for a statutory ban.

    iii) It was said that the Claimant company's directors and officers insurance covers mere negligence but not wilful neglect. However, I am not sure that this is actually factually correct. Such insurance policies as have been exhibited do not appear to support the submission. Even if it were correct, there is no basis to rely on the terms of the Claimant's directors and officers insurance as an aid to the interpretation of the articles. This is not least because the articles do not require that the Claimant take out such insurance: Article 133(B) of the Claimant's articles of association merely provides that the Claimant may do so but does not specify the terms on which any such insurance may be taken out. There is, in any event, no reason to suppose that the specific wording of the insurance taken out by the Claimant which likely occurred only after the articles were first adopted was within the contemplation of the parties, or otherwise can be prayed in aid as part of the background matrix as a guide to interpretation.

    iv) Finally, Mr Wells made the point that was picked up by his counsel to suggest that the indemnity provided by Article 133(A) was limited so as to protect the directors against claims from third parties rather than claims by the company itself. I have already rejected this submission as a matter of construction.

54. Accordingly, I reject the Claimant's submission that the indemnity provided by Article 133(A) is limited to protecting the directors against claims from third parties, and not from claims by the company itself.

55. Thirdly, the Claimant submitted that properly interpreted the indemnity "does not prevent a claim for non-wilful neglect or default". The Claimant made the point that, as there is a comma between "wilful act" on the one hand and neglect or default on the other, it is at least ambiguous whether the word "wilful" governs neglect or default. An example was provided by Dr Walter. In the sentence, "He was wearing blue trainers and socks", the word "blue" clearly governs trainers; but it is unclear whether the socks referred to are blue or not.

56. In support of its submission on this point, the Claimant relied upon the report of Dr Walter, the Oxford University grammarian, as an aid to construction. I have to say by way of preliminary remark that I derived only very limited assistance from Dr Walter's report. Indeed, I consider that the purported reliance on it was unnecessary for me to decide the issues of construction put before me, and possibly even improper. My reasons for saying this are as follows:

    i) The expert application was for permission pursuant to CPR rule 35.4 to rely on Dr Walter's report as expert evidence. However, expert evidence should be restricted to what is reasonably required to resolve the proceedings: CPR rule 35.1.

    ii) With all respect to Dr Walter, I do not consider her evidence to be expert evidence at all. For expert evidence to be reasonably required, the subject matter must not be "such that a person without instruction or experience in the area of knowledge of human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area": see *RBS (Rights Issue Litigation)* [2015] EWHC 3433 (Ch) per Hildyard J at [17]. Reading and interpreting a contractual provision written in English is not a recognised body of expertise which is not otherwise available to the court.

    iii) Where Dr Walter goes wrong is to adopt an overly narrow approach. In certain respects she explains that she can give no "discernible meaning" to the words used in Article 133(A). This, however, is not the right approach to construction. One does not focus only on dictionary meanings when construing a legal provision. Moreover, Dr Walter engages in what is an impermissible process of rewriting "in plain English" Article 133(A). In doing so, she purports to usurp the court's function and seeks to determine the very issue which is for the court to determine.

    iv) Finally, to the extent that Dr Walter seeks to rely on various decisions of English, Cayman and US law, this is inadmissible as Dr Walter is not legally qualified.

57. By the time of the hearing, the Claimant simply said that it was not pursuing the Expert Application as an application to adduce expert evidence. Instead, the court should treat Dr Walter's report as a matter of submission giving it whatever weight it thought appropriate. It seems to me, therefore, that regardless of the outcome for this hearing, I should dismiss the Expert Application as it is no longer pursued.

58. Returning now to the construction of Article 133(A), the starting point is that if the indemnity is to have meaning and effect, there must be a clear dividing line between conduct which is indemnified and conduct which falls outside the indemnity. In my view, there is such a clear dividing line, one that accords both with the natural reading of the clause and with the existing case law. The key points are as follows:

    i) The Court of Appeal of the Cayman Islands in *Weavering Macro Fixed Income Fund Limited (In Liquidation) v Peterson* considered an indemnity

with similar, albeit again not identical, wording[2]. In particular, the Court of Appeal with the leading decision given by Sir John Chadwick, President, considered the meaning of the words "wilful neglect" or "default".

ii) The Court of Appeal in *Weavering v Peterson* held that wilful neglect or default involved the company proving either: (a) that the director made a deliberate and conscious decision to act or to fail to act in knowing breach of his duty and negligence, however gross, was not enough. Alternatively, (b) that the director appreciated at the least that his or her conduct might be a breach of duty and made a conscious decision that, nevertheless, he or she would do, or omit to do, the act complained of without regard to the consequences.

iii) The use of the word "respectively" shows, in my view, that wilful applies to both neglect and default. I note that in *Perpetual Media Capital v Enevoldsen* (the case in the Court of Appeal of Guernsey) the relevant article on which the director relied was in similar terms to the present but the indemnity there contained a carve-out in respect of "their own wilful act neglect or default respectively", this time without a comma separating "wilful act" from "neglect".

iv) In the present Article 133(A) there is a comma placed after "wilful act". This makes no difference. Although the Claimant's solicitors relied on the presence of the comma, Dr Walter herself pointed out that the comma at the end of "wilful act" is not sufficient to eliminate the ambiguity which exists either way. Dr Walter therefore somewhat undermined the impact of the Claimant's submissions. It seems to me that in order for the exception to apply and thus for the indemnity to fall away, the court needs to find that the directors acted in a way that they either knew or suspected was a breach of duty and yet carried on regardless. This creates a clear and intelligible exception to conduct which would otherwise be indemnified.

v) Counsel for the Claimant submitted that, if "wilful act, neglect or default" were to be read in the way contended for by the Defendants, then the various sub-clauses in the second half of Article 133(A) would be unnecessary (dealing with specific situations, such as lodging or depositing assets with bankers, or defect of title in property acquired by the Company). Counsel for the Defendants submitted that those specific instances were simply accretions to the indemnity, probably added over time to deal with specific situations which had arisen in practice. In my view, whatever the origin of those additional sub-clauses, they do not have the effect of watering down the key provisions of the indemnity.

vi) The Claimant had a further submission on this point, which was to say that the exception to the indemnity applies wherever there is a "wilful act". The

[2] The provision was as follows: *"Every Director, agent or officer of the Company shall be indemnified out of the assets of the Company against any liability incurred by him as a result of any act or failure to act in carrying out his functions other than such liability (if any) that he may incur by his own wilful neglect or default. No such Director, agent or officer shall be liable to the Company for any loss or damage in carrying out his functions unless that liability arises through the wilful neglect or default of such Director, agent or officer."*

Claimant submitted that this meant one where there was a deliberate act, interpreted so as to mean one where the directors were aware of what they were doing. The Claimant relied on a decision of the Irish Supreme Court in *ICDL GCC v European Computer Driving Licence* [2012] IESC 55 in support of this proposition. That case did not concern the construction of articles of association but, rather, dealt with a licensing agreement in relation to the seven countries of the Gulf Cooperation Council. More particularly, the dispute between the parties related to a limitation of liability clause where liability was limited insofar as it was not caused "by a wilful act or gross negligence". In the leading judgment of the Supreme Court, given by Fennelly J, it was held that in context it would suffice for an act to be wilful, if it were done deliberately and that it was not necessary for the party committing it to do it with intention to injure or that the person committing it knew that it is unlawful: see at paragraph 128.

vii) In other words, in Fennelly J's view, all that would be required for the exception to apply would be some deliberate, that is volitional act. Unless the directors were asleep or in the grip of a psychotic episode, the indemnity would not apply. That is an initially surprising view, although it may be justified in light of the specific provision under consideration in that case. The position adopted by the majority was that the right to an indemnity would be lost, provided that the party relying on the clause committed an "intentional act"; it was not necessary to show that the party appreciated that those actions amounted to a breach of contract (as Fennelly J went on to find that they did): see at paragraph 160.

viii) However, in a powerful and, to my mind, persuasive dissent, O'Donnell J pointed out that he was unable to agree with this formulation because to interpret "wilful act" in that way would in most, if not all, cases lead to the automatic disapplication of the limitation clause. At paragraph 24 of his dissenting judgment, O'Donnell J said this:

> "It is of course the case that when viewed in isolation, the words 'wilful act' can be understood as meaning no more than intentional, voluntary, or willed, and not automatic, inadvertent or accidental. But those words have to be viewed in the context in which they are used. It also carries a connotation of self-will, perversity, and being headstrong and even obstinate. Furthermore, it is not merely a 'wilful act' which is required to disapply the limitation contained in clause 25.1: it must be a wilful act which gives rise ('causes' in the language of the clause) to a cause of action. The act in its wilful or intentional nature cannot be separated from the cause of action, in this case an alleged breach of contract. It is in my view clear, that what must be intended, or willed or be the subject of obstinacy, is a breach of contract (or other wrong giving rise to a cause of action arising out of the contract). This is not only consistent with what I consider to be the natural meaning of the words, but also the structure of the clause, and with the limitation in clause 25.1 being

> disapplied only in exceptional circumstances. The line which is drawn is a logical one and furthermore consistent with the distinction being made in the context of gross negligence. In this way there is a continuum of the type of conduct which will lead to the limitation clause not being applied. This conduct runs from intentional breach, through headstrong conduct, recklessness and gross negligence. In each case the conduct must relate to the possibility of a breach of contract. In this way the clause is being read as a consistent and coherent whole, rather than by reference to dictionary, or judicial, definitions of individual words…"

ix) It seems to me wrong, both as a matter of language and as a matter of authority, to read wilful act in the context of Article 133(A) as meaning simply any deliberate act: see *Burnett or Grant v International Insurance Company of Hanover Ltd* [2021] 1 WLR 2465 per Lord Hamblen, Justice of the Supreme Court, at [46] - [54] for a useful discussion of some of the principles that could be applied when construing the meaning of "deliberate act".

59. If the Claimant were right in its suggested interpretation of the clause, then the exception of a wilful act, neglect, or default would almost entirely swallow up the initial starting indemnity. I therefore reject the Claimant's submission that Article 133(A) is to be interpreted in such a way that wilful act is to be read as being limited to acts which were deliberate and that wilful does not restrict both neglect and default. Instead, the word "wilful" applies to all three. In reaching my conclusion, while I am engaged in construing the language actually used in Article 133(A), I am also in my view following guidance given by two experienced panels of judges in the Court of Appeal of both the Cayman Islands and Guernsey in dealing with similarly but again, I emphasise, not identically worded indemnity clauses.

60. Fourth, the Claimant submits that even if only a wilful act, wilful neglect, or wilful default is sufficient for the Defendants to lose the indemnity to which they would otherwise be entitled, then the Claimant seeks permission to amend its Particulars of Claim to allege that the Defendants' actions did, indeed, amount to a wilful breach of duty. The Claimant submits that:

> "There is ample reason to consider that the default and neglect by Defendants are wilful since they were expressly alerted to the problem by KPMG."

61. The existing Particulars of Claim advance a case based solely on a negligent breach of duty. This is plain from the Claim Form, the Particulars of Claim and the evidence filed in response to the Dismissal Application. The question therefore is whether I should allow the proposed amendments. In *Peterson and Ekstrom v Weavering* [2015] (1) CILR 45, Sir John Chadwick P, in giving judgment in the Court of Appeal of the Cayman Islands, concluded that:

> "It follows that, in my judgment, the Directors are correct to content that, in order to establish the liability of a director under the second limb of the *City Equitable* test - 'recklessly careless in the sense of not caring whether his act or omission is or is

> not a breach of duty' - it is necessary to satisfy the court that the director appreciated (at the least) that his or her conduct might be a breach of duty and made a conscious decision that, nevertheless, he or she would do (or omit to do) the act complained of without regard to the consequences; and that if the evidence does not establish that the defendant at least suspected that his neglect or default might constitute a breach of duty, it is not appropriate to characterise his breach of duty as 'wilful neglect or default' whether under the first or second limb of the City Equitable test. To hold otherwise would, in my view, be to fail to give full meaning to the requirement that the "neglect or default£ relied upon must be 'wilful'." (at [117])

62. At paragraph 50A of the proposed Amended Particulars of Claim the following is alleged:

> "If, contrary to the Claimant's case, the Court finds that a necessary condition of liability of the Defendants is that the breaches of duty are wilful, then the Claimant will aver that they were wilful. The Claimant will rely on, inter alia:
>
> 50A.1. The fact the Defendants are sophisticated and experienced business people and board members.
>
> 50A.2. The fact that the Defendants as a matter of basic competence must have been concerned by and interested in TAG-EGG-RBK transaction given its unusual structure and major importance the group and the substantial risks it posed.
>
> 50A.3. The express warnings from KPMG and PWC including those summarised above. The effect of these was to bring home the importance of the TAG-EGG-RBK transaction, the risks associated with it, the inadequate paperwork and the absence of a readily verifiable and enforceable mechanism to ensure repayment by EGG of the loan.
>
> 50A.4. The decision by the Defendants to not pursue a direct bank loan – without the risk and complications of the intermediary EGG. The negotiations with the bank appear to have taken place in [the first quarter of] 2012. The possibility of the bank loan was raised with the Defendants in August 2012. The Defendants chose instead to pursue the TAG-EGG-RBK transaction despite a direct bank loan being available. This more complicated transaction created an obvious risk (which the Defendants were warned about) and they were at the same time told how chaotic and disorganised the existing arrangements were and they did nothing. They then failed to follow up on KPMG's warnings, they failed to ask the management to confirm that they had heeded these warnings. They did not implement the Pledges Safeguard Obligation or take steps to ensure payment by EGG of the loan, they failed to

> instruct the lawyers to properly analyse the existing legal documents."

63. Looking at the proposed amendments, particularly the proposed paragraph 50A as a whole, new subparagraphs 50A.1 and 50A.2 clearly do not support any allegation of conscious wrongdoing. As to paragraphs 50A.3 and 50A.4, these allegations, even if proven, seem to me in their current form consistent with an allegation of negligence and therefore not conscious wrongdoing.

64. Obviously this is a summary judgment / strike out application and I must not turn the hearing of the dismissal application into a mini trial on the documents. However, I was taken to the minutes of a meeting of the audit committee of Tethys Petroleum Limited held at 2.30pm on 10 August 2012. Lord Lilley, Mr Hammond and two representatives of KPMG were in attendance at that meeting together with a number of other directors of the Claimant. I have considered these minutes carefully. The minutes record that the representative from KPMG pointed out that:

> "… although there was no question over the relationship with EGG, clearly there was a risk aspect and although the Bank loan is with EGG, the Company needed to ensure that EGG would honour its side of the loan with the Bank. [The KPMG representative] stressed that from the Company's perspective, there needed to be a clear picture of the arrangements put in place. …"

65. Mr Hammond is then recorded as commenting that sufficient procedures had been carried out for the original US$5 million loan that had been negotiated with the separate Kazakh bank, but when it subsequently transpired that a larger facility with better terms of repayment from a different Kazakh bank became available, there was a short time to secure this new facility and then:

> "… perhaps the process was somewhat rushed and similar procedures were not fully implemented."

66. Both parties sought to derive assistance in the course of submissions from *Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm). This was a case where the claimant bank successfully resisted an application by the defendant to strike out the Particulars of Claim. The key paragraph for present purposes, at [20], is as follows:

> "I agree with Mr Gourgey QC that this overstates what is required for a valid plea of fraud. The Claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact 'which tilts the balance and justifies an inference of dishonesty'. At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the

> plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge. This is made absolutely clear in the passage from Lord Hope's speech at [55]-[56] which I quoted above."

67. My conclusion on the proposed amendments is that what is lacking in their current form is any plea that either Lord Lilley or Mr Hammond took a deliberate and conscious decision to act or fail to act in knowing breach of his duty, or at a minimum that the Defendants appreciated that their conduct might be a breach of their duties but made a conscious decision to proceed. The Defendants submitted that not to follow the advice of auditors is not necessarily wilful neglect. I agree, although it may be if a director is told to do something by the auditors and this is not done, it is certainly a deliberate act. However, there is no duty to follow advice from auditors and a failure to do so is not necessarily negligent. There is nothing in the current proposed paragraph 50A which in the words of the *Kekhman* decision "tilts the balance" so that what is alleged is more likely than not consistent with, in this case, "wilful neglect or default" rather than simple negligence.

68. In the course of his submissions, counsel for the Claimant said that, if required, he could further revisit the wording of the new paragraph 50A and add further wording to make it plain that what was being alleged was that there was indeed a wilful breach in the sense required by the *Weavering* case. The difficulty is that, as counsel for the Defendants pointed out, the Claimant has already had an opportunity to seek to rescue its claim by putting in the proposed amendments. In any event, it seems to me that I can only address whatever proposed amendments are actually put before me with counsel's name on it. I will not give permission at this juncture for the claim to continue on the basis of a hypothetical amendment which has not been presented to the court.

69. At this stage, I do not express any view on whether the Claimant has, or has not, the evidentiary basis to make a proper plea of wilful neglect or default as those terms are explained in the *Weavering* case. However, I do not consider that what is required is simply a matter of adding a particular form of words to the proposed Amended Particulars of Claim. It is a matter of considering whether or not the Claimant has a real prospect of succeeding on a case of wilful neglect at trial. What must be shown is the facts as pleaded are more likely than not to amount to a case of wilful neglect or default, as set out in the authorities and as I have interpreted them, rather than simple negligence. I note that even at the conclusion of the hearing there was no application to amend the Particulars of Claim beyond what is already set out in the draft Amended Particulars of Claim produced in December 2022.

70. I therefore refuse the Amendment Application. This has the consequence that, subject to considering the separate position of Mr Hammond as an alleged employee of the Claimant, which is the next issue to which I turn, the Defendants are entitled to rely on the indemnity and to be fully indemnified in respect of the claims pleaded in the Particulars of Claim. This means that there is no cause of action against and the Defendants are entitled to summary judgment and for the claim to be struck out.

Issue 2: whether the Claimant is a party to the service agreement with Mr Hammond

71. There is an alternative claim against Mr Hammond, alleging that he was an employee of the Claimant, that he owed duties as an employee to the Claimant and that he breached those duties: see paragraph 38 of the Particulars of Claim as follows:

> "The Second Defendant, as a senior employee of the Claimant (chief commercial officer and CEO), also owed it a duty to exercise reasonable care and skill with respect to his functions."

72. In relation to that plea, Mr Hammond's solicitors raised a Part 18 request of the Claimant. Request 1 asked:

> "Please confirm whether it is the Claimant's case that the alleged duty is owed at common law or under contract."

And the response was:

> "It is a term to be implied into the contract of employment between the Claimant and the Second Defendant. A term requiring a higher duty (and which is now relied upon) was expressly set out in the contract."

Then Request 3 was as follows:

> "If it is the Claimant's case that the alleged duty is owed under a contract, please provide full and proper particulars of the alleged contract …"

And the response provided was as follows:

> "There was a contract of employment between the Claimant and the Second Defendant (see attached). If and to the extent this is denied by the Second Defendant the Claimant will specify details of it as appropriate."

73. Pursuant to that Response to Part 18 request, the Claimant duly produced a service agreement, apparently undated, the named contracting parties to which are Tethys Services Limited and Mr Hammond. There is therefore an immediate problem with the Claimant's reliance on the service agreement, in that there appears to be no privity of contract between the Claimant and Mr Hammond.

74. Turning to the detailed provisions of the service agreement, I note the following. The initial recital provides:

> "Whereas the Employer wishes to employ the Executive to act as Executive Vice-President Corporate Development of Tethys Petroleum Limited [that is the Claimant] on the terms and conditions of this Agreement and the Executive wishes to accept such employment."

I point out that Mr Hammond is defined as "the Executive", whilst the Employer is defined as the other company, Tethys Services Limited. However, in the definition section, "'Group" is defined to be Tethys Petroleum Limited, (that is the Claimant),

and any holding company and any subsidiaries or undertakings, and the Claimant is more specifically defined for the purposes of the service agreement as "the Company".

75. Clause 2.1 provides under the heading "the Employment":

> "**Appointment**
>
> Subject to the provisions of this Agreement, the Company employs the Executive and the Executive accepts employment as Executive Vice-President Corporate Development of the Company with effect from [a blank space] notwithstanding the date or dates of this Agreement. The Executive will report on a day to day basis to the Chief Executive Officer of the company."

At clause 3 (Duration of the Employment), and clause 3.1 (Continuous Employment), it states:

> "The Executive's continuous period of employment with the Company commenced on 1 June 1998…"

I interpose here to say I have no basis for knowing whether that date is right or wrong, but it certainly does not appear to be right.

76. Clause 3.3, under the heading "Payment in lieu of notice", provides at 3.3.1:

> "The Company shall be entitled, at its sole discretion, to terminate the Employment immediately in writing at any time and to make a payment to the Executive, calculated in accordance with the provisions of this clause 3.3 ..."

Such payment is defined as a "Notice Payment. This reference to the Company, in clause 3.3.1, is a reference to the Claimant. Again it is fair to point out, as counsel for the Claimant rightly showed me, that numerous other clauses in this agreement, including clauses 5.1 and 18.5, are drafted on the basis that the Employer is in fact the Claimant company but, of course, that does not sit very easily with the named parties to this service agreement.

77. Turning to such evidence as there is, Mr Wells says this at paragraphs 44 and 46 of his witness statement:

> "44. The services agreement was entered into by Tethys Services and Mr Hammond some time in 2007 for the employment of Mr Hammond by the Claimant as Executive Vice-President of Corporate Development…

> 46. The main purpose of Tethys Services was to employ UK based staff for the Claimant. Whilst it was decided by the Claimant that all of its UK based staff would be employed through Tethys Services, as far as I am concerned the reality on the ground was that Mr Hammond was always treated as and deemed to be an employee of the Claimant. However, I am not aware of the reason why the Claimant decided to employ the UK staff through Tethys Services as I was not closely involved in Tethys at that time."

78. At the moment, I do not see how there can be a contractual claim against Mr Hammond on the basis of the services agreement provided. The Claimant is simply not a party to it. Of course, there are various recognised and well established exceptions to the privity of contract principle. However, none is pleaded. I pressed counsel for the Claimant as to his case on this and received no clear explanation. The Contract (Rights of Third Parties) Act 1999 will not assist as it expressly does not apply to contracts of employment. There might well be a claim in tort whereby Mr Hammond owed tortious duties of care to the Claimant but that is not the current pleaded basis at paragraph 38 of the Particulars of Claim.

79. It was also submitted on behalf of Mr Hammond as a further and additional argument that the indemnity found in the articles of association protects him in any event. It was said that when one compares the pleaded breaches of director's duties with the pleaded breaches of his duties as a senior employee, they almost entirely overlap. This can be readily seen when one looks at and compares paragraphs 41 and 42 of the Particulars of Claim – in other words, the pleaded breaches of duty are the ones described as a breach of Mr Hammond's duties as director and the other as a breach of his duty as employee, they are largely if not entirely coterminous, sometimes even using the same words for the same breaches.

80. Given the way in which the Claimant has pleaded matters, there is no viable distinction between what it is alleged that Mr Hammond did or not do as employee and as a director. The same facts and matters are alleged in relation to both. For that reason, in my view the indemnity does protect Mr Hammond from any claim in his capacity as an employee even if it was held that I was wrong to have found that he was not employed by the Claimant in light of the terms of the service agreement on which the Claimant relies.

<u>Issue 3: whether the contractual claim against Mr Hammond is an abuse of process</u>

81. I can deal with this quite shortly. Because the claim form refers to the duties owed to the Claimant "as its former directors", the Defendants submit that it would be an abuse of process to pursue a claim against Mr Hammond as an employee. They say the claim form would need to be amended in circumstances where it is arguable that the limitation period in which to bring the claim has expired and, in any event, no application to amend has been brought.

82. Insofar as this is a procedural objection, there is a simple solution available to the Claimant. I agree that the claim form needs to be amended but I could simply require the Claimant to undertake to issue an application to amend and to remove the words "as its former directors" from the claim form. Insofar as there might be an arguable

limitation defence, given that the claim against Mr Hammond very plainly arises out of "the same or substantially the same facts as those already relied upon", permission could still be given to amend notwithstanding the arguable expiry of the limitation period, pursuant to CPR Part 17 rule 17.4.

83. However, insofar as the Defendants submit that it would be futile to permit the amendment given that the claim is otherwise liable to be struck out or summary judgment entered upon it, then I return to the point above which is that on the pleaded claim, I consider that Mr Hammond was not an employee of the Claimant in any event. Therefore the Defendants' objections to allowing the amendment to the claim form are as a matter of substance correct. Permission to amend the claim form should be refused if it would be pointless to allow the amendment.

Issue 4: whether the Claimant has suffered any loss

84. The Defendants say that all of the claims are bound to fail in any event because they have been brought by the wrong Claimant. It is contended that this is a knockout blow regardless of my findings on the other issues. The evidence in support of the Dismissal Application has identified all the underlying transactions entered into in 2012 said to give rise to the claim: see the second witness statement of Mr Kenton, paragraph 34. It is striking that the Claimant is not a party to any of these agreements. This evidence has not been challenged by the Claimant. At various points in his skeleton argument, counsel for the Claimant appeared to suggest that the Claimant had guaranteed TAG's obligations to EGG. This appears to be factually incorrect. There was no guarantee.

85. In the draft Amended Particulars of Claim, there are two references to the Claimant being "exposed to enforcement action" by the Kazakh bank or its successor. However, in oral submissions made to me, it was conceded that this was wrong and had to be removed. The only company exposed to enforcement action was the subsidiary, TAG. The only agreement which the Claimant appears to have entered into was the settlement agreement entered into on or about 24 December 2019, that is at a time when neither of the Defendants was a director of the Claimant. The only reason why the Claimant made the payment of the equivalent of US$3.4 million pursuant to the settlement agreement was because TAG apparently lacked the funds to do so.

86. On those facts, it appears that the Claimant took a voluntary decision, for perfectly sound commercial reasons, to make a payment to prevent enforcement action being taken against TAG. However, the Claimant was not legally obliged to make that payment. In those circumstances, it does appear that the losses pleaded in the Particulars of Claim are losses flowing from the alleged failure to include in the transaction documents what has been described as the pledges safeguard obligation. They are therefore losses which have been incurred by TAG, which was a party to those transactions, and not the Claimant, which was not. An alternative way of conceptualising matters is that the breaches pleaded in section E of the Particulars of Claim are properly seen as breaches of duties owed to TAG by its directors and not to the Claimant.

87. In the evidence filed in response, Mr Wells makes a number of points as follows. First, Mr Wells complains that the Defendants' position is unsupported by evidence.

That response does not go anywhere as the Defendants' strike out application is founded on paragraphs in the Claimant's own Particulars of Claim.

88. Secondly, it is said that TAG is ultimately a wholly owned subsidiary of the Claimant, and the Claimant should have the right to make a claim for its subsidiaries. There is no pleaded basis for this assertion. It also seems to me wrong as a matter of English law.

89. Thirdly, it is said that discussions and decisions about the transaction took place at the Claimant's board meetings and the affairs of TAG are managed by the Claimant. Even if I accept that as true, and on a summary judgment application I probably should, this does not have the effect in law of making the Claimant either a party to the transaction or a party able to claim loss as a result of the transaction, and there is no pleaded basis for making such an assertion.

90. Finally, it is said that advances from EGG were shown on the Claimant's financial statements and the Claimant carried out a fair assessment of its liabilities for the purposes of its 2012 financial accounts. There is an obvious answer to this. That is, the Claimant's financial statements are consolidated statements which include the financial statements of subsidiaries. In any event, this accounting point does not give rise to, as a matter of law, any pleaded loss on the part of the Claimant.

91. I therefore reject the various points made by way of submission by Mr Wells. Accordingly, it does seem to me that even if I were wrong in my construction of Article 133(A) in the Claimant's articles of association, this is a wholly separate reason to grant the Defendants an order striking out the claim, or alternatively entering summary judgment on the dismissal application.

<u>Issue 5: what are the consequences of the abandonment of the Georgia claim?</u>

92. This is another short point. As mentioned above, the Claimant refers to two claims in the claim form: the claim in relation to the transaction, that is between TAG, EGG and RBK; and a separate claim in relation to a 2013 investment in oil and gas exploration blocks in the Republic of Georgia. The Particulars of Claim make no reference to the Georgia claim. The Claimant has confirmed it is not pursuing them. The question is what should be done about it.

93. If a claim is not being pursued, the right course of action is for the Claimant to file a notice of discontinuance in relation to it, alternatively for it to be struck out. This is a simple matter of case management. The Claimant has not filed a notice of discontinuance, apparently because it wishes to avoid the presumption set out in CPR Part 38 that the costs following a discontinuance are to be paid by the Claimant. The Claimant draws to my attention the following facts:

   i) The claim form envisaged the claim might include the Georgia claim.

   ii) However, following a review about points made on behalf of the Defendants in correspondence following the issue of the claim form, it was decided not to pursue the Georgia claim.

iii) If the Claimant were to be ordered to pay the costs of the Georgia claim it would "incentivise bad litigation tactics".

94. I am far from convinced that the Claimant's submissions on this point are right. It seems to me that if claims are not being pursued, the sooner there is a recognition by all the parties that that is the case, the better it is for everyone. However, the parties agreed, with my blessing, that it made sense to address the cost consequences of the Georgia claim only after I handed down judgment on the Dismissal Application as a whole. At this stage, I will simply indicate that it does seem to me appropriate, even if I had not held that the rest of the claim was liable to being struck out for the reasons given above, to strike out the Georgia claim. However, the court has a discretion on costs and I will consider the discrete costs occasioned by the Georgia claim at a hearing to be fixed to deal with consequential matters.

F. CONCLUSION

95. It follows for the reasons given in this judgment that the Dismissal Application succeeds. The claim is struck out pursuant to CPR rule 3.4(2), alternatively, summary judgment is given in favour of the Defendants pursuant to CPR rule 24.2. As to the two other applications before me made by the Claimant, I dismiss both the Expert Application and the Amendment Application.

96. I will formally adjourn this hearing to a date to be fixed convenient to the parties' counsel, at which hearing I will hear submissions on any consequential orders, including any submissions on costs.

(This Judgment has been approved by Master Pester.)

Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Telephone No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com