Case No: QB-2021-004022

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

Neutral Citation Number: [2025] EWHC 225 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 February 2025

**Before**:

**BRUCE CARR KC**
**(Sitting as a Deputy Judge of the High Court)**

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**Between:**

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| **MARK CHASSY** | **Claimant** |
| **- and -** | |
| **LEFT SHIFT IT LIMITED** | **First Defendant** |
| **DAVID SILVERSTONE** | **Second Defendant** |
| **MARK SMITH** | **Third Defendant** |

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**Ms Beth Grossman** (instructed by **Simons, Muirhead & Burton LLP**) for the **Claimant**
**Mr Stephen Innes** (instructed on a Direct Access basis) for the **First and Second Defendants**
**The Third Defendant** did not appear and was not represented

Hearing dates: 21-25 & 28 October 2024

# Judgment

**Bruce Carr KC (Sitting as a Deputy High Court Judge) :**

**Introduction**

1. On 15 October 2021, the Claimant, Mr Mark Chassy, issued a Claim Form and Particulars of Claim in which he sought damages for breach of contract based on a failure by the First Defendant to pay various sums which he claimed were due under the terms of a contract of employment originally entered into between himself and NMQA Limited ("**NMQA**") on 17 May 2012. The claims against the First Defendant were based on the contract having been transferred to the First Defendant on 1 January 2014 and by operation of law pursuant to the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE**"). The claims were however, not limited to ones arising out of his own contract alone but also covered the contracts of four other individuals whose employment had also been transferred to the First Defendant pursuant to TUPE or who had otherwise come to be employed by the First Defendant. The relevant individuals were as follows:

    a. David Aistrup, whose employment also transferred on I January 2014 under TUPE;

    b. Alex Cardoso, who was employed by the First Defendant under the terms of a contract of employment dated 10 July 2015;

    c. Paulo Macinanti, who was employed by the First Defendant from 8 January 2014;

    d. Eduardo Sousa, who was employed by the First Defendant under the terms of a contract of employment dated 14 July 2015.

2. The Claimant and the four individuals named above (collectively referred to as "**the Former Employees**") had terminated their employment with the First Defendant by

resignation on 26 April 2019. Those terminations were considered by an Employment Tribunal which, by a judgment dated 25 June 2020, concluded that the Former Employees had all been constructively (and unfairly) dismissed from their employment with the First Defendant as of 26 April 2019 and awarded compensation in accordance with the statutory scheme contained in the Employment Rights Act 1996 ("**ERA**"). In her Judgment, Employment Judge Brown acknowledged that those statutory proceedings did not relate to or include any claims for breach of contract or unpaid wages.

3. Mr Aistrup is sadly now deceased. However, on 29 October 2020, the executor of his estate assigned to the Claimant all claims relating to his former employment with the First Defendant. Similar assignments were made personally by Mr Cardoso (on 11 November 2020), Mr Macinanti (on 3 November 2020) and Mr Sousa (8 November 2020). As a result, the Claimant claims to be the legal assignee of the rights of the relevant individuals ("**the Assignors**") based on similar breaches of contract to those which he pursues in his own name.

4. The Claimant also pursues claims against the Second and Third Defendants in respect of the losses that are alleged to flow from the breaches by the First Defendant of his own contracts of employment as well as those of the Assignors. Those claims are pursued on the basis that the Second and Third Defendants were directors of the First Defendant at all times material to such claims and that in that capacity, they are jointly and severally liable for all of the losses said to flow from the First Defendant's breaches of the contracts of employment of the Former Employees, they being said to have induced or procured such breaches.

5. The claims brought by the Former Employees can broadly be broken down as follows:

    a. Non-payment of salary over varying periods of months;

    b. Non-payment of pension contributions (with the exception of Mr Aistrup, for reasons which will be explained below);

    c. Non-payment of expenses incurred in the course of employment (in relation to the Claimant alone);

    d. Non-payment of holiday entitlement.

6. The total damages claimed by the Claimant in relation to the claims of the Former Employees was set out in the Particulars of Claim at £311,601.91. The Claimant also claimed statutory interest pursuant to section 35A Senior Courts Act 1981.

7. In a Defence dated 17 February 2023 and filed on behalf of all three Defendants, issue was taken with the legal status of the assignments made to the Claimant by the Assignors. It was admitted that the Second Defendant was a registered director of the First Claimant from 8 January 2014 to 9 November 2016 and from 14 April 2021 onwards – but not otherwise, either on a registered or de facto basis. As to the Third Defendant, it was admitted that he was a registered director between 22 January 2014 and 26 April 2021 – but again, not otherwise, either on a registered or de facto basis.

8. As to the substance of the claims brought against it, the position of the Defendants in summary and as set out in their Defence was as follows:

    a. In relation to unpaid wages, whilst non-payment was admitted to a limited extent by the First Defendant, the Former Employees had consented to variations in the terms of their contracts of employment or had otherwise

acquiesced in or waived any breaches of contract. It was also asserted that the Former Employees were estopped from pursuing such claims, given that they were aware of financial difficulties which the First Defendant had faced but nevertheless continued to work in the knowledge that it was not possible for the First Defendant to pay their wages;

b. The claim in respect of non-payment of pension contributions was admitted by the First Defendant subject only to a defence of set-off based on allegations relating to the Claimant's conduct at the point at which he resigned from his employment with the First Defendant. The Defendants' case collectively is that they had intended to enrol the Former Employees into a company pension scheme once the First Defendant was on a firmer financial footing;

c. The claims in respect of payment for unused holiday entitlement, and again subject to the defence of set-off, were admitted to a limited extent by the First Defendant based on its assertion that the contractual entitlement to carry over and be paid for unused holiday was limited to 5 days, with a further 5 days if permission was given and that payment on lieu on termination of employment was in any event at the discretion of the directors of the First Defendant;

d. The Second and Third Defendants admitted that, whilst they were statutory directors of the First Defendant, they owed the duties set out in sections 172 and 174 Companies Act 2006. They denied however, that they had acted in breach of such duties, asserting that they had at all times acted in good faith in their attempts to carry on the business of the First Claimant during periods of financial difficulty.

9. As set out above, a claim of set off was also advanced in the Defence by all three Defendants based on the assertion that the Claimant had acted in breach of his contract of employment – in particular his express obligations with regard to confidentiality and the implied term of trust and confidence – by embarking "on a course of deliberate deletion, removal and misuse of confidential data belonging to" the First Defendant. The allegation was that the Claimant had deliberately removed important confidential information of the First Defendant which had been contained in a software messaging application known as "Slack" to which the Claimant had had access during the course of his employment up to the point at which he had resigned from the First Defendant in April 2019.

**The position of the Third Defendant**

10. The Third Defendant did not prepare any witness evidence for the purpose of the trial and did not otherwise engage with the litigation after the Defence was filed on his behalf. The apparent reason for that emerged shortly before the trial was due to commence, when it was discovered that he may be an undischarged bankrupt. This issue came to the attention of the Claimant on 8 October 2024 when it was disclosed in the course of a without prejudice letter sent to him on behalf of the First and Second Defendants.

11. The Claimant's solicitors then attempted to do what they could to check the position and discovered an entry on the Bankruptcy Register which bore a similar name to that of the Third Defendant. The questions which then arose for consideration before me were first, whether the evidence demonstrated that the Third Defendant was indeed subject to a bankruptcy order and secondly, if so, how should the court proceed. Ms Grossman on behalf of the Claimant, sought to persuade me that the trial should continue to judgment

as regards the claim against the Third Defendant in order to "prevent injustice and delay" and that there would be a significant impact on the Claimant (and the Assignors) should matters not proceed against him. Whilst section 285(2) Insolvency Act 1986, on proof of bankruptcy, gives the power to either stay proceedings or allow them to continue on such terms as the court thinks fit, this should not prevent the court proceeding to judgment as it would only be at the stage of enforcement that there would be a potential impact on the estate of the bankrupt individual. The trial should therefore continue with any required safeguards in relation to the bankruptcy being addressed only if and when enforcement became an issue.

12. On the evidence provided to me, I was satisfied that the Third Defendant was indeed an undischarged bankrupt. I then concluded that the trial should be allowed to continue on the basis that, as proffered by Ms Grossman on behalf of the Claimant, he would be subject to an undertaking not to enforce any judgment against the Third Defendant without leave of the Court or written agreement of the Defendant's trustee in bankruptcy. I did consider whether the Third Defendant was prejudiced by this course of action but ultimately concluded that given that he had clearly taken no step to engage in the proceedings, an adjournment of the trial was not appropriate. In addition, his interests were substantially aligned with those of the Second Defendant who of course was present at and participated in the trial process and was able to put forward arguments that were supportive of not only his, but also the Third Defendant's position, particularly on the key issue of individual liability for inducement to breach of contract by the First Defendant.

**The issues for determination**

13. By the time that the matter came before me for trial, the issues had been agreed between the Claimant and the First and Second Defendants as follows:

(1) What sums were due to be paid, but were not paid and have not been paid to each of the Former Employees pursuant to their contracts of employment and/or any relevant statutory obligation?

(2) Have the claims arising out of any alleged sums being assigned to the Claimant?

(3) Did any of the Former Employees waive any right to any sum, and can the defendants rely upon any such waiver?

(4) When each of the Second and Third Defendants were not registered directors at Companies House, did either of them continue to be a de facto director and therefore continue to owe obligations pursuant to the Companies Act 2006?

(5) Did the Second Defendant or the Third Defendant breach those obligations?

(6) Is the First Defendant liable for sums owed to the Former Employees and if so, in what amounts?

(7) Are the Second Defendant and/or the Third Defendant personally liable for those sums, (or any part of them)?

(8) What amount would be due by way of interest to the Claimant?

(9) Did the Claimant cause information to be lost to the First Defendant which was commercially viable to it? Did the Claimant deliberately take actions to cause loss and damage to the First Defendant?

(10) If so, was that loss in breach of a duty owed to the First Defendant?

(11) What loss was caused (pursuant to the usual principles of causation) to the First Defendant? What quantum of any alleged loss can be proved?

14. In addition, the List of Issues prepared for trial also contained further matters set out under the heading: "Second Defendant's Further Issues – Unagreed". Although described as "the Second Defendant's" issues, the questions set out dealt in large part with the points raised in the Defendants' set off defence based on the alleged conduct of the Claimant. Further, although described as "Unagreed", no particular point has been taken (by the Claimant) in relation to them. In any event, issues (1) and (3) in that list appear to me to raise evidential points which bear directly on the questions raised under Issues (9)-(11) on the agreed list. Issue (2) on the unagreed list relates to the alleged retention of laptop computers by the Former Employees after their employment came to an end when they resigned. Again, this point has not featured in the submissions made by counsel and in any event, does not appear to me to have any bearing on the issues that I have to determine.

15. That leaves two further points (Issues (4) and (5)) in the unagreed list which raise questions more broadly about the conduct of the Second and Third Defendants in their running of the First Defendant and what were the "pivotal events" which resulted in the First Defendant experiencing significant cashflow issues in 2018-2019. Whilst I can see that some of this might be relevant to questions of whether the Second and Third Defendants acted in breach of the duties that they owed as directors of the First Defendant, again they appear to me to be discrete points based on the evidence in the case which may then impact on Issue (7) of the agreed list. I do not see them as separate questions which require individual or separate consideration outside the scope of those issues which have been agreed between the parties. In addition, again, I did not understand Mr Innes to make any separate or distinct submissions in relation to them.

**Legal Principles**

16. One of the key questions in these proceedings is the extent to which the Second and/or Third Defendants are personally liable as directors of the First Defendant on the basis that the former induced or procured breaches of contract by the latter. In support of his assertion that they are so liable, the Claimant relies on the provisions of sections 172 and 174 Companies Act 2006 ("**CA**"). Section 172 CA reads as follows:

> "(1) A director of a company must act in the way which he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole., and in doing so must have regard (amongst other matters) to –
>
> (a) the likely consequences 0f any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers, and others,
>
> (d) ……
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and.
>
> (f) the need to act fairly as between members of the company."

17. Section 174 CA sets out a director's duty to act with reasonable care, skill and diligence and provides as follows:

> "(1) A director of a company must exercise reasonable care, skill, and diligence.
>
> (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with –

(a) The general knowledge, skill, and experience that may reasonably be expected of a person carrying out. The functions carried out by the director in relation to the company, and

(b) the general knowledge, skill, and experience that the director has."

18. In **Antuzis v DJ Houghton Catching Services Limited** [2019] Bus LR 1532, Lane J dealt with an application for summary judgement made by a number of Claimants (who had been employed as chicken catchers) who claimed that the Defendant company, in failing to pay their wages, making unlawful deductions and not providing holiday pay, had breached contractual terms which were express or which had impliedly been incorporated into their contracts by virtue of a number of statutory provisions. The Claimants made an application for summary judgment against the company but also sought to establish that its sole director and company secretary were personally or severally liable for the company's breaches of contract.

19. In addressing the issue of the individual liability of directors, Lane J held that in determining whether a director, by failing to act bona fide, was liable for inducing breach of contract by a company, it was their conduct and intention in relation to their duties towards the company, not to third parties, that provided the focus of the enquiry. Nevertheless, the nature of any breach which had occurred between the company and the third party, and its consequences were relevant to the issue of personal liability in respect of that third party. Where a director causes a company to commit breaches of contract, which also involve breaches of statutory duty and where this causes severe reputational damage to the company, this could indicate that the director had acted in breach of the duty to act in good faith to promote the company's success. On the facts of the case, Lane

J held that the malpractice of which the director and company secretary were guilty, had "catastrophic consequences" for the company and that they as directors had not acted bona fide towards it. On that basis, they were held to be jointly and severally liable to the Claimants for inducing the company's breaches of contract.

20. It is important to record that Lane J's conclusions were very much based on the facts of the case as he found them to be. For example, at paragraph 86, he stated as follows:

> "The evidence is, however, simply overwhelming that D2 and D3 were operating D1 at all material times in a deliberate and systematic manner, whereby chicken catchers were working massively more than the hours recorded on the pay slips. If this was not so, then there would have been no need to engage in the fictional exercise [in relation to the recording of hours worked] which D2 and D3 required of Ms Shanks. That exercise was necessary because (contrary to the assertion that such a thing was impossible) no records were being kept by D2 and D3 of the hours worked by chicken catchers. The reason why no records were being kept was because D2 and D3's modus operandi involved a flagrant disregard of the [Agricultural Workers Order] requirements as to minimum pay."

21. Under the heading "*K. Preliminary issue*" Lane J dealt with the law relating to the liability of directors for torts and breaches of contract committed by a company. At paragraph 108, the judgment reads as follows:

> "108. The general principle is that directors of a company will be liable for the torts of the company, committed at their direction.
>
> 109. In **Rainham Chemical Works Ltd v Belveder Fish Guano Co Ltd** [1921] 2 AC 465, 367, Lord Buckmaster held:

> "If the company was really trading independently on its own account, the fact that it was directed by Messrs Feldman and Partridge would not render them responsible for its tortious act, unless, indeed, they were acts expressly directed by them. If... those in control expressly directed that a wrongful thing can be done, the individuals as well as the company are responsible for the consequences."

110. A somewhat different position obtains, however, where the unlawful act is procuring a breach of contract. In **Said v Butt [**1923] KB 497, the plaintiff procured a theatre ticket, which was not in his name, knowing that if his true identity had been known, he would have been refused admission, owing to a dispute between him and the theatre company. McCardie J held that non-disclosure of the fact that the ticket was bought for the plaintiff prevented the sale of the ticket from constituting a contract, the identity of the plaintiff being a material element in its formation. For that reason, the action failed.

111. However, McCardie J made these obiter observations at pp 505 and 506:

> "But the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law, the acts of his employer. In such a case, it is the master himself, by his agent, breaking the contract he has made, and in my view, the action against the agent... must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract...
>
> "I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of contract between his employer and a third person, he does not become liable to an action in tort at the suit of the person

whose contract has thereby been broken. I abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, wholly outside the range of his powers, procures his master to wrongfully break a contract with a third person.””

22. Having reviewed the authorities relating to what the judge called the “so-called rule in **Said v Butt**”, Lane J said this at paragraph 114:

> “The conclusion of Waller J in **Ridgeway Maritime v Beulah Wings Ltd** [1991] 2 Lloyd’s Rep 611, cited in para 57 of the judgment, points towards the conclusion that I draw: namely that it is the officer’s conduct and intention in relation to his duties towards the company – not towards the third party – that provide the focus of the “bona fide” inquiry to be undertaken pursuant to the rule in **Said v Butt** [1920] 3 KB 497.
>
> 115. This does not, however, mean that the nature of the breach of contract which occurs between the company and the third party is irrelevant. On the contrary, the nature of the breach and its consequences, may directly inform whether the officer of the company has breached his or her duties towards the company.”

23. At paragraph 116 of his judgment, Lane J noted a submission made by counsel for the Claimants to the effect that the breaches of contract committed by the Defendant company also involved breaches of statutory duty rather than as a result of ‘arm’s-length agreements struck between the claimants and D1. Those duties were statutorily imposed by Parliament in order to protect vulnerable workers from exploitative employers. The judgment then continues at paragraph 117 with a reference to a comment made by

counsel for the Defendants, Mr Allen, in response to the submission made with regard to statutory duties:

> “117. Mr Allen made the valid observation that merely procuring a breach of contract of this kind cannot be the touchstone for deciding if the director is liable. If it were, then directors would, in the employment field, regularly face personal liability. Because many aspects of employment contracts have a statutory element. Such a conclusion, he said, cannot be right.
>
> 118. I agree. However, Mr Hendy’s submission cannot be so easily circumvented. As we have seen, Section 172 of the Companies Act 2006 imposes important duties on directors to act in good faith so as to promote the success of the company and, in so doing, to have regard to matters such as ‘the likely consequences of any decision in the long term; the interests of the Company's employees; the impact of the Company's operations on the community; and the desirability of the company maintaining a reputation for high standards of business conduct”. Section 174 of the same Act imposes a duty on the director to exercise reasonable care, skill, and diligence.
>
> 119. The nature of the breach of contract is directly relevant to the determination of whether, in a particular case, a director has complied with section 172, as regards his or her duty to the company and the ultimate question whether inducing the breach is actionable against the director.
>
> 120. There is, plainly a world of difference between, on the one hand, a director consciously and deliberately causing a company to breach its contracts with a supplier, by not paying the supplier on time because, unusually, the company has encountered cash flow difficulties, and, on the other hand, a director of a restaurant company who decides the company should supply customers of the chain with

burgers made of horse meat instead of beef, on the basis that horse meat is cheaper. In the second example, the resulting scandal, when the director's actions come to light, would be, at the very least, likely to inflict severe reputational damage on the company, from which it might take years to recover, if it recovered at all.

121. In this particular example, the fact that supplying horse meat is likely to violate food and trading standards legislation is plainly relevant because it is society's disapproval of acting in this manner that gives rise to the statutory duty, and the breach of that duty is therefore indicative of societal disapproval of what the director has caused the company to do and the resulting reputational damage to the company.

122. Accordingly, as a general matter, the fact that the breach of contract has such a statutory element may point to there being a failure on the part of the director to comply with his or her duties to the company and, by extension, to the director's liability to a third party for inducing a breach of contract. Whether such a breach has these effects, will depend on the circumstances of the particular case."

24. The judge then went on to make a finding, based on the facts of the case, that the Defendant directors were not acting bona fide vis-à-vis the Defendant company by not paying the Claimants in accordance with their contractual and statutory entitlements. Damning findings were made, leading to the conclusion that the directors were fully aware that they were "unable as a matter of law to act in this way on behalf of D1" (see paragraph 126). The motivation for their conduct was then described in paragraph 127 as follows:

"D2 and D3 did all these things because they were concerned to maximise the profits of D1, which they - and only they - enjoyed. But just as in the restaurant

example, the desire to maximise profits has had catastrophic consequences for D1. When the malpractices finally came to light, D1's fortunes dramatically declined. Far from having a reputation for high standards of business conduct, D1 stands exposed as a pariah.

128. Before the exposure of D1, D2 and D3's activities were manifestly not in the interests of the company's employees, so far as the chicken catchers were concerned. Following exposure, their activities can be seen not to have been in the interests of any of the employees, since there are no longer any supervisors or drivers.

……

130. In short, D2 and D3 were not acting bona fide vis-a-vis D1. It is, accordingly, necessary to turn to **OBG Ltd v Alan [2007]** Bus LR 1600 in order to determine whether D2 and/or D3, acting in their own right, are liable for inducing breach of contract.

131. For our purposes, the following passage of the judgement of Lord Hoffman is relevant:

> "39. To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realise that it will have this effect. Nor does it matter that you ought reasonably to have done so. This proposition is most strikingly illustrated by the decision of this House in **British Industrial Plastics Limited v Ferguson** [1941] All ER 479, in which the plaintiff's former employee offered the defendant information about one of the plaintiff's secret processes which he, as an employee, had invented. The

defendant knew that the employee had a contractual obligation not to reveal trade secrets, but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal, McKinnon LJ observed tartly that in accepting this evidence, the judge had “vindicated his honesty at the expense of his intelligence” but he and the House of Lords agreed that he could not be liable for inducing a breach of contract.

40. The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a consistent line of decisions. In **Emerald Construction Company Limited -v- Lowthian** [1966] 1 WLR 691, union officials threatened a building contractor with a strike unless he terminated a contract for the supply of labour. The defendants obviously knew that there was a contract - they wanted it terminated- but the court found that they did not know its terms. And, in particular, how it, how soon it could be terminated. Lord Denning, MR said “even if they did not know the actual terms of the contract but had the means of the knowledge - which they deliberately disregarded - that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get the contract terminated, heedless of its terms, regardless of whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not’.

41. This statement of the law has since been followed in many cases, and, so far as I am aware, has not given rise to any difficulty. It is in accordance with

the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact.

………..

42. The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it that it is the means by which he intends to achieve some further end. Or even that he would rather have been able to achieve that end without causing a breach. Mr Guy would very likely have preferred to be able to obtain Miss Wagner services without her having to break her contract. But it did not matter. Again, people seldom knowingly cause loss by unlawful means, out of simply disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves.

………

43. On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been "targeted" or "aimed at". In my opinion, the majority of the Court of Appeal was wrong to have allowed the action in **Miller v Bassey** [1994] EMLR 44 to proceed. Miss Bassey had broken her contract to perform for the record company, and it was a foreseeable consequence that the recording company would have to break its contract with accompanying musicians, But those

breaches of contract were neither an end desired by Miss Bassey nor a means of achieving that end.

……'

132. I have no hesitation in finding that both D2 and D3 satisfy the requirements laid out by Lord Hoffman. I am in no doubt whatsoever, having heard the evidence, that both of them "actually realised" that what they were doing involved causing D1 to breach its contractual obligations towards the Claimants. What they did was the means to an end. There is no iota of credible evidence that either D2 or D3 possessed an honest belief that what they were doing would not involve such a breach. On the contrary, the evidence is overwhelmingly to the contrary. At all times, each knew exactly what they were, that what he or she was doing. The breaches they occasioned were central to D1's modus operandi.

133. Judgment in the preliminary issue will be entered in favour of the Claimants. D2 and D3 are jointly and severally liable to the claimants for inducing the breaches of contract of D1."

25. Lane J's conclusion therefore, that the Second and Third Defendants were personally liable for inducing breaches of contracts by the company of which they were officers, was a finding made in circumstances of deliberate and repeated violations of contractual and statutory provisions, the latter in particular being part of a framework designed to protect vulnerable workers from exploitation. In inducing the company to act as it did, the individual directors were driven solely by a desire to maximise the profits of the company for their exclusive benefit. In so doing, and focussing on the correct question of whether the directors were in breach of their duty to the company (rather than whether they were acting in bad faith towards the third party whose contract had been breached),

it is unsurprising that Lane J should have concluded that the directors could not seek shelter behind the rule in **Said v Butt**.

26. Lane J's approach and analysis was considered by Eyre J in **IBM United Kingdom Limited v LZLABS GmbH & Others** [2022] EWHC 844 (TCC). Having reviewed that analysis, Eyre J helpfully summarised what he regarded as the proper approach in such cases as follows (at paragraph 36):

> "In my judgement, and applying Lane J's analysis, the matter has to be approached on the basis that the question of whether a director acted bona fide and within the scope of his or her authority will be very dependent on the circumstances of the particular case. Regard is to be had to the director's duties to the company. The director will not have been acting bona fide if he or she was in breach of the duties set out in section 172. However, the question must be considered in the round remembering that liability is to be seen as an exception to the general rule that a director will not be liable in tort for inducing the company of which he or she is a director to breach a contract. It follows that not every instance of causing a company to breach a contract or a legal obligation will involve a director in a breach of the section 172 duties nor will every such instance cause him or her to be characterised as acting in bad faith for the purposes of the rule in **Said v Butt**. The key will be whether the director was properly acting to promote the success of the company taking account of the matters to which he or she is required by section 172 to have regard. In that exercise it will be necessary to consider the circumstances as a whole. Those will include the motivation of the director and the nature of the duties said to be broken but in addition the

nature of the obligations being broken by the company and the consequences of the company's breach can be relevant to the question of whether the director can properly have been said to have been acting in the interests of the company.

27. More recently, the issue of personal liability of directors has been considered by the Court of Appeal in **Northamber plc v Genee World Limited & Others** [2024] EWCA Civ 428 in which the passages from the judgments of Lane and Eyre JJ which I have cited above were cited with approval in the judgment of Arnold LJ.

28. In their Defence in the present case, the Defendants say that each of the Former Employees was given the option of leaving to pursue employment elsewhere given the deferment of their wages and return to the First Defendant as and when its financial position improved. None of the Former Employees took that option (such as it was) but according to the pleaded Defence "by their statements and/or actions, they elected to continue to work for [the First Defendant] in the full knowledge that [it] was not in a position to pay their salaries and that there was a risk that it would not be able to do so." This was said by the Defendants to amount to consent and/or an agreement and/or a representation that they would continue to work for the First Defendant and would not advance any contractual claim in respect of unpaid salary. It was then said that the First Defendant had reasonably relied on to its detriment by continuing to employ them, rather than terminating their employment and/or liquidating the company. In his opening Skeleton Argument, and by reference to paragraph 10 of the Defence in which the above references appear, Mr Innes suggested that the unpaid wages claim should fail on the basis of "waiver/variation/acquiescence and/or estoppel." By the time of his Closing

Submission, he repeated the assertion (at paragraph 15) that by continuing to work in circumstances in which they were aware of the First Defendant's financial difficulties, the Former Employees had "represented that they would continue to work for the company and that they would defer and/or forego their salaries and would not claim any contractual right to the same." Again, it was asserted that the First Defendant had relied on this conduct to its detriment.

29. A modest concession in relation to this argument was then proffered by Mr Innes in that at paragraph 18 of his Closing Submissions in that he accepted that it could not be maintained that the Former Employees had agreed "to forego their salaries entirely……..[It] seems inevitable that if funds had come in before they left the [First Defendant's] employment, everyone would have accepted that of course these should be used to make up the missed payments". The submission continued as follows: "more plausibly, the [Former Employees] elected to defer payment of their salaries unless or until the [First Defendant] was in a financial position to pay them, which did not occur." I have to confess that, on the basis of the submissions made by Mr Innes, I am not entirely confident as to the precise legal basis on which the election/waiver/variation/estoppel point is put.

30. If the matter is put in terms of a strict waiver by "election", the doctrine will generally only apply in a narrow set of circumstances in which a choice is made between two rights or powers. In **Data Petroleum (Caribbean) Limited v BVI Electrical Corp** [2021] 1 WLR 5741, the matter was put by Lord Leggatt (at paragraph 21) as follows:

> "What is fundamental to the principle of waiver by election and crucial for present purposes is that it is only capable of applying where a choice must be

made between two alternative and inconsistent (in the sense of mutually exclusive) courses of action, such that adopting one of them necessarily entails forsaking the other."

31. If the matter is put as one of variation, one would expect to be able to identify the formation requirements which would apply equally to the formation of a contract, namely offer and acceptance, supported by consideration

32. If it is put on the potentially broader footing of a waiver by estoppel, one would expect to be able to identify a clear and unequivocal statement or representation (which could be in the form of particular conduct) that a party was giving up a contractual right. Secondly, the party relying on the doctrine would need to show that it had relied on the conduct or representation and thirdly, it would be inequitable to allow the other party to renege from its promise, the waiver generally operating so as to suspend rather than extinguish the right that has been waived.

33. Section 13 Employment Rights Act ("**ERA**") creates a statutory right for a worker not to suffer unauthorised deductions from their wages. Section 13(1) ERA provides as follows:

"(1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or.

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

34. It is suggested on behalf of the Claimant that the effect of this section is to exclude the Defendants from advancing any argument in relation to the claim for non-payment of salary based on any alleged waiver/forbearance/estoppel arguments as none of the matters relied on by the Defendants had been put in writing and agreed to by the Former Employees. The Claimant's argument is that the contents of section 13(1) ERA is to be implied into the contracts of employment of the Former Employees. I disagree – the purpose of section 13 ERA is to provide a specific, straightforward statutory remedy in cases in which workers claim to have been underpaid. The right of the employer in relation to deductions covered by the section, is limited under section 13(1)(a) and (b) to those to which the worker has agreed as part of his contract or otherwise in writing and with his agreement or consent. Section 23 ERA then provides the worker with a right to complain to an Employment Tribunal in the event that the employer has made a deduction which is not permitted by the exceptions set out in section 13(1)(a) or (b). I do not regard those provisions as, in effect, re-writing the common law position as it applies to waiver, forbearance or estoppel and as it applies to a claim in contract brought in the county court or the High Court.

35. However, the fact that non-payment of salary amounted to the making of unlawful deductions contrary to the provisions of section ERA, is a factor relevant to the consideration of the question of whether the Second and Third Defendants were acting in bad faith and/or contrary to the duties set out in sections 172 and 174 (as was recognised by Lane J in his judgment in **Antuzis** to which I have referred above).

36. In support of their arguments based on set off, the First and Second Defendants rely on the implied term of trust and confidence as set out in **Woods v WM Car Services Ltd** [1981] ICR 66 as follows:

> "It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage
> the relationship of confidence or trust between employer and employee."

37. Although framed in **Woods** by reference to the conduct of the employer, the fact that the duty is a mutual one, applying as much to the conduct of the employee as to that of the employer, was recognised by the House of Lords in **Malik v BCCI** [1977] IRC 606 – see Lord Steyn at page 42F. In any event, the Claimant was subject to an express term in his contract of employment to the effect that he would "in all matters act faithfully to the company."

**The Facts**

38. The First Defendant is a limited company involved in the development and sale of software products. It also offers IT support to purchasers of its products as well as providing software products to its business partner, IBM which the latter would then sell on to its own customers. When IBM did so, the First Defendant would receive royalties based on the use by its customers of the First Defendant's products. One of its principal sources of income came via another software company named "Green Hat" with which NMQA had built a successful relationship from around 2011 onwards, to the point at which NMQA was Green Hat's most successful independent reseller and implementer of its software. Green Hat (and its software products) were acquired by IBM in 2013.

39. Following the transfer of the NMQA business to the First Defendant, the commercial success of the link with Green Hat initially continued, enabling the First Defendant to establish and trade on a firm financial footing, with revenues of around £2.5m in 2015. However, in the second quarter of 2016, IBM took the decision to outsource the development, implementation and support of Green Hat products to one of its development partners, HCL. This had a dramatic impact on the First Defendant's revenue and cashflow and it is perhaps no surprise that from around that time, difficulties began to emerge relating to the payment of salary of the Former Employees. The Claimant attributes the deterioration in the relationship with IBM to what he says were the behaviours of the Second and Third Defendants.

40. The Former Employees are all IT specialists who, as set out above, were employed by the First Defendant at the times material to the issues in this case. The Claimant first came across the Second and Third Defendants when he was working under a freelance contract with NMQA. The Second and Third Defendants were directors of NMQA. Part of its business was consulting and that part of the business was eventually moved to a separate company, the First Defendant, as a result of which the contracts of employment of the Claimant and Mr Aistrup were transferred pursuant to TUPE. The Claimant came to be employed from 1 April 2016 on a salary of £95,000 per annum.

41. Messrs Macinanti, Cardoso and Sousa all joined the First Defendant after the initial transfer of an undertaking from NMQA.

42. In the Particulars of Claim, the Claimant pleaded the contracts of the Former Employees were all in standard form and contained the following provisions:

- Clause 4.1 – salary to be paid monthly in arrears by BACS on or about the 25th day of each calendar month;
- Clause 4.2(b) – expenses incurred by employees in the course of their employment would be repaid to them. (It was also suggested that a similar term was to be implied on the basis of custom and practice);
- Clauses 7.1 and 7.4 – an entitlement to 25 days holiday each calendar year and pro-rata payment of unused holiday entitlement to be paid on termination of employment;
- Clause 7.2 – employees could only take holiday at times permitted by the employer;
- Clause 9.1 – a figure amounting to 5% of gross monthly salary to be paid each month by the employer into the employer's group pension scheme.

43. At paragraph 7 of their Defence, the Defendants admitted the above express terms save that:

    - As far as Messrs Cardoso, Macinanti and Sousa were concerned, the initial entitlement was to 22 days but increasing by 1 additional day for each year of employment, subject to a maximum of 25 days. Further, it was said that the obligation in their case to pay 5% of gross salary into the group pension scheme only arose after the successful completion of a 6-month probationary period;
    - In Mr Aistrup's case, his holiday entitlement was limited to 22 days.

44. It is accepted by all parties at trial that the contracts of employment of the Former Employees all contained an express variation clause ("**the Unilateral Variation Clause**") in the following terms:

"CHANGES TO THE TERMS OF EMPLOYMENT

*The Company reserves the right to make reasonable changes to any of the terms and conditions of employment and in that event the employee will be given not less than 1 (one) month's written notice of any significant changes by individual notice. Such changes shall be deemed to be accepted unless the employee notifies the Company of any objection in writing before the expiry of the notice period*."

45. At paragraph 8 of their Defence, the Defendants claimed that the Former Employees were subject to the rules set out in an Employee Handbook "**the Handbook**") under which there was a 5-day limit on the amount of holiday that could be carried over from one year to the next and that leave not taken would be lost unless specific provision was given. There was also said to be a maximum of 10 days which could be carried over with permission. The Defendant's rely on these provisions as limiting the scope of the claims for unpaid holiday advanced by the Former Employees.

46. The "FOREWORD" to the Handbook contained the following wording:

    "The Staff Handbook specifies which policies, procedures and rules are incorporated into your contract of employment."

47. Under the heading "**Holiday Year**", the Handbook stated that:

    "The Company's holiday year runs from 1 January to 31 December.

    Only 5 days leave may be carried out over from one leave year to the next. Leave not taken will be lost unless specific permission is given. The maximum exception with permission is 10 days of carryover."

48. And under the heading "Holiday Booking", the Handbook contained the following:

> "On termination of employment, all outstanding annual leave must have been taken prior to the effective date of departure. At the discretion of the Director, payment may be made in lieu of holiday entitlement."

49. Pausing for a moment, it is clear that these provisions are both unworkable and unlawful. Unworkable, because an unanticipated date of departure may mean that it was simply not possible to take all annual leave prior to the date of departure (as the facts of this case demonstrate where the Former Employees resigned with immediate effect as they were entitled to do due to non-payment of their contractual entitlements). Unlawful, because Regulation 14 Working Time Regulations 1998 creates a statutory entitlement to payment in lieu where a worker leaves his or her employment at a point at which they have not taken all of the annual leave that has accrued to them as of that date – payment in lieu is therefore a matter of statutory right and not employer discretion.

50. In late 2016/early 2017, work was carried out in the preparation of the Handbook which was intended to apply to the First Defendant's employees, including of course, the Former Employees, although none of them who gave evidence at trial recall seeing it or it coming into force. They did however, accept that they may have seen it. I will return to the evidence relating to this below.

51. Problems with non-payment of salary began to emerge in 2017. By August 2018, salary payments to the Claimant came to a complete stop. Payments to the Assignors became problematic at or around the same time although apparently not to the same extent as had applied to the Claimant. In his evidence, Mr Macinanti said that there had been

conversations with the Second and Third Defendants regarding non-payment of salary in which he was told that the First Defendant was unable to pay. At first, employees received a percentage of what was due to them but that from around November/December 2018, he was told that there was no money at all from which to pay salaries. He said he was told that if he wished to get a loan in order to make up the shortfall, the First Defendant would ultimately pay back the loan with interest. He said that the Former Employees were given weekly updates about possible investment, with the Second and Third Defendant seeking to reassure them by saying that "we are so close, we are almost there". He said in cross-examination that he had decided to stay on in employment on the basis that he was being told by the Defendants that "we will pay you, but we don't know when."

52. Mr Cardoso's evidence was to similar effect – he said that the Second and Third Defendants were open about not being able to pay salaries but would say that they were waiting for cheques to come – he said it became like a script to the effect that the money would come at some point.

53. It is clear that at around this time, the First Defendant was facing significant financial difficulties. Much of the explanation for this says the Claimant, (in his witness statement) was that the Second and Third Defendants were "difficult people who did not know how to run a business" and that they "alienated so many customers and IBM salespeople over time [that] we lost a lot of our consultancy work and the consultants had their employment terminated." Whilst, given the way in which matters developed overtime, leading to the Former Employees resigning from their employment with the First Defendant, the Claimant's sentiments are understandable, it is to be noted that he had

worked with both Defendants for many years, first as a freelance consultant and then, from May 2012, as an employee of NMQA, in the role of Principal Consultant.

54. The Claimant had also invested some of his own money in the First Defendant in the form of loans and had persuaded his father to do likewise. The Claimant loaned the sum of £95,000 to the First Defendant in 2016 and in October of that same year had persuaded his father to do likewise to the tune of $300,000. Both investments were initially in the form of loans but were later converted by agreement into shares at a point at which it became apparent that the First Defendant was not able to make appropriate repayments of the money that they had lent to it. Whilst the conversion of the loans to shares may, by the time that it occurred, have had an element of Hobson's choice about it, the fact of long-standing employment coupled with personal investment would tend to suggest that the Claimant saw the First Defendant's business as potentially viable and saw the Second and Third Defendant as individuals who were capable of making it so. In cross-examination, he accepted that, at the time that the loans were made by himself and his father, he believed that the First Defendant "had a good product and we could succeed."

55. The Second Defendant, in his witness statement gave a detailed explanation of why he says that cash flow issues occurred in 2016 and into 2017, in particular due to the loss of the Green Hat business and substantial delays in payments from Jaguar Land Rover, which had represented "one of the largest single service deals in [the First Defendant's] history". He states that whilst these problems were "uncomfortable", they were mitigated by steps taken by himself and the Third Defendants, including raising funds from investors and them selling their own shares in the business. They also took no salaries during this period. Mr Nesbit (the First Defendant's COO) gave evidence that when salary defaults began to occur, he would keep a record (or "tracker") in which he recorded

the net amount owed to employees in each case and also recorded any amounts that were paid directly to them. He confirmed that neither of the Second or Third Defendants took any salary in 2018-19 – he said of them that they were making sacrifices (in terms of their salaries) and that he wanted, as far as he could, to ensure that the employees of the First Defendant got paid.

56. In the latter part of 2017, the First Defendant was able to secure investment funding through an investment company, Riverside Capital ("**Riverside**"), with a first tranche of funding in the sum of $1,000,000 being released in November 2017, at the point at which the First Defendant entered into an agreement with IBM under which it agreed to become a reseller of a software product of the First Defendant known as "Orson". However, based on what is said by the Second Defendant in paragraphs 8-9.1 of his witness statement, the cashflow position deteriorated during the course of 2018 and into 2019. Without hopefully doing any injustice to the detail set out in the statement, the problems can be summarised as follows:

    a. In Q1 of 2018, there was an $800,000 shortage in expected cashflow;
    b. This meant that the First Defendant did not cross the revenue threshold which would have triggered the release of a further $500,000 from Riverside, which had the effect of producing an "expected cash" shortfall of $1,300,000;
    c. The primary sales channel represented by Green Hat had come to an end due to the decision taken by IBM to outsource that work – this led to the First Defendant having to release its consultant team from employment;
    d. Whilst the Second and Third Defendants were able to negotiate a further loan arrangement with Riverside in the sum of $1,000,000, this was only enough to "keep the business running and the team paid until September 2018";

e. The Second and Third Defendant's made substantial efforts to try to raise additional equity funding for the business but without material success;

f. The sales forecast based on the IBM/Orson agreement provided to be significantly over optimistic – expected sales over Q2-4 of 2018 had been set at $2.9m but actual sales amounted to less than $300,000;

g. The poor sales results in turn made it even more difficult to raise additional funds to support the business.

57. At paragraph 9.1.2, the Second Defendant describes the senior management team including himself, the Third Defendant and the Claimant, meeting in September 2018 to discuss he cashflow issues that the First Defendant was facing. He states that agreement was reached to the effect that senior individuals in the business, including the Claimant would "defer receiving payments as far as possible for the time being in order to prioritise paying the development team, the lowest earners and anyone who was in a vulnerable position. This included Alex Cardoso, David Aistrup and even Paolo Macinanti." The statement goes on:

> "From then on [the Third Defendant] liaised directly with every team member, via email, chat, calls or in person conversations to understand the needs of each person so that the smaller amounts of payments coming in to [the First Defendant] could be allocated where they were most needed to give the business and the employees the best chance of continuing as far as possible and as far as they wanted to……….[E]very attempt was made to get the required funds to these more vulnerable resources………
>
> At no point did we guarantee that we would successfully complete an equity raise or close sufficient sales to ensure the business survived. The team knew

the situation we were in from September 2018 onward. They had ample opportunity to resign, to choose another role etc. However, they all chose to continue, knowing that we could not guarantee regular and consistent payment within a specific timeframe."

58. Turning to the question of pension payments, the Second Defendant's evidence in his witness statement (at paragraph 9.3) notes that on 2 April 2014, Saif Qureshi, the First Defendant's Office Manager, who was responsible for setting up the pensions programme, wrote to staff stating that a new pension scheme was being established but that in the meantime until it was set up, contributions would accrue. By July 2015, Ms Qureshi was writing to the Second and Third Defendants stating that "We are finally ready to launch the pension. The total to be paid is £58,047.73. Before I send this, I just want to check if we are good to go? I'm not sure how the payment dates work until I upload the payment file." The following day, she wrote again stating "I have submitted the pensions. We have the option of paying on the 10th July (this Friday) shall I go for this date. Or would you prefer next week." The Second Defendant replied to this email stating "ASAP please."

59. The Second Defendant then states in his witness statement that

> "Something must have held up the actual funding of the pensions at that point (July 2015) as the next communication we have on the subject is from Ed Nesbitt (COO) letting us know that auto-enrolment was due and should be completed within 3 months of that date. [The Third Defendant] responded to Ed saying: Yes, fund it them in 3 months" (sic).

60. Mr Nesbitt's email also refers to the need to "clear up past pensions liabilities asap" and the Second Defendant's email, addressing the auto-enrolment point only, says "Yes – defer it for the maximum three months." The Second Defendant's evidence is that "at that point we were waiting for the Riverside investment and OEM deal with IBM to go through and expected them both to have been completed comfortably within that 3-month window." It is apparent that in fact this never happened, and it is now accepted by the Defendants that there is a collective pension shortfall of £76,985.96. In his witness statement Mr Nesbit stated that when he "became aware of the pension situation [he] began to track the amounts due with accrued interest. This information was then included in the Management Accounts. There was no intention to conceal this information. The expectation was that with the large enterprise deal that was nearing completion with Discover, all pensions would be funded."

61. The Claimant's evidence is that from around 2015 or thereabouts, wherever he asked the Second and Third Defendants about his pension, he would receive the answer that they were "working on it." It was not until March 2019 that he says that he discovered that no pension had been set up for him and that no contributions had been paid into it. When he raised the matter with Mr Nesbitt (using one of the Slack channels), the discussion proceeded as follows:

> "**Mr Nesbit**: This has been an ongoing discussion with Mark and David about getting that set up….and it is allocated in the [Riverside] VC funds
>
> **The Claimant**: But so….like 5 years of it…..Sorry man, this is not against you….but D and M told me that this was set up. Do you mean that they never put any money in a pension fund for me?

**Mr Nesbit**: I know that since I took over this type of thing it has not happened and I am tracking…….I have all the data…….It is all run through payroll….. so you know it is all officially tracked……in the company's books.

**The Claimant**: I'm not an accountant egghead, I just want my money

**Mr Nesbit**: Of course."

62. It is perhaps unsurprising that, whilst the pensions issue might not have been the final straw for the Former Employees (with the exception of Mr Aistrup), their resignations in fact came shortly thereafter, when there was yet another non-payment of salary.

63. As to the funding of pension entitlements by the First Defendant, the position of Mr Aistrup was different to that of the other Former Employees in that he had agreed to top up his pension fund by way of salary sacrifice. This is relied on by the Claimant as evidence of concealment in relation to the position of the remaining Former Employees – in short, he suggests that as Mr Aistrup had opted for part of his salary to be paid by way of sacrifice into his pension fund, the Defendants had little option but to establish and pay into such a fund themselves – this they did in order to "cover their tracks". As the remaining Former Employees had not done this, the true position of non-payment could be concealed from them. The Claimant's evidence was that he was continually assured that money was going into the pension fund – he accepted that the First Defendant may have been keeping track on pension entitlements within its management accounts. Mr Nesbit gave evidence to the effect that he was responsible for tracking the pension payment shortfall once he became aware (at some point in 2017) that such payments were not in fact being made – he said that there was no intention to conceal that information and that the expectation was that once a particular deal had been completed by the First

Defendant, "all pensions would be funded." He also said that his understanding was that interest would also be paid on the late contributions. He said that he had trusted the Second and Third Defendants to resolve the issue but that this had not in fact come about. He accepted that the Former Employees (with the exception of Mr Aistrup) had been issued with payslips which indicated that pension contributions had been paid when in fact they had not.

64. It seems undoubtedly to be the case that the Former Employees did not take the holiday entitlements that had been granted to them under the terms of their contracts (and to which they were entitled in part under the terms of the Working Time Regulations 1998). The First and Second Defendants admit that holidays were not taken and that some payment is due in respect of this. The fact that the Former Employees were building up over a prolonged period, significant amounts of untaken holiday, is said by the Claimant to be illustrative of "a corporate and systemic failure". The evidence of the Former Employees was that they were not permitted to take holiday – the Second Defendant disputed that this was the case and suggested that the Former Employees had willingly agreed to forgo holiday at times. Mr Macinanti's evidence was that he was told at all times that if he was unable to take holiday because of work, his entitlement would carry over to the following year. He said that he did not recall seeing the Handbook which contained the provisions set out above.

65. The Claimant's evidence (in cross-examination) was that he remembered being sent a PDF of the Handbook and being told to sign it but he was not sure that he had ever done so. He said that he was told on occasions that it did not apply to him. In his witness statement he said that on some occasions he was told that he could carry over unused

holiday payments but on other occasions, he was told to "use it or lose it". He said that the Second Defendant had assured him that if work was taking priority such that he could not take his holiday entitlement, it was agreed that he could carry it over. He said that he was clear in his understanding that he would be allowed to take holiday but if not, he would be compensated for days that he had not taken.

66. The Second Defendant's evidence was to the effect that if particular holiday dates could not be granted "a formal process had to be gone through and approval given." He suggested that all of the First Defendant's employees, with one exception – Steve Richards – had signed to accept the terms of the new Handbook. I was not provided with any documentary evidence to support this having been done in the case of the Former Employees. He said however that he himself had never read the Handbook and that, whilst he was in general terms aware of the carry-over policy, he did not get this from the Handbook itself.

67. Reverting to the chronology and picking matters up on 26 April 2019, the Former Employees resigned from their employment with the First Defendant and brought proceedings in the Employment Tribunal as outlined above.

68. Up to the date of his departure, the Claimant had been the administrator of the First Defendant's Slack account and of its Dropbox account. (There was a second Slack account which had been set up by Mr Macinanti but that account is not relevant to the issues in this claim.) On the day that he resigned from his employment, the Claimant deleted the First Defendant's private Slack channels (that is those to which only the First Defendant's staff had access). His evidence was that he deleted – or at least attempted to delete – only his own private messages which were contained in two of the private

channels. One of the channels was with "former employees in the development team. The other was with David Aistrup and Dennis Mink". His statement continues (at paragraph 69) as follows:

> "Both channels were for general chatter about work. Neither contained commercially important information. In the latter channel, Dennis Mink did not leave the company with the rest of us so and so the Defendants could have seen those messages if they wanted.
>
> ………..
>
> 71. Anything that related to the Company's products, such as code or technical information was kept in various online repositories, such as Dropbox or BitBucket and I handed over all the passwords in my possession to these repositories to the Company when I left. I did not keep or delete any of this data."

69. He did however confirm in cross-examination, that Slack was used by Mr Macinanti for discussions with the product development team, including with Mary Johnstone, another IT specialist employed by the First Defendant – although he maintained that all of the relevant conversations were either still in place or could be retrieved using the Slack software administrator tools. He said that on the day of his departure, he had deleted conversations between the Former Employees on Slack which related to them resigning from the First Defendant. He said he had deleted "some private channels and maybe a couple of public channels in which [he] was a participant." He maintained that there "was nothing of commercial value in them – all the First Defendant's IP was in different tools which [he] handed over to them……Any [channels he] deleted were limited to [his] private conversations – nothing wider." He said that he had done this because he had lost confidence in the Second and Third Defendants and he did not want them to know

what options he and the other Former Employees had been considering in relation to their departure. In addition, he accepted that, with hindsight, he should not have attempted to do what he did which was to delete the contents of the Slack channels to which he had contributed. He also accepted that it was in fact possible that he had deleted the entirety of the First Defendant's Slack account – in other words, all of its channels, whether he was a contributor to them or not. He said however, that if this had happened, it had not been intentional and that his attempt (which may have failed) had been to delete a much smaller amount of material within the account. In any event, he maintained the position that nothing of value would have been lost as any information which had been deleted related to "commonly understood issues".

70. Under cross-examination, Mr Macinanti accepted that Slack would have contained information relevant to the First Defendant's products which were under development. In re-examination, he confirmed that Slack was used for technical discussions rather than business ones and confirmed that it was used for product development.

71. The evidence presented on behalf of the Defendants presented in their witness statements, presented a rather different picture. In his witness statement, the Second Defendant suggested that the Claimant had "deliberately and consciously deleted all date, irretrievably from all private Slack channels…The data he deleted stretched back over several years and was of significant business value."

72. The Defendants also relied on the evidence of Mary Johnston. Her evidence was that she had been using Slack to communicate with other employees and management over a

period of 9 years or so and that she had used it for the purposes of sharing documents with colleagues. She went on to say this:

> "In private Slack channels I also had discussions with the ORSON development team. These discussions included recommended changes, testing of new builds, defects detected during testing, prioritisation of new features, and bug fixes, future releases and schedules, questions about how software performed and work arounds for known issues. I would bookmark the critical conversations so that I could return to the developer's specific advice as needed. Slack private channels served as my knowledge base for storing advice and information from the development team."

73. She said that Slack was the only software tool that she used in the course of her product development work – she did not use any of the other options (Dropbox etc) which might have been available. She said that after the Claimant had gone, she had lost all of the data that she had had on Slack.

74. Mr Nesbit also confirmed in his evidence that he had found that all private channels on Slack had been deleted following the resignations of the Former Employees.

75. Returning to the evidence of the Second Defendant, he states that the effect of the Claimant deleting all of the private Slack channels was that a significant amount of work was irretrievably lost and that new product protypes and design details had to be re-created effectively from scratch. He then goes on to suggest that this caused significant delays in bringing a new product – 'Test Data Extractor' – to market with knock on consequences in terms of delayed sales and loss of maintenance payments related to the use of the product. He assessment the total losses due to what he says was a deliberate

act of destruction by the Claimant as being $441,939 as the product was one year late in coming to market.

76. During the course of the trial itself, evidence emerged to the effect that the First Defendant's assets had been sold to a company known as Apica AB, a company registered in Sweden. The Claimant suggests that this was done in an attempt to put the assets of the First Defendant out of the reach of the Claimant. The Second Defendant disputed this and suggested that under the terms of the sale agreement, which had effectively been forced on him by Riverside as the best option available to the indebted First Defendant, a sum of $360,000 had been set aside in order to satisfy any potential award of damages and costs to the Claimant. When cross-examined on this point, the Second Defendant stated that:

> "….our primary concern was to address the liability of this claim – we did not consider a deal [for the sale of the First Defendant] until this was sorted – everything else was secondary…..I refused to do a deal until the principles relating to the allocation of funds to meet the liabilities and settlement of this claim had been agreed….In the end, the only other option was liquidation which would hugely reduce the value of [the First Defendant]. There was no other way to get a contribution towards these proceedings – it was an excellent deal and the only way forward for the First Defendant."

77. More generally in relation to his duties as a director, the Second Defendant confirmed that he was fully aware of the need to act in good faith. He said that it was always the intention that pension payments would be funded but that this had had to be deferred due to cash flow issues – in short "the cash was not available to fund the pensions". He had

used his own money – in the form of the proceeds of sale of shares – to fund the running of the company rather than for what it had been intended, namely addressing his significant health problems. He said that he was not aware that employees had been receiving pay slips which suggested that pension contributions had been paid but that those contributions would have been paid if funding had come in. He said that the issue of funding (or lack of it) had come up at various points in 2015, 2016 and 2017 but that there were always cashflow problems within the First Defendant. He denied that there was any deliberate concealment of this issue, albeit that he suggested that pensions funding was more within the remit of the Third Defendant than his own.

78. He said that throughout the period of financial difficulty, he was "confident that we would get investment…a number of funders had indicated a serious level of interest." He said that the Defendants had "gone to great lengths" to ensure that the Former Employees were kept aware of the financial position. He did not believe that the First Defendant had reached the point of insolvency because they were continually looking at alternative sources of funding. He said that:

> "we were managing a shifting situation and we agreed to prioritise the employees…We communicated with them on a weekly basis to ensure that they were in the best place that they could be….We were fully occupied trying to address the situation…..We agreed to prioritise the most vulnerable – we were making nuanced decisions on a month by month basis."

**The Issues**

**Issue (1) What sums were due to be paid, but were not paid and have not been paid to each of the Former Employees pursuant to their contracts of employment and/or any relevant statutory obligation?**

79. As far as pension payments are concerned, it has been accepted by the First and Second Defendants that the unpaid entitlements (subject to any defences advanced by them) amount to £76,985.96 across all of the Former Employees. It is also agreed, subject to the First Defendant's set-off defence, that the Claimant is entitled to repayment of expenses in the sum of £29,096.28. The remaining items are not agreed as set out below.

80. Dealing first with the Claimant himself, in his Closing Submissions on behalf of the First and Second Defendants, Mr Innes accepts that the following sums have not been paid to the Claimant:

   a. Salary of £31,892.44 – as against the figure of £63,333.33 claimed by the Claimant. The figure claimed by the Claimant is said to amount to 8 months' salary. Given that at the material time, his salary was £95,000 per annum, the sum that he has claimed must be a gross sum. His loss is in fact the net sum that he would have received, albeit that that sum may need to be grossed up to address any tax liability that he might now face as a result of any judgment in his favour. Given that his net monthly pay was £5,259.68, it would suggest that his loss (before any grossing up) is £42,077.44. Whilst it appears to be accepted that he was paid the sum of £10,185, this had been deducted from the figure applied to expenses, with the effect that the net sum of **£42,077.44** is owed;

   b. Holiday pay of £5,240.08 as against the figure of £33,442.92 claimed by the Claimant (based on 84.5 days). This was on the basis that the provisions of the Employee Handbook applied and that allowed for a maximum of 5 days to be

carried over with the possibility of a further 5 in the event that specific permission was given. As to this, I am not satisfied on the evidence I have heard, that the Claimant ever accepted the terms of the Employee Handbook. Even if he had, it seems to me that he was given assurances by the Defendants that, whatever the provisions of that Handbook, he would be compensated for holidays that he had not been able to take. Whether those assurances amounted to a waiver by the First Defendant or some form of estoppel, does not in my view matter very much. The fact is that the Claimant was not taking holidays as he was devoting himself to trying to make a success of the First Defendant's business. He travelled extensively and without a break (which is how he came to incur many of the expenses for which he claims reimbursement) – it would be wholly unjust if he were not now compensated for the holidays which he had not been able to take. In the absence of figure being put forward by the Defendants (apart from one based on the terms contained in the Employee Handbook) I assess the loss under this head as claimed by the Claimant - £33,442.92. However, this would again appear to be based on gross salary. Netting that figure down produces a figure of **£22,222.15**;

c. Interest on loans – this was claimed in the sum of **£4,320.21** but was "not admitted" by the Defendants. No serious objection to this claim has been put forward by the First and Second Defendants save that the point has been made that one would need to ensure that there was no double counting based or any award of statutory interest made as part of this judgment. The sum represents interest on loans for the benefit of the First Defendant and I am satisfied that the Claimant is entitled to recover interest payments that he was obliged to make.

81. As far as Mr Aistrup was concerned:

   a. Salary - it was admitted that 2.21 months' salary was owed but that the figure of £10,500 was very slightly over what was due as a gross figure (£10,497.50) and that in any this was subject to a reduction for tax and that his monthly pay was £3,398.39. This produces a net loss of **£7,510.44**;

   b. Holiday pay – this was admitted to the extent of £3,144.05, as against the figure claimed of £7,125 (based on 30 days). Again, the amount claimed appears to be based on gross figures – the net figure for 30 days on my calculations is **£5,097.58**.

82. Turning to Mr Cardoso:

   a. Salary – In its Defence, the First Defendant accepted that 2.1 months was owed amounting to £8,339.98 gross as against the figure claimed of £16,000 based on 4 months' salary (claimed as a gross figure). However, based on the spreadsheet of payments produced by the Defendants, it appears to be accepted that 7 months' salary was due in respect of which partial payments totalling £12,577 had been paid. Given that his net salary for 7 months would have been 7 x £2,988.14 - £20,916.98, his net loss, taking account of the payments that were made direct to him (without any apparent deduction for tax) is **£8,339.98**;

   b. Holiday pay – this was accepted to the figure of £2,647.62 as against a claim of £3,000 (based on 15 days). The figure of £3,000 claimed appears to be a gross sum – netting this down by 25.29% (as set out in the First and Second Defendant's closing submissions) produces a net loss of **£2,241.30**;

83. Mr Macinanti:

a. Salary – this is accepted by the Defendants in their Defence up to the value of £16,037.76 gross based on 2 months' salary as against a figure of £27,708.23 based on 3.5 months' gross salary claimed by the Claimant. However, again based on the schedule of payments produced by the Defendants at trial, it would appear that his salary was not paid over a period of 7 months but that he did receive a number of payments into his account to a total of £20,780. Given that these payments are shown as having gone directly into Mr Macinanti's bank account, it would appear that no deduction for tax was made in respect of them. That being so, his net loss referable to a 7-month period would appear to be £36,817.76 (7 x £5259.68). Then taking into account the payments of £20,780 paid directly to him, this leaves a shortfall of **£16,037.76**;

b. Holiday pay – accepted in the sum of £5,240.08 against a claim for £5,937.50 (based on 15 days). Given that the sum claimed is referable to a period of 15 days, it must be a gross sum. Netting it down by 33.56% produces a net loss of **£3,944.87**.

84. And finally Mr Sousa:

a. Salary – this has been accepted by the Defendants in their Defence in the gross sum of £16,051.98 as against the sum of £20,000 claimed as being 4 months' loss of salary. However, based again on a shortfall referable to 7 months and setting off partial payments shown to have reached Mr Sousa's bank account, he has received a total of £8,925 against a net figure which he should have received of 7 x £3,568.14 = £24,976.98. There is therefore a net shortfall of **£16,051.98**;

b. Holiday pay – this is accepted in the Defence in the sum of £3,309.52 as against a claim for £3,750 (based on 15 days). Again, however, this appears to be a gross figure – which computes to a net loss of **£2,676.37**.

85. For avoidance of doubt, the figures set out in bold in the above paragraphs, represent the amounts that have not been paid to the Former Employees and which the Claimant is entitled to claim in these proceedings, subject of course to the answers to the remaining issues addressed below. The total of those sums is £130,519.67 to which needs to be added the pension contributions which the Defendants accept have not been paid and which amount to £76,985.96 and the sum of £29,096.28 in respect of the Claimant's unpaid expenses. The total of all of these figures therefore comes to £236,601.91. Questions however arise as to the tax treatment of the various components which go to make up that figure and I will address those below.

**Issue (2) Have the claims arising out of any alleged sums being assigned to the Claimant?**

86. In his closing submissions, Mr Innes accepted that evidence of assignment to the Claimant had been provided in the form of deeds entered into by the Assignors. It was also accepted that written notice of this had been given to the First Defendant. As far as the Second Defendant was concerned, it was said that the letter relied on as providing notice of assignment (from the Claimant's solicitors dated 8 September 2021, had not been addressed to him but only to the First and Third Defendants. On that basis, there could, said Mr Innes, only have been an equitable assignment to the Claimant of those claims that were brought against him. However, given that there was no reasonable likelihood of the Assignors bringing separate proceedings against him (not least because

they had (with the exception of Mr Aistrup) given evidence in the trial), Mr Innes accepted that it may be appropriate for the court to dispense with the usual rule that, in the case of an equitable assignment, the assignor would normally need to be joined by the assignee as a party to the proceedings. As to that, I agree and therefore dispense with that procedural requirement.

**Issue (3) Did any of the former employees waive any right to any sum which was otherwise due to them, and can the Defendants rely upon any such waiver?**

87. As set out above, I do not accept the preliminary point made by Ms Grossman to the effect that any claim based on waiver, falls at the first hurdle due to the provisions of section 13(1) ERA.

88. The Claimant asserts that the Defendants cannot succeed in a case based on variation of the contracts of employment of the Former Employees due to "non-compliance with the variation provisions stipulated in each of [their] contracts" (as set out in the Unilateral Variation Clause). It is also said that any variation would need to be certain as to its ambit and duration and that this was not present. The Claimant also suggests that no consideration was provided by the First Defendant for any such variation.

89. As to any possible election, the Claimant suggests that there was none as the Former Employees had not made a clear choice between two alternative and inconsistent courses of action.

90. Ms Grossman's case on behalf of the Claimant with regard to waiver by promissory estoppel was that the necessary elements for such an estoppel were not present in that the

Former Employee had made no unequivocal promise or representation to give up their contractual rights and forgo sums that were otherwise due and owing to them – at its highest, all that could be said was that, in the face of the First Defendant's apparent financial difficulties, they had adopted a "wait and see" approach to what was an evolving situation. It is also said that there was no evidence of any reliance by the First Defendant on any relevant conduct of the Former Employees. Finally, on this point, Ms Grossman submits that it would in any event be wholly inequitable for the Defendants to rely on the doctrine given the misrepresentation of the position regarding pension payments and the inconsistency of the Defendants' messages about funds coming in to the First Defendant.

91. In response, Mr Innes suggests that, even if taken at its highest, the Unilateral Variation Clause does not operate so as to exclude a waiver by an employee of his contractual rights or an estoppel.

92. He suggests that his waiver/estoppel arguments are founded on the following propositions (set out at paragraph 15 of his Closing Submissions):

(1) the Former Employees were made aware and kept informed of the First Defendant's financial difficulties;

(2) the Former Employees were given the option of leaving;

(3) by their actions, they elected to continue to work for the First Defendant in the knowledge that it could not pay their salaries (as they fell due) and that there was a risk that it would never be able to do so;

(4) "accordingly, they represented that they would continue to work for the [First Defendant] and they would defer and/or forego their salaries and would not claim any contractual right to the same";

(5) the First Defendant "reasonably relied on their conduct to its detriment in that it agreed to continue to trade and to employ them rather than take steps to liquidate and terminate their employment."

93. Mr Innes goes on to suggest that propositions (1)-(3) cannot sensibly be challenged and that proposition (5) has not been challenged in that the First Defendant clearly did continue employing the Former Employees.

94. As to proposition (4), Mr Innes appeared to accept that this was a case in which any representation arose as a matter of conduct rather than by express words. He also candidly accepted that it could not realistically be maintained that the Former Employees had agreed to forego their salaries entirely but "more plausibly" it was a case in which they had elected to defer payment of their salaries "unless and until the [First Defendant] was in a financial position to pay them, which did not occur."

95. On the evidence that I have seen and heard, I am not satisfied that the Former Employees can properly be regarded as having varied their contracts of employment or waived any entitlement to any of the sums which were prima facie owing to them and which are now claimed by the Claimant in his own right and as assignee of the claims of his former colleagues. Whilst it is right that all of the Former Employees continued to work for the First Defendant during a period of significant financial uncertainty and without their contractual payments having been met in full, I do not think that they can properly be regarded as having given up their rights to such payments in any of the ways for which the Defendants contend. There was neither waiver, nor election nor any form of estoppel pursuant to which they agreed that the First Defendant should be released from its contractual obligations. At best, they did no more than give the First Defendant additional

time to pay them, based on the warm words from the Second and Third Defendants to the effect that investment was on its way and would come soon. They may therefore be regarded as having agreed to some form of deferral of payment but once it became clear to them that they were not going to be paid as promised, they were entitled to resign from their employment and bring proceedings to recover that which had not been properly paid to them.

96. All of this reasoning is equally applicable in relation to outstanding holiday payments. I am satisfied that holidays were not taken and that, whatever the provisions of the Handbook, the Former Employees were given to understand that their entitlements to holiday would be allowed to roll over. To the extent that holiday had not been taken up to the point at which they all resigned, they are entitled to payment in lieu and did not waive any entitlement – for the same reasons that apply to their outstanding salary.

97. In so far as pension contributions are concerned, the same principles apply but with the additional feature that the Former Employees were all issued with pay slips which recorded pension contributions as having been made by the First Defendant when (with the exception of Mr Aistrup), this had not in fact happened. It is to my mind impossible to argue that those affected had in any way waived their entitlement to sums which on the face of the payslips, had in fact been paid.

**Issue (4) When each of the Second and Third Defendants were not registered directors at Companies House, did either of them continue to be a de facto director and therefore continue to owe obligations pursuant to the Companies Act 2006?**

98. As far as the Second Defendant is concerned, this ceased to be an issue as, at paragraph 20 of his Skeleton Argument dated 18 October 2024, Mr Innes on his behalf accepted that he was indeed a de facto director at all material times and therefore owed the duties set out in sections 172 and 174 CA.

99. As far as the Third Defendant is concerned, I do not think that there is any basis on which to reach any different conclusion to that which has been accepted by the Second Defendant by way of concession. Whilst his particular role within the Frist Defendant may have differed from that of the Second Defendant (in that they had different areas of responsibility within the business), they operated as the controlling directors of the company at all times – when they were statutory directors and also during those periods in which they ran the business but were not registered in name at Companies House.

**Issue (5) Did the Second Defendant or the Third Defendant breach those obligations?**

100. Although expressed as a distinct issue, separate from Issue (7) below, it seems to me that the answer to this question is provided by the outcome of the analysis below under that separate issue. I do not understand there to be any free-standing points that require to be determined under Issue (5) which are not addressed under the rubric of Issue (7) and the written submissions provided by both counsel do not appear to draw any such distinction. It might be said that Issue (5) is limited to the narrow question of whether the Second and Third Defendants breached the obligations that they owed to the First Defendant under sections 172 and 174 CA and that such breaches would not necessarily be co-terminous with the answer to the question of personal liability addressed under Issue (7). However, whilst that might be a theoretical possibility, I do not think it is helpful to try

and address the issue of personal liability by potentially dividing the issues up in this way and for that reason, I will address, under Issue (7), any relevant considerations that flow from the obligations owed by the Second and Third Defendants under the CA.

**Issue (6) Is the First Defendant liable for sums owed to the Former Employees and if so, in what amounts?**

101. Again, the answer to this issue is determined as a consequence of the analysis relating to other issues in the case, in particular in this instance by Issue (1), where I have addressed those sums which should have been paid to the Former Employees and Issue (3), where I have dealt with the question of whether any of them have waived any entitlement to receive such sums.

**Issue (7) Are the Second Defendant and/or the Third Defendant personally liable for the sums (or any part of them) which in breach of contract have not been paid to the Former Employees?**

102. The Claimant asserts that the Second and Third Defendants are so liable. In particular, it is said that their actions were not carried out in good faith in that they had misled the Former Employees with regard to the pension payments and that the fact that Mr Aistrup had been treated differently with regard to his pension contributions (because he had opted for a salary sacrifice arrangement) was indicative of deliberate concealment of the true position.

103. As far as salary was concerned, there was, said the Claimant "a very considerable lack of transparency in what the Second and Third Defendants had told the Former Employees."

104. On this point, it is worth reflecting back on the outline legal position. In outline terms, a limited company is one which has a separate legal identity from its owners and directors. Neither the directors nor owners will generally be liable in respect of its contractual debts or losses. Whilst directors will owe duties to a company (as set out in sections 172 and 174 Companies Act), they will not generally owe similar duties to any other parties, including employees or creditors. The protected position of directors is reflected in the rule in **Said v Butt** – if directors act properly in the interests of a company and do so in order to promote its success, they will not be liable in tort for having procured a breach of contract by that company where, for example, it fails to pay its creditors or employees. If that were the case, one would routinely see litigation succeeding against individual Defendant directors in circumstances in which a company had run up debts to such an extent that it had become insolvent. Something more is required and one of the routes by which individual liability can arise is if a director has acted in breach of his or her duties owed under the relevant sections of the CA. However, in considering that issue, the focus is very much, at least as a starting point, on the director's actions and intentions as regards the company itself and not as regards a third party that may be affected by the company's failure to meet its contractual obligations. In short, it is a breach of the duties owed to the company which provides the gateway to personal liability to the third party. Whilst it is of course, correct that in fulfilling the duty to act in good faith to promote the success of a company includes, under section 172, a requirement to have regard to the interests of that company's employees, this is not to be elevated into an obligation, without more, to ensure that, for example, employees are paid on time so that the company is seen to meet its contractual obligations towards those employees. The stark examples set out in the judgment of Lane J in **Antuzis** are helpful in understanding the difference – the director that causes a company to 'rob Peter to pay Paul' in circumstances of financial difficulty,

will not generally and without more, be regarded as acting in breach of the duties that he owes to that company. Contrast that with the director who knowingly and dishonestly supplies a counterfeit product to its customers with a wholesale disregard for the fact that this will ultimately leave the company's reputation in tatters – that director does not act in the best interests of that company and therefore exposes himself to personal liability. The facts of **Antuzis** itself provide another graphic example of the circumstances in which personal liability may arise – the directors were knowingly falsifying the employment records of vulnerable employees whose wages were subject to statutory protection and were doing so in order simply to line their own pockets as the beneficiaries of dishonestly inflated company profits.

105. The facts of the present case are in my view, a considerable distance from those particular examples where a breach of duty to the company can be identified. In my view, it is clear from the evidence that the Second and Third Defendants had a vested interest in the First Defendant succeeding and that, when faced with financial problems, they attempted as best they could, to address this by seeking out further outside investment. Whilst they continually gave assurances to the Former Employees that they would be paid at some point, I do not accept that this could be said to be a breach of the duties that they owed to the First Defendant – I have no doubt that both the Second and Third Defendants wanted the First Defendant to succeed and had an active interest in it doing so. The assurances that they gave to the Former Employees were designed to persuade them to remain in employment rather than leaving with the effect of putting the First Defendant in an even more precarious position. Even if imperfect business decisions were made (as to which I make no express finding), they were made in the hope that it would help the First Defendant to survive and thrive.

106. There is arguably a different position with regard to pension payments where the evidence indicates not that these were the subject of the same assurances given in relation to outstanding salary payments but rather that the relevant contributions had in fact been being made on behalf of all of the Former Employees, not just Mr Aistrup. Even here however, I am not satisfied that the evidence is sufficient to demonstrate that the Second and Third Defendants were not acting in the best interests of the First Defendant. Given that Mr Nesbit was tracking the contributions that had not in fact been made – and given that his understanding was that the intention ultimately was to pay them with interest added – this appears to me to be another example of the First Defendant simply not having the funds to meet its contractual liabilities due to the financial problems that it was facing.

107. As far as holiday pay was concerned, I proceed on the basis that there was agreement between the First Defendant and the Former Employees to the effect that they would be allowed to 'roll over' their holiday entitlement. There was therefore no immediate right to holiday pay up to the date of their resignation – their claims are not for holiday that was taken but for which they were not paid – rather they are for payment in lieu arising at the date on which they resigned. Whilst the outstanding amounts were clearly not paid on the date that they left the employment of the First Defendant, I do not think that it can sensibly be said that the Second or Third Defendants induced or procured any breach of contract in respect of the non-payment, still less that it can be said that they acted in breach of the duties that they owed to the First Defendant.

108. The same reasoning applies to the Claimant's claim for expenses – he was entitled to repayment of expenses incurred in the course of his employment. No particular date for

payment is relied on by him save that he should have been reimbursed at the latest on the final day of his employment. This then leaves this part of his claim in materially the same position as the claims for holiday pay to which I have referred above.

**Issue (9) Did the Claimant cause information to be lost to the First Defendant which was commercially viable to it? Did the Claimant deliberately take actions to cause loss and damage to the First Defendant?**

109. The allegation made on behalf of the First and Second Defendants is that the Claimant *deliberately* deleted information belonging to the First Defendant and which was useful to it – in short, he had deliberately deleted or destroyed the First Defendant's confidential information and did so in a way that "made the data unrecoverable…in relation to the Company's' new product components and design." (see paragraph 24.2 of the Defendants' Defence.)

110. If that is what happened, Mr Innes argues that this would plainly amount to a breach of the implied term. However, on the evidence that I have heard, I am not satisfied that he did this – I do not believe that he deliberately deleted the First Defendant's confidential information or deliberately caused the problems with taking its product to market as described by Ms Johnston and the Second Defendant in their evidence. I accept the Claimant's evidence that his intention went no further than seeking to delete conversations between himself and the other Former Employees regarding their potential resignation from the First Defendant. Whilst it might be argued that even that information – being created during the course of employment, using its software – is information which is owned by the First Defendant and *was* deliberately destroyed by the Claimant,

I do not see that this will have caused any loss to it. Therefore, whilst I accept that the Claimant must, in the course of attempting to delete information relating to his departure from employment, have inadvertently caused the deletion of material contained more widely within the First Defendant's Slack channels, I do not accept that he deliberately took any action to cause loss and damage to it.

**Issue (10) If so, was that loss in breach of a duty owed to the First Defendant?**

111. Given my conclusions in relation to Issue (9), this issue does not fall for consideration.

**Issue (11) What loss was caused (pursuant to the usual principles of causation) to the First Defendant? What quantum of any alleged loss can be proved?**

112. Again, based on my conclusions in relation to Issue (9), this issue does not arise. Had I found that the Claimant had deliberately gone about damaging the First Defendant's business, I would have been prepared to proceed on the basis that this may have caused loss and damage to it. However, whilst the Second Defendant did seek to advance a basis on which damages might be calculated, it seems to me that this had what one might call a 'back of an envelope' quality about it and did not in my view provide sufficient evidential foundation on which to calculate any particular identifiable loss which may have flowed from the loss of any material which had been on the Slack system but which was no longer there after the Claimant had left his employment with the First Defendant.

**Interest on amounts due to the Claimant**

113. I am satisfied that the Claimant is entitled to statutory interest on the amounts that I have identified above as owing. A rate of 8% is excessive however, particularly during an era

of relatively low commercial interest rates. In those circumstances, it seems to me that a rate of 3% is appropriate.

**Tax treatment of the amounts due to Claimant**

114. There are broadly speaking, six categories of loss on which the Claimant has succeeded, and it will be necessary to determine the extent to which any of those categories will need to be grossed up to meet any tax liability that he has. Those categories – and my very much provisional views in relation to them – are as follows:

    a. Pension contributions relating to the Claimant himself – as to which it may well be that grossing up will need to be applied;

    b. Pension contributions relating to the Assignors – as to this, the loss that the Claimant has recovered flows on the face of it from the fact of the assignments that he entered into, with the consequence that it does not appear to be an emolument from his own employment in respect of which he is liable to be taxed. If that is right, there would be no requirement for any grossing up;

    c. Salary and holiday payments relating to the Claimant – again, this may need to be grossed up;

    d. Salary and holiday payments relating to the Assignors – subject to further submissions from the parties – the same reasoning would apply here as in relation to the pension payments referrable to the Assignors, with the consequence that these sums would not need to be grossed up;

    e. The Claimant's own expenses – if, as appears to be the case, this is simple reimbursement of expenses incurred in the course of his employment, then it would not appear to be an emolument from employment and therefore would not potentially be subject to any grossing up;

f. Interest on loans – again, this does not appear to have the character of an emolument and if so, would not need to be grossed up as it would not be taxable in the hands of the Claimant.

115. I have not heard submissions from the parties which address the points which I have set out and, as Ms Grossman has properly noted in her written submissions on quantum, any grossing up exercise is dependent on the broader findings that I have only now made in relation to the various heads of claim pursued by the Claimant. I will therefore give the parties a period of 21 days from the date on which this judgment is handed down, to attempt to agree the methodology and calculation of the final award to be made to the Claimant having regard to any tax consequences that flow from this. On the assumption that this can be done, then the parties should also submit an agreed draft Order. If, on the expiry of that 21 day period, an agreed figure has not been reached, I will then allow the parties a further period of 14 days to provide written submissions on the tax consequences of the findings that I have made and as to the final figure that should be recorded in the judgment as payable to the Claimant by the First Defendant.