Neutral Citation Number: [2025] EWHC 384 (Ch) No. BL-2024-001071

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

Rolls Building
Fetter Lane
London, EC4A 1NL

24 February 2025

Before:

DEPUTY MASTER HANSEN

B E T W E E N :

FUTURE SOUND ASIA SDN BHD

Claimant

- and -

(1) THE 1975 PRODUCTIONS LLP
(2) MATTHEW TIMOTHY HEALY
(3) ADAM BRIAN THOMAS HANN
(4) ROSS STEWART MACDONALD
(5) GEORGE BEDFORD DANIEL

Defendants

MR ANDREW BURNS KC & MR PAUL EMERSON (instructed by Child and Child Solicitors) appeared on behalf of the Claimant

MR EDMUND CULLEN KC & MR MARK WILDEN (instructed by Clintons LLP) appeared on behalf of the Defendants

Hearing date: 19 February 2025

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Approved Judgment

DEPUTY MASTER HANSEN:

1. This is my judgment on an application by the 2nd to 5th Defendants ("D2-D5") dated 17 September 2024 ("the Application") to strike out the claims made against them personally on the basis that the statement of case discloses no reasonable grounds for bringing those claims and/or on the basis that the Claimant has no real prospects of succeeding on those parts of the claim. Mr Cullen KC leading Mr Wilden appeared for the Defendants. Mr Burns KC leading Mr Emerson appeared for the Claimant. I am very grateful to all Counsel for their hard work on this case.

2. The Claimant is the organizer of a music festival known as the "Good Vibes Festival" in Selangor, Malaysia ("the Festival"). The music festival is an annual event. It began in 2013 and has been promoted and managed by the Claimant since that time save for a hiatus caused by the coronavirus pandemic.

3. The First Defendant ("the LLP") is a limited liability partnership incorporated on 27 August 2015 and operates as the corporate vehicle for live performances undertaken outside the UK by a band called "The 1975" ("the Band"). D2-D5 are the members of the Band. The Band has no separate legal personality but is a convenient shorthand for referring to the members of the Band collectively.

4. The Band had previously performed at the Festival in 2016 ("the 2016 Festival") and some significance is attached to that fact by the Claimant for reasons that I will explain in due course. However, the present dispute arises out of events at the Festival scheduled to take place between 21st and 23rd July 2023 ("the 2023 Festival").

5. By way of background, the Band has gained a certain reputation within the international music industry as supporters of LGBTQ rights and commentators on political issues and their support for certain causes has often been reflected in the nature of the Band's live performances. That said, the case is not about artistic freedom. It is about whether the members of the Band can be held personally liable as a matter of law for the events which unfolded at the 2023 Festival as a result of their live performance, notwithstanding the fact that the Claimant contracted with the LLP in relation to the Band's appearance at the 2023 Festival.

6. The Band performed on the first evening of the Festival. What is alleged to have happened is set out in some detail in paragraph 33 of the Particulars of Claim as follows:

> *"Matthew Timothy Healy and others, inter alia, displayed and carried out the following conduct:*
>
> *(a) Drank alcohol on stage from a bottle of wine that had been smuggled onto the stage by Member of the Band or a crew member;*
>
> *(b) Acted in a drunken way and appeared to be intoxicated;*
>
> *(c) Smoked cigarettes on stage;*
>
> *(d) Appeared to vomit on the stage and/or grunt and spit excessively, including towards the audience;*
>
> *(e) Deliberately damaged and/or destroyed a video drone belonging to the videographers engaged by the Claimant and boasted about doing such, with the following narrative:*
>
> *'Yes that is right ladies and gentleman push forward you get a push back.*
> *Fly one of these things over my head one more fucking time (throws drone down) I swear to God I will find you. Don't fly robots in my face (jumps and smashes the drone). Not in the fucking mood'.*
>
> *(f) Delivered a profanity-laden speech to the audience where, inter alia, the following was stated:*
>
> *'I feel sorry for you guys*
>
> *I made a mistake*
>
> *No fuck it, not that, I made a mistake, when we were booking shows, I wasn't looking into it, and then. I don't see the fucking point, right, I do not see the point of inviting The 1975 to a country and then telling us who we can have sex with.*
>
> *And I am sorry if that offends you and you are religious, and it is part of your fucking government. The government are a bunch of fucking retards, and I don't care anymore if you push, I am going to push back. I am not in the fucking mood. I am not in the fucking mood. If you are filming this on Tik Tok I am not in the fucking mood anymore.*
>
> *I saw Tik Tok the other day where I picked up a child that I love who is a friend of mine, friend of mine's child and I put them down and there was a Tik Tok conversation as to whether my finger placement was appropriate.*
>
> *So, what, we are casually accusing people of being a paedophile now are we for entertainment? Is that what we are doing No? Well, it fucking looks like it. I am not having a go at you there is people filming this. It fucking looks like it. You don't casually insinuate that shit. I am not in the fucking mood anymore.*

Unfortunately, you don't get a set of loads of uplifting songs because I'm fucking furious and that's not fair on you because you're not representative of your government.

Because you are young people, and I am sure a lot of you are gay and progressive and cool.

So, I pulled the show yesterday I pulled the show yesterday and we had a conversation and we said "you know what? We can't let the kids down because they're not the Government."

But I've done this before, I've gone to a country where, its, fucking…I don't know what the fuck it is? Ridiculous. Fucking ridiculous to tell people what they can do with that and that [points to groin and mouth] and if you want to invite me here to do a show, you can fuck off.

I'll take your money, you can ban me, but I've done this before and it doesn't feel good, and I'm fucked off".

(g) kissed another Band member, Fourth Defendant, Ross Stewart MacDonald, on stage in a pretend passionate embrace, for a prolonged period of time, such an event having been prearranged before the scheduled performance began and it took place after the various comments and references above and was linked to such comments".

7. This conduct is collectively referred to in the Particulars of Claim as "the contravening conduct" and I shall adopt that terminology but in doing so, I am making no findings on what in fact happened. However, for the purposes of the Application, it is common ground that I should proceed on the basis that the facts set out in the Particulars of Claim are assumed to be true.

8. The Particulars of Claim then go on to allege that the entertainment license held by the Claimant for the 2023 Festival was revoked as a result of the contravening conduct with the consequence that the remaining two days of the 2023 Festival were cancelled, causing substantial losses to the Claimant.

9. Against that background, on 23 July 2024 the Claimant issued proceedings against the LLP and the individual band members.

10. The Application relates largely to the claim against the individual band members, D2-D5. The Defendants also applied to strike out the apparent negligence claim against the LLP. However, Mr Burns confirmed in argument that the only claim being pursued against the First Defendant is for breach of contract and he specifically confirmed that no claim in

negligence is pursued against the LLP, despite the suggestion to this effect in the pleading and in the prayer for relief.

11. Thus the reference to "the LLP" in paragraph 56 which alleges negligence against "the LLP and the Band and each of the Band members" should be struck out. Likewise, any references in the prayer to "damages for breach of the duty of care" and "damages for negligence" which purport to relate to the First Defendant should also be struck out. Mr Burns also agreed that any references to the Band and/its members in connection with the allegations of breach of contract should be struck out as there is no claim for breach of contract against the individual band members, and nor could there be given that the only contract in place in this case is a contract between the Claimant and the LLP, the terms of which I shall return to in due course. To the extent therefore that the Application seeks to strike out those parts of the Particulars of Claim in paragraphs 50-55 which allege breaches of contract by the Band and/its members, I accede to that application and those parts should also be struck out.

12. I can now deal with the main thrust of the Application, which relates to paragraphs 23-25, 56-57 and 59-62 of the Amended Particulars of Claim ("APOC"). Paragraphs 23-25 and 56-57 allege that D2-D5 owed the Claimant a duty of care to act and perform in a reasonable, lawful and appropriate way when performing at the 2023 Festival and allege that that duty has been breached, resulting in substantial loss and damage to the Claimant in a sum just short of £2m. They also include a claim for exemplary damages. Paragraphs 59-62 seek to hold the D2 and D4 liable for inducing a breach of contract by the LLP.

13. I am proceeding by reference to what is a draft APOC on the basis that the case there pleaded is as good as the Claimant can make it. If it cannot survive in that form, it cannot survive at all. The parties agree that if I dismiss the application, I will also give leave to amend, and if I accede to the Application, I will refuse leave in relation to any amendments that impact D2-D5.

14. Paragraphs 23-25 allege that D2-D5 owed the Claimant a duty of care to act in a reasonable, lawful and appropriate way when performing at the 2023 Festival. The pleader goes on to say, referring to the well-known three-fold test for establishing a duty of care that "It was fair, just and reasonable in all the circumstances to impose a duty of care and each Band member assumed responsibility to the Claimant for the consequences of its actions". The matters relied on as giving rise to a duty of care are said to be as follows:

"(a) The matters set out in paragraphs 8 to 10 and 16 to 22.

(b) The fact that the Band were performing at the music festival.

(c) The fact that the Band were aware of the role of the Claimant in the music festival.

(d) The fact that the Band were aware that they had to conduct themselves in a lawful manner and comply with and not breach the Prohibitions and/or the Guidelines and not act in such a way as to require or precipitate the intervention of the PUSPAL concerning the music festival.

(e) The fact that the Band were aware that there would be adverse financial consequences if the music festival was suspended or cancelled or in any other way controlled or restricted by PUSPAL.

(f) The fact that the Band would cause loss and damage to the Claimant if they acted improperly, illegally or inappropriately while performing at the music festival causing it to be suspended or cancelled".

15. The matters set out in paragraph 8-10 relate to the 2016 Festival at which the Band also performed. Prior to the Band's performance at that festival, the Claimant's representative reminded the Band's Tour Manager of certain "prohibitions" in relation to the band's performance, namely that they should not swear on stage, smoke on stage, drink on stage, take off any article of clothing or talk about politics or religion. The Claimant's case is that these prohibitions "remained applicable, which was known to the LLP and the Band".

16. The matters set out in paragraphs 16-22 relate to (i) the so-called PUSPAL Guidelines (ii) certain provisions of Malaysian criminal law (iii) an assurance offered to PUSPAL to comply with "all local guidelines and regulations" and (iv) a conversation between a representative of the Claimant and the Band's Tour Manager shortly before the Band went on stage to perform in which the Claimant reiterated the importance of adhering to the PUSPAL Guidelines and not drinking or smoking on stage or discussing politics or LGBTQ issues.

17. The PUSPAL Guidelines are issued by the Malaysian Central Agency for the Application for Foreign Filming and Performance by Foreign Artists which prohibit behaviour "that may cause discomfort to the audience and that touch upon religious and social sensitivities, and are contrary to the cultural values of the local society". They then give a series of examples including "performing in a wild manner, and displaying actions that are contrary to the performance code of ethics" and "displaying actions or speech that is indecent, with

provocative acts such as kissing, kissing a member of the audience or carrying out such actions among themselves".

18. Paragraph 16A of the APOC sets out various provisions of the Malaysian criminal law which criminalise, inter alia, "doing an obscene act in any public place" and "any acts of gross indecency, including same sex kissing".

19. Paragraph 17 explains how the Claimant's application for a license to the Band to perform at the 2023 Festival was initially refused, apparently because of concerns raised in an article in Rolling Stone magazine about the D2's substance abuse problems. In order to pursue an appeal against this refusal, the Claimant's representative asked the Band's manager, a Mr Oborne, to provide a written undertaking to PUSPAL that the Band would "adhere to all local guidelines and regulations".

20. Paragraph 18 then avers that "Such undertaking was provided with the knowledge and agreement of the LLP and the Band and was relied on by the Claimant".

21. The form and content of the "undertaking" are important. The document in question is an undated letter provided by Mr Oborne on the letterhead of All on Red Limited which I shall hereafter refer to as the PUSPAL Letter. The addressee is "Unit PUSPAL", followed by an address. It is entitled "Re: Matthew Timothy Healy (Matty Healy) of The 1975" and provides (so far as material) as follows:

> *"To Whom It May Concern*
>
> *This agency serves as representation to the above-referenced individual.*
>
> *This letter confirms that Matthew Timothy Healy (Matty Healy) has fully recovered from his past heroin addiction and no longer uses the drug.*
>
> *...*
>
> *In addition we would like to reassure you that Mr Healy and The 1975's live performance set during their performance in Malaysia shall adhere to all local guidelines and regulations".*

22. Finally, the Claimant relies on the fact that, about an hour before the Band were due on stage, a representative of the Claimant informed three members of the Band's tour management team that:

"(a) The said Regulations had to be complied with.

(b) During the performance there was to be no smoking or drinking on stage by the Band or any of its members.

(c) During the performance there was to be no mention or discussion of any political issues or LGBTQ related issues.

(d) There would be serious consequences if there was misconduct …"

23. Paragraph 21 pleads that the representatives of the LLP and the Band accepted these restrictions and agreed to communicate them to the LLP and the Band and accepted that they would be complied with by the LLP, the Designated Members of the LLP and the Band. Paragraph 22 avers that if the representatives had indicated that the Band would not comply, the Band would not have been allowed to perform.

24. On the basis of the foregoing, the Claimants aver that each member of the Band has assumed responsibility to the Claimant for the consequences of its actions and/or that it is fair, just and reasonable that a duty of care is imposed in these circumstances. Insofar as the contravening conduct as pleaded was only undertaken by D2 and D4, the Claimant alleges that D3 and D5 are nonetheless liable as joint tortfeasors pursuant to the common design principle. Additionally, the D2 and D4 are alleged to be liable for inducing a breach of contract by the LLP.

25. I propose to deal with the claims and the strike-out/summary judgment application in the following order: (i) the duty of care issue (existence, content, breach); (ii) the common design claim; (iii) the inducement claim and (iv) the exemplary damages issue.

26. Before doing so, I shall briefly set out the well-known tests that I must apply in determining this application.

27. CPR 3.4(2) provides that:

> *"The court may strike out a statement of case if it appears to the court –*
>
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim …"*

28. Statements of case which are suitable for striking out on ground (a) include those which are incoherent and/or those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the claimant and would waste resources on both sides.

29. CPR 24.3 provides that:

> *"The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—*
>
> *(a) it considers that the party has no real prospect of succeeding on the claim... or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*

30. The relevant principles applicable to applications for summary judgment were helpfully set out by Lewison J as he then was in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at para.15 and approved by the Court of Appeal in *AC Ward & Son Limited v Catlin Limited* [2009] EWCA Civ 1098. They are as follows:

(i) The Court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success.

(ii) A "realistic claim" is one that carries some degree of conviction. This means a claim that is more than merely arguable.

(iii) In reaching its conclusion, the Court must not conduct a "mini trial".

(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.

(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.

(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.

(vii) On the other hand, if the claimant's case is bad in law, the sooner that is determined the better. Thus if the court is satisfied that it has before it the evidence necessary for the proper determination of the issue, and that the parties have had an adequate opportunity to address it in argument, the court should grasp the nettle and decide the point.

31. There is an overlap between the provisions of CPR 3.4 and the provisions of CPR Part 24. Broadly, the same principles will govern the defendant's strike-out application: White Book, 3.4.21. However, as noted by Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) at paragraphs 26 and 27:

> *"There is one potential distinction between the position in relation to an application for summary judgment under CPR r. 24.2 and an application to strike out under CPR r. 3.4(2)(a). As just noted, under CPR 24 evidence is admissible to show that the pleaded allegations are fanciful – albeit that the court will be very cautious about rejecting a claimant's factual case at the summary judgment stage.*
>
> *When considering an application to strike out however the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible."*

32. I would also refer to what the Judge said in the same case at paragraph 21 where she said this:

> *"The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that - even bearing well in*

mind all of those points - it would be contrary to principle for a case to proceed to trial."

33. With those principles in mind, I now turn to deal with the application.

34. Duty of Care. I have explained above the factual matrix relied on by the Claimant as giving rise to the existence of a duty of care owed by each of the individual members, the content of that alleged duty and the circumstances in which it is said it came to be breached, causing loss and damage to the Claimant.

35. What I have not yet explained in any detail is the contractual context against which this particular allegation falls to be considered. The Claimant does not pursue its plea of breach of contract against D2-D5 because they did not contract with the Claimant. Nor does the Claimant pursue its plea of negligence against the LLP. The claim against the LLP proceeds on the basis of alleged breaches of the express and/or implied terms of a written agreement dated 12 October 2022 ("the Contract").

36. The Contract is a contract between the Claimant as the Promoter and the LLP described as the Company for the services of The 1975, who are described as the Artist. The Contract provides as follows:

> *"Whereby the Promoter engages the Company and the Company accepts the engagement to present:*
>
> ***The 1975***
>
> *To appear at the venue(s) on the date(s) and upon the terms set out below:*
> *Blue stage: outdoor, Good Vibes Festival, Selangor Darul Ehsan, Kuala Lumpur, Malaysia – Friday 21 July 2023"*

37. There then follow terms dealing with the Artist's fee for the performance and the payment schedule for payment of the fee followed by a series of detailed provisions, under the heading "General Clauses", which deal with topics including the Artist's billing, artwork, advertising, press and media, sponsorship, recording, the capacity of the venue, the guest list etc.

38. There is then this section, under the heading "Show":

"12 PERFORMANCE TIME AND DURATION

12.1 The Artist will perform for a duration of tbc minutes
12.2 The Artist's stage time will be 22:00 to 23:00 tbc
12.3 The Artist is to appear on room/stage: Blue stage – outdoor. The capacity of the room/stage is: TBC"

39. There is nothing in the Contract about the PUSPAL Guidelines or adherence to local guidelines and regulations. Thus the Claimant's case against D2-D5 is not and cannot be that D2-D5 are co-extensively liable with the LLP for breach of contract; it is that D2-D5 have voluntarily assumed more onerous obligations to the Claimant than the LLP, the contractual counter-party.

40. There then follow a further detailed set of terms dealing with Security, Sanitation, PA and Lighting, Catering, Accommodation, Transport, Visas, Insurance, Legal and Cancellation. Under the heading Jurisdiction, it provides that the Contract shall be construed and governed in all respects in accordance with the laws of England and the Courts of England shall be the exclusive courts of jurisdiction.

41. The Contract is the understandable jumping off point for Mr Cullen's submissions. He submitted as follows:

> *"The Agreement was the means by which C, D1 and D2-D5 came together voluntarily to cooperate with each other (with the liability of the D2-D5 being limited as a result of their services being provided through D1) on the basis of what parties in their position would reasonably understand to be a particular allocation of risk. The agreed apportionment of liability included the use by D2-D5 of D1 as an LLP (with limited liability accordingly). C accepted that position."*

42. He then referred me to the recent case of *Lifestyle Equities CV v Ahmed* [2024] UKSC 17, [2025] AC 1 as representing the current state of the law on the intersection between the liabilities of corporate entities and their directors/agents. Whilst that case was concerned with trade mark infringement, Mr Cullen submitted that what Lord Leggatt there said about the significance of a contract between the claimant and the principal had a direct and telling read-across to the present case.

43. He referred me in particular to the following passages in the judgment of Lord Leggatt:

"54… When parties make a contract, unless the contract is personal in nature, the general rule is that a party may employ agents to carry out its obligations. When the contracting party is a company, that is of course the only possible means of performance. If a company breaks a contract, that must be because one or more agents of the company have caused the breach. When an agent, acting as such, makes a contract, the normal understanding is that the agent assumes no liability towards the other contracting party. Only the principal does. Similarly, the normal understanding is that, if the agent causes the principal to break the contract, only the principal will incur liability to the other contracting party, and not the agent. This is, I think, a general norm or social understanding which the law should and does reflect.

…

57. It is possible to view this consequence as an instance of a wider principle which Jane Stapleton in her recent book, Three Essays on Torts (2021), ch 2, p 35, calls "tort's cooperation principle". She argues that it is a general principle of tort law that, where parties come together voluntarily to cooperate with each other on the basis of what parties in their position would reasonably understand to be a particular allocation of risk, the law will not impose obligations in tort which would circumvent that risk allocation. An example is the common case of a building contract under which a single main contractor contracts with the building owner to construct a building and enters into sub-contracts for the performance of the work and the supply of materials. If the work or materials are defective, it is not normally open to the building owner to sue a sub- contractor or supplier in the tort of negligence. This is not because the building owner has made any contractual promise not to sue the sub-contractor or supplier. Ex hypothesi there is no privity of contract between them. It is because the participants have chosen to cooperate with each other on the basis of a risk allocation expressed in a particular contractual structure and the law of tort will not impose obligations which would circumvent this allocation of risk: see e.g. Simaan General Contracting Co v Pilkington Glass Ltd (No 2) [1988] QB 758; Norwich City Council v Harvey [1989] 1 WLR 828; Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, 196 (Lord Goff of Chieveley)."

44. On this basis, Mr Cullen submits that the imposition of a duty of care owed by D2-D5 to the Claimant would drive a coach and horses through this principle and is simply wrong in law. Mr Cullen maintained that liability in negligence could only attach to D2-D5 if they have assumed personal responsibility to the Claimant such as to give rise to a special relationship. In the present context, he submitted that the House of Lords decision in *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 defined the circumstances in which an agent could incur personal liability on this basis. In this connection he referred me to the following passages in the speech of Lord Steyn at pp. 834-835:

"It will be recalled that Waite L.J. took the view that in the context of directors of companies the general principle must not "set at naught" the protection of limited liability. In Trevor Ivory Ltd. v. Anderson [1992] 2 N.Z.L.R. 517, 524, Cooke P.

expressed a very similar view. It is clear what they meant. What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue in this case is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of Hedley Byrne, which requires the existence of a special relationship between plaintiff and tortfeasor, it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself.

...

"The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the franchisor company, and the director. In such a case where the personal liability of the director is in question the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees".

45. Applying that test to the pleaded facts at paragraph 23 of the POC, he submitted that none of them was sufficient to give rise to a duty of care, whether taken individually or cumulatively. In particular he submitted that:

    a. None of them comes close to being a communication by one or other of D2-D5 that he personally was assuming any responsibility to C.

    b. On the contrary, none of them is a communication by one or other of D2-D5 to C *at all.*

    c. Almost all of the alleged "*Facts and Matters Giving rise to a Duty of Care"* seem to concern the state of knowledge of *"the Band"*, which, according to *Williams*, has nothing to do with the question.

46. He further submitted that insofar as the Claimant alleged that it is fair, just and reasonable to impose a duty of care, this was an untenable submission where the substance of the duty is alleged to have been a requirement to comply with the PUSPAL Guidelines and/or the newly-pleaded Malaysian laws in circumstances where D2-D5 are not alleged to have known of their content.

47. Mr Burns' overarching submission in response was that the Claimant had a more than fanciful prospect of persuading a court at trial that this was one of those unusual and/or novel situations where, on the particular facts and notwithstanding the absence of any contract between the Claimant and the individual band members, a duty of care might nonetheless arise on the basis of a special relationship and an assumption of responsibility and/or on the basis of the three-fold test referred to above.

48. <u>*Discussion*</u>. I accept, as Mr Burns submitted, that the assumption of responsibility principle derived from *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. [1964] AC 465 is not confined to statements but may apply to any assumption of responsibility for the provision of services. I also accept that this extended *Hedley Byrne* principle is capable, in principle at least, of rendering D2-D5 personally liable on the basis of an assumption of responsibility. However, it is worth recalling, in this connection, how Lord Devlin explained the principle, namely on the basis that "*the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in Nocton v. Lord Ashburton [1914] A.C. 932 , 972 are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract*": at pp. 528-529. It is only if the case does not fall within the extended *Headley Byrne* principle, that one needs to embark on the further inquiry whether it is "fair, just and reasonable" to impose a duty of care.

49. I also accept the point that Mr Burns was at pains to emphasise, namely that the question whether the Court would uphold a duty of care in circumstances such as the present is fact sensitive. However, it is not realistic to suggest that the material facts are not already before the Court and it is not enough to say that the case should go to trial because something may turn up that bears on the issue. The relevant facts are set out in the APOC and I will assume they are all true. Thus I do not agree with Mr Burns that the issue as to whether a duty of care exists in this case is one of fact, best left over to a trial. It is primarily a question of law to be determined on the assumed facts. Nor do I accept that the state of the law in this field

is such that there is any uncertainty about the applicable principles. As Lord Steyn made clear in *Williams v Natural Foods* at 834E, "the identification of the applicable principles is straightforward". They can be taken from *Williams v Natural Foods* and *Henderson v. Merrett Syndicates Ltd*. [1995] 2 AC 145.

50. The better point may be that cases such as this involve, in one sense at least, the making of a policy decision as to which side of the line the case ought to fall and that decision involves striking a balance on the particular facts of the case which the trial judge will be best placed to do. I have given that submission careful consideration but ultimately have concluded that the Claimant's case is bad as a matter of law and that there is no good reason why the matter should go to trial. I shall therefore accede to this part of the application and strike-out this part of the claim and/or give summary judgment for the D2-D5 on this part of the case. I do so for the following reasons.

51. There were no personal dealings between the Claimant and the band members. The band members were entitled to limit their liability by incorporating the LLP to enter into contracts for their foreign performances. They are not the same as the LLP, which is a distinct and separate legal entity. As Lord Leggatt said in Lifestyle Equities at [54]: "… *the normal understanding is that, if the agent causes the principal to break the contract, only the principal will incur liability to the other contracting party, and not the agent. This is, I think, a general norm or social understanding which the law should and does reflect".* So that is the starting point.

52. However, D2-D5 may nonetheless incur personal liability in tort to the Claimant if they are found to owe the Claimant a duty of care (which they have breached resulting in loss). The case has principally been advanced by Mr Burns on the basis of the extended *Headley Byrne* principle and the suggestion that on the particular facts of this case D2-D5 can be said to have assumed personal responsibility to the Claimant and/or that the Claimant has at least a real prospect of succeeding on that point at trial. I shall therefore focus on that aspect of the case but will also deal with his fall-back position based on the well-known three-fold test referred to above.

53. There are essentially three specific factual limbs to the Claimant's case on assumption of responsibility. First, they rely on the 2016 prohibitions (see paragraph 15 above) which are said to have "remained applicable" seven years later. Secondly, they rely on the PUSPAL

Letter and in particular the reassurance therein that the Band would "adhere to all local guidelines and regulations". Thirdly, they rely on the conversation with the Band's Tour Management about an hour before the Band went on stage (see paragraph 22 above). The Claimant also relies on the facts that the Band were aware that there would be adverse financial consequences and specifically loss to the Claimant if they behaved badly resulting in the cancellation of the Festival.

54. I shall consider each of these substrata in turn before looking at the position cumulatively.

55. The 2016 prohibitions go nowhere in my judgment. There is no suggestion that they were ever mentioned again after 2016. I cannot see any tenable basis for the suggestion that a Court could use this material as a building block for holding that D2-D5 had assumed personal responsibility to the Claimant in 2023.

56. The PUSPAL Letter is perhaps the highpoint of the Claimant's case but it too does not begin to bear the weight put upon it by the Claimant. Accepting that things said on behalf of the Band by its management can bind the Band, the assurance such as it was, was addressed to PUSPAL and was designed to assist in the license appeal. It cannot sensibly (or with any real prospect of success) be construed as a voluntary assumption of personal responsibility by D2-D5 to the Claimant outwith the existing contractual framework. I agree with Mr Cullen that the PUSPAL Letter is more realistically construed as a document designed to tick a box and get over the licensing hurdle.

57. The conversation about an hour before going on stage with the Band's Tour management is far too flimsy a basis for a finding of a voluntary assumption of responsibility.

58. The other matters relied on relate to the state of mind of the Band and/or its individual members which is irrelevant for present purposes according to Lord Steyn.

59. These three features of the Claimant's case must of course also be looked at cumulatively alongside the other matters relied on in paragraph 23 of the APOC as giving rise to a duty of care but they must together be tested against Lord Steyn's "*touchstone of liability*", to use his language in *Williams v Natural Foods*.

60. So tested, I agree with Mr Cullen that it is fanciful to suggest that, on the appropriate objective analysis, there have been sufficient things said or done by or behalf of D2-D5 to the Claimant, and thereby crossing the line, conveying either directly or indirectly an assumption of responsibility on the part of the individual band members to the Claimant. The overall position as between the Claimant and D2-D5 is not akin or "*equivalent to contract"*, and is a long way from even coming close.

61. As to whether it is fair, just and reasonable to impose a duty of care, I have come to the conclusion that the prospects of establishing a duty of care on this basis are equally fanciful for 3 reasons. Firstly, it is to be noted that the parties to the Contract were not unfamiliar to one another, given the Band's presence at the 2016 Festival, and yet they settled on "*a particular allocation of risk".* The Claimant did not expressly bargain for more protection or seek to have express recourse to the individual band members personally in the event that the performance did not fulfil expectations. I consider that it would be wrong in those circumstances to impose obligations in tort which would circumvent that risk allocation. Secondly, this type of tortious liability has to be kept within reasonable bounds and to impose a duty of care on the individual band members would set at naught the protection of limited liability that they sought to achieve via the LLP. Thirdly, I agree with Mr Cullen that it would not be fair, just and reasonable to impose a duty of care, where the substance of the duty is alleged to have been a requirement to comply with the PUSPAL Guidelines and/or Malaysian laws in circumstances where D2-D5 are not alleged to have known of their content.

62. For all those reasons, I find that the Claimant has no real prospect of establishing that D2-D5 owed the claimant a duty of care, whether based on a special relationship and an assumption of voluntary responsibility or on the basis of the well-known three-fold test or, indeed, by taking an incremental approach by reference to the established categories where a duty has been upheld.

63. Both parties also addressed me on the content of the alleged duty and its breach but in the circumstances I consider it unnecessary to address these points, save to say that I would not have acceded to this part of the application had I accepted that the Claimant had a real prospect of establishing a duty of care. Whilst the way in which the content of the duty is pleaded is somewhat unusual, I consider it can be construed as being a duty to perform the service with reasonable skill and care. Further, if such a duty existed, the Claimant has a real prospect of establishing that it was breached.

64. However, for the reasons I have given, and there being no other compelling reason for the issue to be disposed of at a trial, I will strike out and/or grant reverse summary judgment on those parts of the APOC which allege that D2-D5 owed the Claimant a duty of care in tort.

65. I can deal with the remaining issues quite shortly.

66. *The common design claim.* As previously noted, neither D3 nor D5 are directly implicated in the contravening conduct. Mr Burns argued however that they were liable as joint tortfeasors on the basis of a common design and referred me to *Fish & Fish Ltd v Sea Shepherd* [2015] AC 1229 in that connection. He directed my attention, in particular, to paragraphs 28, 41 and 52 of the APOC and submitted that the band members were all in it together so to speak, and that this was a sufficient case to go to trial. I disagree. The APOC do not plead a common design but that is not fatal if such a common design can be spelt out of a plan of the type pleaded if that plan amounts to a common design. That aspect of the claim is sufficiently pleaded in my view. However, this species of accessory liability requires more than merely a common design. As Lord Leggatt explained in *Lifestyle Equities* at [136]:

> *"There is a further, distinct principle of accessory liability by which a person who assists another to commit a tort is made jointly liable for the tort committed by that person if the assistance is more than trivial and is given pursuant to a common design between the parties".*

67. The APOC does not plead any more than trivial acts of assistance as against D3 and/or D5. Even if I had been wrong on the duty of care issue, I would have struck out the claim against D3 and D5 on this basis.

68. *The Inducement claim*. The APOC allege that D2 and D4 induced the LLP to breach the Contract. The difficulty with the Claimant's case here is the well-established rule in *Said v Butt* [1920] 3 K.B. 497 (cited in *Lifestyle Equities* at [46-47] & [54]) which provides (per McCardie J at 506) that: *"if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken"*.

69. It has been held that the burden of establishing that an agent was not acting bona fide within the scope of his authority is upon the claimant, and the claimant is required to plead the facts on which it relies: *Holding Oil Finance Inc v Marc Rich & Co AG* (CA) 29/2/96 at page 30 of the transcript. There is no allegation of a want of good faith in the APOC. That is fatal to this claim. I therefore strike out the inducement claim against D2 and D4.

70. *Exemplary damages.* That leaves only the issue of exemplary damages and given my earlier conclusions, I propose only to deal with the position vis-à-vis the LLP and to do so very shortly. As a matter of principle, exemplary damages are not available when the wrong complained of is merely a breach of contract: Chitty, 30-069. This part of the APOC should therefore also be struck out.

71. For all those reasons, the application for strike-out and/or reverse summary judgment is granted. I will hear Counsel as to the appropriate form of order to give effect to my judgment.