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Case No: QB-2019-003081

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 25th June 2021

Before:

ANTHONY METZER QC
(Sitting as a Deputy Judge of the High Court)

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Between:

MR ROBERT DAVID MACKENZIE	**Claimant**
- and -	
(1) AA LIMITED (formerly AA PLC)	**Defendants**
(2) AUTOMOBILE ASSOCIATION DEVELOPMENTS LIMITED	

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James Laddie QC and Andrew Smith (instructed by Reynolds Porter Chamberlain LLP) for the Defendants

Gavin Mansfield QC and Hugh Jackson (instructed by Shakespeare Martineau LLP) for the Claimant

Hearing dates: 10-12 March 2021

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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JUDGMENT OF THE DEFENDANTS' APPLICATION FOR SUMMARY JUDGMENT/ OR TO STRIKE OUT OF PARTS OF THE CLAIMANT'S CLAIM

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 25th June 2021.

This judgment was revised pursuant to CPR 40.12 on 30 June 2021. The revised judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii.

Anthony Metzer QC:

The Applications

1. There are three outstanding applications brought by the Defendants all referred to in the third witness statement of Simon Goldring dated 7 May 2020: **A234-270**, who will be referred to in this Judgment as the Applicants ("the As"), against the Claimant, here referred to as the Respondents for summary judgment and/or strike out of parts of the Respondent's ("R's") claim; a fourth was compromised between the parties in the course of the hearing and need not be referred to further, though of course will form part of the Final Order. I have referred to "the As" throughout for convenience, even where it would only be more accurately referable to one of the Applicants.

2. I was provided with comprehensive and very helpful skeleton arguments, oral submissions and written closing submissions with flow charts and I would like to record my thanks for the considerable assistance I received from the erudite and clearly focussed submissions from both sides.

3. The three applications for summary judgment/strike-out are as follows:

    a) The claim as to loss of benefits ancillary to R's employment and his entitlement to participation in a discretionary annual bonus ("The First Application");

    b) Whether R's Management Value Participation ("MVP") shares have any value when assessing R's damages ("The Second Application");

    c) The claim for damages for personal injury ("The Third Application").

4. I propose to deal with the Applications in this order. It is acknowledged and accepted by the As that even if they are successful in all three applications, it does not dispose of the claim in total which will continue to trial as a claim for damages for wrongful dismissal. It is also rightly accepted that I shall assume for the purposes of these applications that the R's claim for wrongful dismissal succeeds, although I recognise that the As case is that this claim is strongly disputed in respect of the matters which proceed to trial.

The legal principles applicable to summary judgment and strike-out

5. The legal principles relating to summary judgment and strike-out are familiar and agreed. In summary, **CPR 24.2** provides that the court may give summary judgment on a claim or issue if it considers that the Claimant has no real prospect of succeeding on the claim or issue; and there is no other compelling reason why the case or issue should be disposed of at trial.

6. The principles applicable in the determination of an application for summary judgment are well settled:

    a) An application for summary judgment is not a summary trial; the Court will consider the merits of the R's case only to the extent necessary to determine whether it has sufficient merit to proceed to trial **[WB 24.2.3 to 24.2.5]** per Lord Woolf in *Swain v Hillman* [2001] C.P. Rep. 16:

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ... Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

b) It is for the As to satisfy the Court that the R has *"no real prospect"* of succeeding and that there is *"no other compelling reason why the case or issue should be disposed of at a trial"* and regard must be had to the overriding objective of dealing with cases justly:

"It is well established that in order to defeat an application for summary judgment it is enough for the defendant to show a prospect of success which is real in the sense of not being false, fanciful or imaginary. However, the burden on the defendant is at most an evidential one. The overall burden of proof rests on the claimant to establish, if it can, the negative proposition that the defendant has no real prospect of success (in the sense which I have mentioned) and that there is no other reason for a trial. Regard must also be had to the overriding objective of dealing with the case justly. The court should not hesitate to give summary judgment in a plain case, and if the case turns on a pure point of law, it may determine that point. However, the court has often been enjoined not to conduct a mini−trial on the documents, without discovery and oral evidence. As Lord Hope said in Three Rivers District Council v Bank of England (No. 3) [2003] 2 AC 1 at 261B, the object of the rule is to deal with cases that are not fit for trial at all" - Per Henderson J. in **Apvodedo NV v Collins** [2008] EWHC 775(Ch) at [32].

c) The procedure for summary judgment is designed for cases not fit for trial at all which was explained by Lord Hope in **Three Rivers DC v Bank of England** [2003] 2 AC 1 at paras 94 & 95:

"*94 ... I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in*

> *the answer to the further question that then needs to be asked, which is—what is to be the scope of that inquiry?"*
>
> *95 I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman , at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."*

d) The Part 24 procedure is designed *"for the swift disposal of straightforward cases"* and the Court should have in mind that there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment than in trying the case in its entirety: Per Mummery LJ in **Doncaster Pharmaceuticals Group Ltd & Other v The Bolton Pharmaceutical Company 100 Ltd***:* [2006] EWCA Civ 661 at paras. 4 & 5.

e) It is not appropriate summarily to determine a claim in an area of developing jurisprudence since decisions as to novel points of law should be based on actual findings of fact: **Equitable Life Assurance Society v Ernst & Young** [2003] EWCA Civ 1114 at 40.

f) In an application for summary judgment the focus is on the evidence which is, or is likely to be, available at trial, per Aldous LJ in **Royal Brompton Hospital NHS Trust v Hammond No. 5**: [2001] 1 WLR 1001 at 108.

7. Issues of causation (and remoteness), which are central matters in this application, are often fact-sensitive. The As rightly recognise that it is therefore only in exceptional circumstances that the Court should accede to an application for summary dismissal of a claim where these issues arise: **Mulvenna v Royal Bank of Scotland plc** [2004] C.P. Rep. 8 per Sir Anthony Evans at [29].

8. The As therefore recognise that where there is a factual dispute, that is (absent clear documentary evidence) a good reason for dismissing an application for summary judgment. However, it is maintained this guiding principle applies with significantly less force where the dispute is not about primary facts, but about a hypothetical counter-factual, which it is maintained is the position in relation to the Second Application.

9. In the alternative to summary judgment, the As ask the Court to exercise its power to strike out. **CPR 3.4(2)(a)** provides, so far as is relevant, that the Court may strike out a statement of case if it appears to the Court that the statement of case discloses no reasonable grounds for bringing the claim. The principles are very similar to those relating to summary judgment but there are some subtle differences making one more suitable than the other depending upon the circumstances and the matters in issue.

10. Examples of cases where the Court may conclude that Particulars of Claim disclose no reasonable grounds for bringing a claim are set out in **PD3A**. These include claims which set out no facts indicating what the claim is about; claims which are incoherent or make no sense and claims which contain a coherent set of facts but those facts, even if true, do not disclose any recognisable claim. (**WB 3.4.2)**.

11. A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (**WB 3.4.2).** On this application, as indicated above, the facts and the R's wrongful dismissal are to be assumed in his favour.

12. From Mr Goldring's witness statement, it appears that the primary position of the As is to seek strike out (alternatively summary judgment) in respect of the First and Third Applications, and summary judgment (alternatively strike out) in respect of the Second Application and I shall proceed on that basis recognising that there is close correlation between the two rules.

The factual background

13. R was formerly the Executive Chairman and Chief Executive Officer ("**CEO**") of the As. On 24 July 2017, R, who was 64 years old at the time, attended a strategy away day at Pennyhill Park Hotel in Surrey for one of the companies in the AA Group. He had previously led a successful management buy-in, and listing on the London Stock Exchange, of the As in June 2014. R drank heavily during dinner and afterwards. After midnight, he was involved in an altercation with a Mr Michael Lloyd, his colleague, which appears to have amounted to an assault on him in the hotel bar, which was captured on CCTV. Mr Lloyd was CEO of the R's insurance and breakdown subsidiary (**APOC 34**). R was swiftly placed on paid leave and an investigation into his conduct was commenced. R held this position between June 2014 and 1 August 2017. On the latter date, shortly after he had resigned (accompanied by a request that he be released from his contract of employment with immediate effect) [**B/5**], he was summarily dismissed for gross misconduct, purportedly on the basis that his behaviour in that incident amounted to gross misconduct, relying on clause 11.3 of the Service Agreement dated 26 June 2014 (the "**Service Agreement**").

14. The workload and challenges R took on appear to have been exceptionally challenging (**APOC 23-29**). At the time of his dismissal, he suffered from a number of physical health conditions (**APOC 31**). By early/mid 2017, it is Rs case that they were aware

that A had become overstressed as a result of his workload, and that his health, including his mental health, had deteriorated (**APOC 32-33**) and it is maintained that the assault incident occurred because he was overworked, exhausted, and physically and mentally ill, and therefore temporarily unable to exercise full self-control. It is therefore R's case that his medical condition, leading directly to the incident, was caused by the As' breach of an implied term and/or common law duty of care, namely a failure to take reasonable care for R's safety and health **(APOC 34, Schedule of Loss [C249])**.

15. R claims in summary that the dismissal was wrongful (i.e. in breach of contract), both because (a) his conduct was not sufficiently grave as to amount to gross misconduct, and that (b) he was not in control of his actions because of illness. As indicated above, it is common ground that the lawfulness of R's dismissal is a matter for trial.

16. R further claims, as set out above, that the incident only occurred because of the deterioration in his mental and physical health allegedly caused by the A's breaches of duty and that their treatment of him over the incident and the subsequent dismissal exacerbated a claimed deterioration in mental health.

17. As a result of the summary dismissal, R claims he was deprived of remuneration and benefits under the Service Agreement and claims damages for this loss amongst a number of heads set out at paragraph 42 of the APOC.

18. These heads include a claim for damages, arising out of R's participation in an incentive scheme governed by the Articles of Association of the As. He (and the management team) received an allocation of Management Value Participation shares ("MVP Shares"), which would be convertible into ordinary shares, or redeemable by the company, if total shareholder return conditions were satisfied on the third, fourth and fifth anniversaries of listing on the London Stock Exchange. The value of such shares would be determined as a percentage of total shareholder return measured against the admission price of £2.50 **(APOC 14-18)**. These MVP shares are of two types – Class 1 being issued in June 2014 and Class 2, subsequently. R held 13,440,000 Class 1, and 19,560,000 Class 2, MVP shares which will be referred to as the Mackenzie Shares.

19. R also pursues a personal injury claim against the As in respect of psychiatric injury for which he claims the As are responsible.

The First Application

20. The First Application relates only to benefits and bonus in the 12-month notice period (**APOC 42.2 and 42.3**). As already indicated, the As accept that the claim will proceed to trial on liability and that the claim for damages must proceed in part in relation to the claim for loss of salary for the 12 -month notice period (**APOC 42.1**).

21. The parties agree that the purpose of damages for breach of contract is to put the R in the position that he would have been in had the contract been lawfully performed. The assessment of damages requires comparison between the "actual" position he was in following breach and the "counterfactual" or "but for" position he would have been in had the As performed the contract

22. The As maintain that on the presumed basis that R's claim that he was wrongfully dismissed is upheld, it would be obliged to assess damages on the assumption that the Service Agreement would have been lawfully terminated in the manner "least burdensome" to the As, relying on **Lavarack v Woods of Colchester Ltd.** [1967] 1 QB 278.

23. Clause 2.3 of the Service Agreement provided for either party to terminate R's employment on 12 months' written notice [**B/139**]. There was also power granted to the As under clause 11.2 of the Service Agreement to summarily terminate R's employment (the "**PILON clause**"), provided they undertook to pay him within 14 days of such termination a sum equal to his basic salary in lieu of his notice period, together with any accrued holiday entitlement [**B/144**]. Accordingly, it is asserted that R is precluded from claiming, as part of his wrongful dismissal claim, damages for the loss of any other employment benefits.

24. R appears to accept in closing submissions: per paragraph 7 (b), that **Lavarack** is binding on the Court (though "ripe for reconsideration") - it is also expressed in those closing submissions at paragraph 7 (a) that it "should not be followed so as to limit R's entitlement to be compensated for his losses", but recognises that is ultimately a matter for the Court of Appeal. R also maintains that "The Least Burdensome Performance" principle properly understood does not exclude assessment of the facts of what the As would have done. R accepts that if the As had exercised the PILON clause, they would not have had to make a payment in respect of bonus or various benefits and concedes that is a factor that may suggest exercising the PILON clause was less burdensome than terminating on notice, but asserts in other respects exercising the PILON clause would have been more burdensome and states that all factors need to be weighed against each other to determine which is the least burdensome mode of performance, specifically claiming that:

    a) If R had been given notice he would have earned his remuneration on a *monthly basis* over the notice period; the PILON had to be paid as a *single lump sum* upon termination;

    b) Unlike a claim for damages, the PILON is paid and recoverable as a debt. There would have been no obligation on the part of the As to give credit for sums earned during the notice period;

    c) Where, as is maintained here, an employer comes to rely on subsequently discovered alleged misconduct as justifying the dismissal (and non-payment of notice monies) see D+CC para 54 **[A47]**, in reliance on **Boston Deep Sea Fishing and Ice Co. v Ansell** (1888) 39 Ch D 339, it is claimed that the **Boston Deep Sea Fishing** principle does not operate to allow a PILON to be withheld or clawed back: **Cavenagh v William Evans Ltd.** [2012] ICR 1231 CA;

    d) All of the post-termination restrictions in the Service Agreement run from the Cessation Date. If notice had been given, the As would have been protected from competition by R's ongoing duties during the notice period, and then the post-termination restrictions. By terminating with immediate effect, it is claimed the As would have a *shorter period of protection* against any competing activity by R.

The Lavarack principle and its development

25. The principle emanates from **Robinson v Robinson** (1851) De Gex M and G 247 per Lord Cranworth at p 257: "Where a man is bound by covenants to do one of two things, and does neither, there in an action by the covenantee, the measure of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most beneficial to the covenantee".

26. In **Harold Abrahams v Herbert Reiach Ltd** [1922] 1 KB 477, there was a breach of a publishing contract. The Defendant in that case was obliged to publish the Plaintiff's books but did not do so. It was held that damages were payable on the basis of a reasonable publication and that this situation was distinguishable from where the contract provided alternative means of performance. Atkins LJ stated at p 483: "*The plaintiff cannot prove a contract for performance of the more onerous obligation. This explains why in cases of this kind the Court regards only the lesser of two alternative obligations*".

27. **Lavarack** itself was actually a case of wrongful dismissal, which is a species of breach of contract. The claim was not simply for lost salary, but also for lost bonus. The Plaintiff in that case had no contractual entitlement to a bonus but maintained that had he not been wrongfully dismissed, he would have been most likely to receive a bonus during his notice period. The CA majority held that this claim to a bonus failed as damages could only be assessed on the basis that the employer would perform its legal obligations under the contract "*and nothing more*" per Lord Diplock at p 294.

28. In **The "World Navigator" [1991] 2 Lloyd's Rep 23,** a shipping case, the claim was for the demurrage costs of waiting in port. It did not succeed, as based upon the **Lavarack** principle, the Court would not speculate on how fast the ship would have loaded had the seller been ready in time and damages would be assessed on the basis that if so, it would have performed the contract in the manner most favourable to it, namely using up the laytime available under the contract, so that meant that on the facts, there was no loss. Staughton LJ stated at p 33 the: " *general principle that a defendant, in performing his contractual obligations, is assumed to have chosen to perform them in the way least beneficial to the plaintiff where the contract gave him that choice*".

29. The As rely upon three additional cases from an employment law perspective which it is claimed support the Lavarack principle, namely **Janciuk v Winerite Ltd [1998] IRLR 63,** per Morison P at paragraph 7 where the Judge concluded: "*the assumption is that the employer would have chosen to have terminated the contract lawfully at the very moment that he had brought [or sought to bring] the contract to an end unlawfully in breach of contract*"; **Horkulak v Cantor Fitzgerald [2004] ICR 697** per Newman J who assessed damages on the basis that the employer would have activated a contractual clause entitling it to reduce the Claimant's basic pay even where it had not done so prior to dismissal; and **Smith v Trafford Housing Association [2013] IRLR 86** in which Briggs J reconfirmed that the Lavarack principle remained good law stating: "..*an employment contract terminable on notice is…a contract giving the*

employer a free choice as to its duration, subject only to giving the requisite contractual period of notice of termination."

30. R submits that the principle has not been followed in a number of cases, specifically where the obligation breached is one obligation which can be performed in a number of different ways, as opposed to a choice of options: per Patten LJ in **Durham Tees Valley Airport Ltd v BMIBaby Ltd** at para 79; where the breach is of a negative obligation: **Jones v Ricoh UK Ltd** [2010] EWHC 1743 Ch (summary judgment) per Roth J paras 74-75 and [2012] EWHC 348 Ch (trial) per HHJ Hodge QC paras 84-86; where the claim is for breach of an obligation during employment, a claim for breach of contract by failure to pay wages was not limited by the fact that the employer could have terminated on notice: **Rigby v Ferodo Ltd** [1988] ICR 29 HL at 35G-36C per Lord Oliver ;and noting that the employer could not rely on the fact that it could have terminated by making a PILON to defeat the employee's claims to rights under a share option scheme: **Levett v Biotrace plc** [1999] ICR 818 CA p.824B per Tuckey LJ.

31. R seeks to distinguish **Horkulak v Cantor Fitzgerald International** by referring to circumstances where the employer has a contractual obligation to exercise a discretion in relation to bonus. R concedes in **Smith v Trafford Housing Trust** [2013] IRLR 86 that Briggs J observed that the approach in **BMIBaby** had not made inroads into the conventional approach (i.e. the Least Burdensome Performance principle) in wrongful dismissal cases (para 99) but maintains that **Smith** must be treated with caution, primarily because the Judge carried out a counter-factual analysis in circumstances where on the facts, he had found the employer would have served contractual notice if it had not been in breach.

My conclusions

32. The basic claim for loss of 12 months' salary at para 42.1 of the APOC is not in issue before me and requires determination at trial depending on whether R establishes his wrongful dismissal claim. This aspect relates to Paragraphs 42.3 and 42.2, namely that had R been given 12 months' notice of termination, he would have had a real and substantial chance of earning a bonus of (up to) 120% of his basic salary, and would have received various ancillary employment benefits. In the course of submissions, I suggested "least burdensome" effectively meant "cheapest". This suggestion has been adopted in the As' closing submissions at paragraphs 5 and 6. That result would be achievable by the exercise of the PILON clause at clause 11.2 of the Service Agreement, which I find is specifically designed to cater for this situation. The contracting parties use these clauses to agree to a termination mechanism whereby the employer has a unilateral contractual right to terminate the employee's employment summarily, at any time and for any reason provided it makes a payment in lieu of defined benefits – specifically, in this case, basic salary in respect of the contractual notice period and payment in lieu of any accrued but untaken holiday entitlement.

33. I am assisted by the relevant authorities, which I consider are binding and cannot be distinguished, to conclude that the authorities which identify the least burdensome course of action for the employer in a wrongful dismissal claim involves an assumption of the earliest possible lawful termination. To suggest that the employer should not benefit from their wrongdoing by relying upon this clause is a misnomer. The employer, as here, would be contractually obliged to pay the loss of salary as damages for the wrongful dismissal *simpliciter*. I do not accept R's suggestions as to why the exercise

of the PILON clause would not be the "least burdensome" option. They are a combination of speculative and vaguely-defined counter-factual scenarios which I do not consider the As would or should be expected to embark upon. First, I do not consider the argument that the As would have exercised its discretion to make a payment in respect of bonus in light of R's long service has any foundation. This is the same argument as was expressly rejected in **Lavarack**. R does not show why any other means of termination would be "less burdensome" save the rather tenuous suggestion that a single lump sum payment would be more expensive than monthly payments which if operated would potentially open up the As to further payments owed to R.

34. Further, if R had been placed on garden leave for the full 12 months being the duration of his contractual notice period, then he would have remained employed whilst on garden leave, and would not have been permitted to commence paid employment elsewhere. Accordingly, there would have been no relevant earnings for which to "*give credit*".

35. Finally, I reject the suggestion that summary dismissal would have reduced the period during which the As would have benefited from the protection of post-termination restrictive covenants. The "*Restricted Period*" (for which the post-termination restraints were operative) is defined in clause 13.7 of the Service Agreement as meaning "*the period of 12 months starting with the Termination Date less any period during which the Executive has not been provided with work pursuant to Clause 3.5*" [**B/150**]. Therefore, had A been given notice of termination on 1 August 2017 and placed on garden leave under clause 3.5 , the parties would have been in precisely the same position with regard to the operation of the restrictive covenants in clauses 13.1 and 13.2 of the Service Agreement, that is to say they would not have been operative post-1 August 2018. It is also noteworthy, in my judgment, in respect of this aspect of R's claim, that he does *not* claim to have been in a position to fulfil his employment duties as at the date of his dismissal on 1 August 2017 (see paragraph 174 of Mr Daniel Jennings' witness statement: [**B267]** and paragraph 137 of R's own witness statement **[C278-9]**) and I do not accept the submission that it would be less burdensome for the As to place him on garden leave, continue to pay for the ancillary employment benefits cited at paragraph 42.2 APOC and to have paid him a substantial bonus at some point in 2018 (of up to £900,000), in respect of a year when he would have been absent from work on his case for a period of approximately six months, rather than paying him no bonus.

36. Further, I do not find, as suggested in the proposed Amended Reply, at paragraph 11B(c)-(d) [**C/297**], that because the Executive Remuneration Policy in the A's annual report states that consideration would be given to payment or part-payment of bonuses in circumstances where the employment of executive directors had ended before the bonus payment date, the As were under an implied obligation in the Service Agreement to exercise that discretion in good faith, non-capriciously and having regard only to all relevant factors. The implied term is derived from the judgment of the Supreme Court in **Braganza v BP Shipping Ltd** [2015] ICR 449 but I find has no application as it is an allegation of a failure to exercise an alleged discretion in R's favour- the **Braganza** term covers the exercise of contractual discretion, which is not what is contained either within the Executive Remuneration Policy or the Service Agreement itself.

37. It is significant in my judgment that none of the possible scenarios envisaged by R contends for a cheaper alternative for the As than the exercise of the PILON clause

which would have been the earliest lawful termination and which in my view was clearly the "least burdensome" contractual alternative for the As which would have enabled them to achieve the same summary dismissal as they did on 1 August 2017.

38. For all these reasons, I find in accordance with the Lavarack principle, which is binding on me and which I find has direct application to the present case, Paras 42.2 and 42.3 are unarguable on the law and facts and these claims are struck out.

The second application

39. The APOC 42.4 and 42.5 claim damages in relation to the Mackenzie Shares. It is common ground that the share price never reached the required prices on 24 June 2017, 24 June 2018 and 24 June 2019 to trigger value in the MVP shares. In order to have any value, the price of the shares needed to hit certain thresholds in each of June 2017, June 2018 and June 2019. R's claim is that but for As' alleged breach of duty and his personal injury, he would have remained in a leadership position in the As and would have been in a position to drive the organisation in a manner that would have led to the share price reaching the relevant triggers, or alternatively that there was a real and substantial chance of that happening.

40. The As submit that prior to his dismissal, and since around mid-2015, R had presided over a significant decline in the share price, particularly in the final two years of his employment, during which the share price fell by 33.2% (from £3.65 to £2.44); that on R's own case, he accepted that it was appropriate for a new CEO to take over his position: paragraph 10 of the Reply [**A/64-66**]; that he required a period of convalescence- Mr Jennings suggests that six months would have been appropriate: see para 174 [**B/267**] so that he would not have remained in operational charge of As' business from 1 August 2017 for 12 months (or any longer) and, at para 25 of the D+CC [**A/30]** R would become Non-Executive Chair; and that as at the first assessment date in June 2017 the share price was well below (specifically, 62.5% of) the applicable target price; at the second assessment date in June 2018, the share price remained well below (specifically, 33.6% of) the applicable target price; and at the third assessment date in June 2019, the share price remained well below (specifically, 10.9% of) the applicable target price.

41. R maintains, in this "loss of a chance" claim, that that there is "incontrovertible evidence", including in the As' own evidence, that the falls in share price were triggered by changes in strategy adopted by the company after R's dismissal including slowing down debt reduction, increasing capex and opex, and, most significantly, cutting the dividend and asserts that the share price decline during R's tenure is of no forensic significance as the four- year transformation strategy was only part way through at that time. In any event, that there was perceived value well beyond market price is , R claims, established by the evidence of a bid approach. It is also claimed that were it not for the As' breaches of duty, R would not have needed to take leave. Further, had the status quo been maintained, there would have been a substantial transformation in the performance of the share price and it is suggested that R's replacement as CEO, Mr Simon Breakwell, had mismanaged the business so that he is personally and directly culpable for the failure to hit the requisite share price in 2018 and 2019, even though

the business had failed, by some distance, to hit the requisite price in 2017 under R's leadership.

The applicable law

42. It is an important principle that the Court should not speculate where it knows: see **Curwen v James** [1963] 1 WLR 748, per Harman LJ (at p.753). The actual performance of As' shares over the relevant period must therefore be of significant relevance when measured against R's counter-factual situation.

43. I have only been directed to one previous case where a claim in tort has been made in which diminution in share value of a listed company has been pleaded as a head of damage: **Collins Stewart Ltd v The Financial Times Ltd** [2005] EMLR 64 . In that case, a supplementary ground for striking out the claim was that it would be "*untriable and a waste of the court's resources*". I have not been provided with any authority which determines that a Claimant has succeeded in claiming substantial damages based upon an avoidable diminution in the share price of a limited company.

44. The parties are agreed that R must establish that he has a more than merely arguable prospect of establishing that the chance was "*real and substantial*" (see **Allied Maples v Simmons & Simmons** [1995] 1 WLR 1602) which meaning has recently been considered in detail by Waksman J in **PCP Capital Partners LLP v Barclays Bank PLC** [2021] EWHC 307. In summary, he concluded that anything less than a 10% chance would not be "*real and substantial*" (see in particular [554-561]). I shall therefore determine this preliminary issue on that relatively low prospect of success.

My conclusions

45. The As rightly recognise that where there is a factual dispute, that is (absent clear documentary evidence) a good reason for dismissing an application for summary judgment. However, they maintain this applies with significantly less force where the dispute is not about primary facts but about a hypothetical counter-factual, which is the position in relation to this Application.

46. It is important to note that the counter-factual scenario encompasses that from its 'base price' of £2.44 on 31 July 2017 (the day before R's dismissal), to satisfy the applicable performance condition, the share price needed to rise substantially, to at least £3.93 by 24 June 2018 – a 61% increase; and/or at least £4.40 by 24 June 2019 -an 80% increase, whereas in fact the share price continued a downward trajectory, falling to: £1.32 on 24 June 2018, a further 46% decrease; and £0.48 on 25 June 2019, a further 80% decrease. During this period, the FTSE 250 share index rose by just over 5% when analysed between 31 July 2017 to 25 June 2018, and between 31 July 2017 and 24 June 2019 fell by 2.43%.

47. R claims that notwithstanding the sustained decline in As' share price under his leadership, had he remained in place, there would have been a huge transformation in the performance of the share price, completely outstripping its historic performance, and the performance of the FTSE 250 index over the period; and that as set out above, his replacement, Mr Breakwell mismanaged the business so that he is personally culpable for the failure to hit the requisite share price in 2018 and 2019 even though it had not done so in 2017 under R's leadership. In summary, it is claimed that under R's

continued leadership, the performance of the share price would have been dramatically better than both before and after R's dismissal.

48. Broker reports are real-time analyses undertaken by equity experts. The As have helpfully served evidence exhibiting nine sets of broker reports from leading analysts which cover the relevant period of 1 August 2017 until 24 June 2019 -the final threshold date. They are: Barclays [**D/3-147**]; Berenberg [**D/148-215**]; Cenkos [**D/216-247**]; Citi [**D/248-325**]; Credit Suisse [**D/326-489**]; Jefferies [**E/4-54**]; Liberum [**E/55-336**]; Morgan Stanley [**E/337-356**]; and Peel Hunt [**E/357-426**].

49. In summary and of significance, the broker reports show that there was very substantial variation between the brokers over the entire period as to As' shares' target price; all of the brokers were over-optimistic as to the target price; none of them issued a target price that met the necessary threshold for the Mackenzie Shares to have any value; and none criticised the appointment of Mr Breakwell as interim, then permanent, CEO following R's dismissal. In fact, there was evidence to the contrary: see for example [**D/5**], [**D/17**], [**D/22**], [**D/39**], [**D/222 & 223**], [**D/241**], [**D/247**], [**D/339**], [**E/27**], [**E/118 & 119**], [**E/123 & 124**], [**E/340**], [**E/362**].

50. Although it is correct to observe that there was a significant fall in the As' share price on the day of the announcement of R's dismissal, it also coincided with the profit warning issued on the same day and the brokers did not criticise Mr Breakwell's announcement of a strategic review, or his announcements in February 2018 that there was to be additional capital and operational expenditure of £45m, and that dividends would be cut to 2p per share.

51. More generally, the brokers did not criticise the strategic and commercial direction in which the As were being led. Mr Breakwell enjoyed substantial investor confidence throughout his tenure-he attracted investor support of greater than 99% (higher even that R) in 2018, 2019 and 2020: see C/338; C/341 and C/343.

52. It is clear on this evidence and I find that the share price continued to be adversely impacted by factors in large part unrelated to the strategic decisions being taken by the As' leadership team including the As' continuing large debt obligation which arose from 2014 when R led the IPO which inevitably resulted in a substantial lowering of the share price.

53. R relies upon Mr Jennings' witness statement where he identifies (at paragraph 117 [B/257]) reports from City Group of 29 March and 9 June 2017 citing a 'target price of £3.85. However, these reports are substantially outwith the other reports in terms of analysts' projections of future performance. Moreover, that projection was still below the requisite level and the market was then unaware of the pending profit warning which was issued on 1 August 2017 which referred to a period of worse than expected performance whilst A was at the helm.

54. Further, the As would still have been obliged to issue this profit warning even without R's dismissal which I find would have a negative impact on the share price. In any event by the day after R's dismissal, Citigroup had significantly downgraded its target price to £3.50.

55. With regard to Mr Breakwell, it would appear to be R's case that he (or someone else equally qualified) would have been leading the business, in charge of its operational affairs, and responsible for taking decisions which he believed to be in the best interests of the business whilst R was convalescing. Further, the evidence from R himself: [F2-11] confirms that it was planned in the imminent future, there would be significant changes in As' leadership structure and personnel, including with regard to R's future. As set out above, there is nothing in the evidence I have been provided with that suggests Mr Breakwell was a surprising or inappropriate appointment, was not well regarded by the shareholders or operated a destructive approach to leadership, or at the very least ran the organisation (together with other board members) in breach of their legal obligations to the As.

56. Further, in respect of R himself, I do not consider that any leader of a significant listed company could single-handedly be responsible for the sort of dramatic turnaround necessary to trigger the share payments. On the undisputed facts of this case, R's ability to influence the share-price would in any event have been affected by his period of convalescence, the imminent appointment of a new CEO and that R would have taken up the position of Non-Executive Chair: see again **F/2-11**. The share price had lost a third of its value in the final two years of R's period in charge and unfortunately he presided over a period of decline. I do not consider there is any evidence at all that he could have generated the sort of share price turnaround that was already needed when he was dismissed.

57. R maintains that the falls in share price were triggered by changes in strategy adopted by the company after his dismissal; that his dismissal itself triggered a fall in share price; that an irreversible slump in the A's share price was caused by the decision to abandon the IPO strategy, announced in February 2018 and reliance is placed upon evidence that there was interest in a bid for the company: first witness statement of Robert Mackenzie paras 102 & 103 **[C273]**. In my judgment, for the reasons set out above, whilst undoubtedly R's dismissal caused a level of volatility, none of these points make any substantial inroads to what in truth is a chasm which R would be required to establish to even the low threshold of a 10% loss of a chance test to effect the required upturn in fortune to trigger the share pay-outs in any of the years. In reaching that decision, I note that under R's leadership, the share price fell 33% in the two years preceding his dismissal; 7 of the 10 original investors had sold or reduced their holdings: **B/213-222**; there was clear concern about the confidence in R of senior executives: see for example the 'Crisis Memo" at **B/178** and perhaps most pertinently, R himself did not believe the share price thresholds would be met which is why he sought the investors' agreement to extend the scheme so that the threshold dates would be moved back a year: [**B/226** and **B/228**].

58. I therefore find that this is one of those relatively rare cases where the submission that the disputed evidence should be resolved at trial is dismissed. I find that there is no good reason to have this issue litigated at trial which would involve a lengthy, hugely expensive and in my view unnecessary enquiry into how the As were managed between 2017-2019 and analysis of the counter-factual scenario if R had remained in charge. I respectfully apply the observations referred to in **Collins v Financial Times** per Tugendhat J at paragraph 70 namely that this aspect of the case "*would be untriable and a waste of the resources of the Court*" and accordingly award the As summary judgment on this aspect of R's claim.

The Third Application

59. The As' application notice seeks to strike out (or obtain summary judgment) in respect of the words "*Damages for personal injury resulting from the damage to his health and wellbeing"*. R claims he suffered personal injury as a result of the As' breaches of contract **[APOC 42.6]**. I have chosen to determine this issue after the second application as R wishes, even though on the As' analysis as reflected at paragraphs 21-23 of their closing submissions, which has some attraction, a finding in their favour would arguably automatically determine that application in their favour too.

The applicable legal principles and disputed issues

60. In what the R describes as the "seminal" judgment of Hale LJ (as she then was) in **Hatton v Sutherland** [2002] ICR 613 Hale LJ identified, at [43], sixteen principles (or "*practical propositions*") relating to an employer's potential liability in a psychiatric injury claim, including (a) the proposition that there are no occupations which should be regarded as intrinsically dangerous to mental health, and (b) that the emphasis is on whether the harm in question was reasonably foreseeable to the employer and whether the employer could have taken reasonable steps to avoid it. Her analysis was approved by the House of Lords in **Barber v Somerset City Council** [2004] IRLR 475 and was applied by Scott Baker LJ in **Hartman v South Essex NHS Trust** [2005] IRLR 293.

61. On the question of foreseeability, in **MacLennan v Hartford Europe Ltd** [2012] EWHC 346 (QB), Hickinbottom J distilled (at [15]-[22]) several important propositions, including the following:

(i) It is insufficient for a claimant to show that his employer knew or ought to have known that he had too much work to do, or even to show that he was vulnerable to stress as a result of overwork. To succeed, he must show that his employer knew or ought to have known that, as a result of stress at work, there was a risk that he would suffer harm in terms of a psychiatric or other medical condition.

(ii) Even then, it is insufficient merely to show that there was a known risk of some psychiatric or other injury in the future. The claimant must show that the employer knew or ought to have known that, as a result of stress at work, there was a risk that he would suffer harm of the kind he in fact suffered. Thus, the employer must have knowledge of an imminent risk of the sort of collapse of health that in fact occurred.

(iii) Although most employees will have difficulties with the amount or nature of their work from time to time, very few are at risk of psychiatric illness as a result. An employer is entitled to assume that an employee can withstand the normal pressures of the job unless it is such that employees are known to be at particular risk of injury (for example, if other employees doing the same or similar work have become ill as a result of the work); or

(iv) the employer knows or ought to know that a particular employee is especially vulnerable to stress-induced illness (for example, where they have knowledge of a previous psychiatric episode as a result of stress at work, or the employee manifests clear signs to his employer of impending harm to health). Most employees will on occasions be 'overworked' and will have problems in 'coping' with their work.

However, that does not mean that work necessarily poses a threat to that person's health. Indeed, even in those circumstances, it will rarely do so.

(v) An employer has a duty to act only when the indications of (imminent) harm are plain enough for any reasonable employer to realise that it should do something about it.

(vi) An employer has no general obligation to make searching or intrusive enquiries, and may take at face value what an employee tells it.

(vii) The foreseeability threshold in such claims is therefore high and may prove a formidable obstacle on the facts of a particular case.

62. Neither party was able to furnish me with any authority where an occupational stress claim had succeeded, absent an express warning, or where it has been brought by a successful "captain of industry". I consider the absence of such authorities to be of some significance.

63. The As submit that R has not disclosed reasonable grounds for bringing the PI claim and has no arguable case that his place of work was unsafe and/or that his system of working was unsafe; that the As failed to take reasonable care for his health and safety, thereby causing him to suffer personal injury; or that the personal injury which R suffered was reasonably foreseeable, given that he did not alert his employer to any imminent risk of the sort of collapse of health now identified namely "*severe generalised anxiety disorder and depression*". There was no medical evidence provided whether by him or his doctor, in respect of any psychiatric illness or known risk of him suffering that injury.

64. Reliance is placed upon the fact that he was the most senior employee and that he therefore would set his own working practices, consistent with his obligations under the Service Agreement.

65. Further, and more fundamentally, with regard to foreseeability, it is submitted that the burden is on R to establish that the As were 'on notice' of an imminent risk of psychiatric injury of the kind he suffered (and for the purposes of this application it must be assumed that he did) prior to the events in late July 2017 as on his case, it was the breach of duty which caused him to assault Mr Lloyd: see paragraph **34.7 APOC** [**A/17**].

66. It is not suggested that R discussed any psychiatric illness, as opposed to a discussion about stress and diabetes - which is clearly very different, with anyone before the incident, although he claims that he did have "*a number of exceptionally challenging objectives*": **paragraph 23 APOC** and was working "*intensively and exceptionally lengthy hours for that purpose*": **paragraph 25 APOC**, and experienced some loss of memory and/or concentration in the course of his work and/or exhibited outbursts of temper or emotion: **paragraph 32 APOC**, and maintains that the As were so aware.

67. R claims that both the board and members of senior management (including the As' human resources manager, Ms Helen Hancock, were aware that R had become overstressed and aware of the deterioration in his physical and mental health (**APOC paras. 32 & 33; RRFI 1, 2 & 4**). Further, prior to the dismissal the As had clear

evidence of R's symptoms, and the prospect that those symptoms were caused by undermining behaviour at work and he having taken on unreasonable levels of responsibility relying upon Dr Mitchell's short report of 31/7/17 **[B4]**. It is claimed that it was wholly foreseeable that the As' treatment led to an exacerbation of R's condition and delayed his subsequent recovery. Reliance is placed upon Professor Ismail's Report starting at **B186**, and I am also requested to have regard to the As' Board which is governed by the UK Corporate Governance Code 2016 whereby under *"Principle B.6: Evaluation*

Main Principle

> *The board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors".*

My findings

68. As set out above, R's personal injury claim requires a finding that it was the As' breach of contract/duty which caused his psychiatric condition: see **paragraph 34.7 APOC** [**A/17**]. R therefore has the burden of establishing the As had actual (which is not suggested here on the evidence), or constructive knowledge of an imminent risk of psychiatric injury of the kind he claims to have suffered, namely *severe generalised anxiety disorder and depression* prior to the incident in July 2017, for a period of between 3 and 18 months prior to his dismissal.

69. I find that there is simply no evidence that R or his doctor provided the As with anything to suggest he was suffering from a psychiatric condition. Further, the R does not claim to have discussed any psychiatric illness (as opposed to a discussion about stress and diabetes) with any of As' employees (or anyone else). Even his own family on R's own evidence (as reflected in Professor Ismail's Report which included interviews with R's wife and son) were wholly unaware of any relevant deterioration in his medical condition. It is significant that R's response to the Request for Further Information at [**A/74]** refers only to one matter, namely a request by R's wife that he be permitted to travel to work early on a Monday morning, rather than on a Sunday night. Whilst it may very well be that he had "*a number of exceptionally challenging objectives*": **paragraph 23 APOC** and worked *"intensively and exceptionally lengthy hours for that purpose*": **paragraph 25 APOC**, I consider the evidence establishes that his character is of someone who responded well to the challenges of hard work and was stoical and quite driven, which helped to explain his considerable success in his career over many years.

70. The highest R is able to put it in his claim is the limited evidence referred to above and further that he experienced some loss of memory and/or concentration in the course of his work and exhibited outbursts of temper or emotion: **paragraph 32 APOC**. I find however that falls far short of being able to establish a realistic, as opposed to a fanciful prospect of proving that the As were, or should have been on notice that R was suffering from the recognised psychiatric condition, or at such imminent risk.

71. R has not pleaded this necessary awareness in the APOC, the Reply, the Voluntary Particulars or the proposed Amended Reply. It is noteworthy that paragraph 10(b)(vii)

of the proposed Amended Reply, avers that: "Further the Defendants having established a Risk Committee which reported to the Board, the need for the separation of the roles of CEO and Chairman was not greatly pressing" which hardly suggests that he was so overworked that it was causing his to suffer psychiatric injury.

72. Significantly, R's own expert report from Professor Ismail, which for the purposes of this application, the As are required to accept, demonstrates that R has suffered those medical conditions, stated (at [**B/194**]:

> "[Decompensation] implies that the mental illness was present but masked before the decompensation event because [the individuals] are coping or managing or have no insight into their psychiatric symptoms. In [R's case] these symptoms had not yet been diagnosed before the incident because he behaved as if he was coping, although there were clues with his increased alcohol intake…"

73. It was therefore the incident itself, according to his own expert, which resulted in the "unmasking of the symptoms to become manifest". At **[B/195-6]**, Professor Ismail further opines that R "tried to cope in the same way with the increasing stress levels, namely by bottling his worries and feelings…[he] did not ask for help as this is not his personality type and if anything, in times of feeling vulnerable, he has probably become more competitive and driven". It is noteworthy in my judgment that " in oral and in written closing submissions, R submitted that the [As'] seek to attach too much weight on passages of the report…(and that) The Court should be cautious in assessing passages in a report where the expert was addressing a different set of issues (diagnosis and causation)". I consider that I must have regard to the Report in the round to the extent that it assists in relation to the findings I am required to determine in this application.

74. R's own GP, with whom he was close, Dr Dorrington Ward, did not detect "any unusual behaviours or report any signs of mental health issues" affecting him: B186/7. R wishes to adduce further evidence: see Mr Jennings **at [B/271-2]**, at paras 195-7, but this prospective evidence only goes to the separate issue of whether he was in an 'automative' state when he seemingly assaulted Mr. Lloyd which R also needs to establish, and not to foreseeability.

75. In these circumstances, I do not agree with R's contention as set out at paragraph 10 (a) of its closing submissions that "there were warning signs from which an employer ought reasonably to have foreseen that there was an imminent risk of injury to R's mental health: see also **APOC 33.2-33.3** and **33.6-33.10 [A14-15].**

76. I conclude that R has failed to establish any reasonable grounds, or realistic prospect of proving, that the As ought to have known that he was suffering from the psychiatric conditions set out in the report of Professor Ismail and I therefore give summary judgment to the As in respect of the claim for damages for personal injury at paragraph 42.8 of the APOC.

Disposal

77. By reason of my conclusions, I accede to the three remaining applications of the As and award them strike out in respect of the First Application and summary judgment in respect of the Second and Third Applications. In the light of the agreement reached in respect of other matters, I shall ask the As to draw up the draft Order including any consequent applications, which hopefully can be agreed, but if not, I shall determine by further submissions.