Neutral Citation Number: [2024] EWCA Civ 428

Case Nos: CA-2023-000565, 000568

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS IN BIRMINGHAM, BUSINESS LIST (ChD)
His Honour Judge Rawlings sitting as a High Court Judge
[2022] EWHC 3562 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 May 2024

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

- -

Between :

NORTHAMBER PLC	**Claimant**
- and -	
(1) GENEE WORLD LIMITED (2) RANJIT SINGH (3) INTERACTIVE EDUCATIONAL SOLUTIONS LIMITED	**Defendants**

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Philip Coppel KC, Damian Falkowski and Kyle Lecuona (direct access) for the **Claimant**
Oliver Ingham (direct access) for the **Second Defendant**
Martin Budworth (instructed by **Clear Legal Ltd**) for the **Third Defendant**
The First Defendant did not appear and was not represented

Hearing dates : 16-17 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Arnold:

Introduction

1. These are appeals from an order made by His Honour Judge Rawlings sitting as a High Court Judge on 3 March 2023 (although both dated and sealed on 21 March 2023) for the reasons given in his judgment of 3 March 2023 [2022] EWHC 3562 (Ch). I granted permission for both appeals, but recommended mediation. It is unfortunate that the parties have not been able to settle their differences.

Factual background

2. The factual background to the appeals can be briefly summarised. The Claimant ("Northamber") is a distributor of information technology equipment, including audio/visual ("AV") screen systems for educational institutions, among other products. It is a trade-only distributor of numerous brands to approximately 2,500 resellers.

3. The First Defendant ("Genee") was primarily an importer of AV displays manufactured by a Chinese company called Hitevision. The Second Defendant, Ranjit Singh, was the sole director of Genee from 12 November 2015. Prior to that, Mr Singh and his wife, Mandeesh Kaur, had both been directors of Genee from 2006. Genee was placed in creditors' voluntary liquidation on 12 November 2018. The liquidation has now been completed and the company was dissolved on 12 April 2024.

4. The Third Defendant ("IES") supplies technology and IT equipment to educational establishments. Mrs Kaur has been the sole director of IES since 2008.

5. Northamber and Genee entered into a distribution agreement ("the Resellers Agreement") in March 2016 and an exclusive supply agreement ("the Exclusivity Agreement") on 13 July 2017. By the Resellers Agreement Genee appointed Northamber as a distributor of its AV displays. The purpose and effect of the Exclusivity Agreement was to make Northamber the sole source of Genee's products in the UK (save for four named resellers to whom Genee was entitled to continue to sell directly, "the Excluded Accounts").

6. The Exclusivity Agreement provided in clause 1.1:

> "Northamber will become the 100% exclusive source for all Genee World products in the UK effective July 1st with no sales by Genee to any reseller or other party in the UK. All enquiries generated or received by Genee will be passed to and transacted via Northamber."

7. Clause 5 of the Exclusivity Agreement provided, so far as relevant:

> "1. Northamber will purchase stock from Genee World's bonded warehouse.
>
> 2. Northamber will purchase stock for delivery to Northamber's warehouse for run rate stock.
>
> 3. Northamber will order stock directly from the Genee bonded warehouse to be shipped directly to re-sellers or end-users for projects, bids, or where urgency is required and Northamber doesn't have the item in stock."

8. Clause 9.2 of the Exclusivity Agreement provided, so far as relevant:

> "… Genee World to send annual audited accounts to Northamber and Northamber retains the right to audit Genee World within working hours should it believe the exclusivity has not been upheld."

9. The Exclusivity Agreement ran initially from 1 July 2017 to 31 December 2018 and provided for automatic yearly renewal each January unless terminated with at least 90 days' notice.

10. It became apparent to Northamber in late 2017 or early 2018, following receipt of reports from resellers that Genee products were being supplied directly to them by Genee, that Genee was breaching the Exclusivity Agreement.

11. There were attempts by Northamber to hold Genee to the terms of the Exclusivity Agreement, in particular at a meeting between the parties in Oxford on 27 March 2018. Mr Singh's response was that, if Northamber tried to enforce the exclusivity provisions, he would wind up Genee and resume trading via a phoenix company supplying the same goods. In the event, that is essentially what Mr Singh did.

12. On 25 July 2018 Genee purported to terminate the Exclusivity Agreement. Northamber did not accept the termination and insisted on its rights under the Exclusivity Agreement, including its right to an audit of Genee in accordance with clause 9.2 of the Exclusivity Agreement.

<u>The proceedings</u>

13. On 15 August 2018 Northamber commenced these proceedings. Claims were brought against Genee for breach of the Exclusivity Agreement and against Mr Singh and IES for inducing breach of contract and unlawful means conspiracy.

14. On 10 September 2018 Northamber obtained an injunction from Garnham J restraining Genee from supplying its goods within the United Kingdom to persons other than

Northamber save for the Excluded Accounts. The order also required Genee to pass to Northamber any enquiries for orders within the UK that it received save from the Excluded Accounts, to provide Northamber with an audited account of its sales since 12 July 2017 and to provide Northamber with all necessary facilities and access to enable it to carry out an audit.

15. On 19 October 2018 Charles Bourne QC sitting as a Deputy High Court Judge varied Garnham J's order so as to require Genee to provide Northamber with a copy of its Sage electronic accounting data.

16. Genee failed to comply with these orders. On 10 December 2018 Northamber applied to commit Mr Singh for contempt of court. After a lengthy hearing, Lance Ashworth QC sitting as a Deputy High Court Judge found, for the reasons given in a judgment dated 16 January 2020 [2020] EWHC 31 (Ch), that Genee had failed to comply with the orders to provide an audited account and a copy of its Sage data and that Mr Singh was in contempt of court in respect of those breaches. On the other hand, Mr Ashworth held that various other contempts alleged by Northamber were not proved. He decided not to impose a custodial sentence "by a very narrow margin". Instead, he fined Mr Singh £25,000 and ordered him to pay 75% of Northamber's costs.

17. In the meantime, on 24 January 2019 Murray J granted Northamber judgment on admissions against Genee for breach of the Exclusivity Agreement and made an order for an interim payment by Genee to Northamber of £431,860.62. On 1 December 2021 DJ Rouine made a further order for an interim payment by Genee to Northamber of £1,202,869.32. By the time of the trial Genee's liquidators had accepted Northamber's proof of debt in the sum of £1,643,729.94 i.e. the total of the two interim payments which had been ordered.

The judge's judgments

18. The trial of the claim took place over nine days in October 2022. The judge delivered a careful and detailed judgment running to 340 paragraphs which was circulated to the parties in draft on 16 January 2023. It can be seen from the judge's judgment that much of the dispute before him concerned factual issues. It is evident that the judge received much less assistance on the law, particularly with respect to the issue of inducement, than this Court did.

19. Mr Singh and IES disputed that Genee had acted in breach of the Exclusivity Agreement for various reasons. The judge rejected all of these contentions and found that, between 1 July 2017 and 12 November 2018, Genee had made significant sales of products in breach of clause 1.1 of the Exclusivity Agreement, including sales to IES from 31 March 2018 onwards. The judge also held, however, that sales by Genee to Capital Link International Ltd ("Capital") had not contravened clause 1.1 of the Exclusivity Agreement.

20. Judgment was entered against Genee for breach of the Exclusivity Agreement in the sum of £1,419,046.62. This amount was the total of the two interim payments ordered by Murray J and DJ Rouine less a sum of £302,711.15 in respect of sales made by Genee to Capital.

21. The judge held that Mr Singh had induced Genee's breaches of the Exclusivity Agreement, but was only liable in respect of the period from 11 September 2018 (i.e. the day after the injunction) until 12 November 2018 (i.e. the date of the winding up resolution). The sales by Genee to IES during that period had not merely been in breach of the Exclusivity Agreement, they had been in breach of the injunction. In causing Genee to act in that way Mr Singh had not acted bona fide within the scope of his authority as a director of Genee. The judge awarded Northamber damages against Mr Singh in the sum of £24,567.74.

22. The judge dismissed Northamber's claim against IES for inducing breach of contract. He also dismissed Northamber's claims for unlawful means conspiracy against both Mr Singh and IES.

23. For the reasons given by the judge in an extempore judgment after he had handed down his main judgment, the judge ordered Mr Singh to pay 70% of Northamber's costs of its claim against him and ordered Northamber to pay 80% of its claim against IES.

Mr Singh's application under CPR rule 40.12

24. On 23 May 2023 Mr Singh made an application under CPR rule 40.12 (commonly known as "the slip rule") for paragraph 1 of the order made on 3 March 2023 to be amended so as to reduce the judgment sum against Genee to £225,269.43. Northamber opposed this application. By an order dated 31 July 2023 the judge amended paragraph 1 of the order made on 3 March 2023 so as to reduce the judgment sum against Genee to £664,351.77 (i.e. not the figure contended for by either party). The judge set out his reasons for making this amendment in the order 31 July 2023 in a little detail, but in brief summary he took the view that the original figure did not make sufficient allowance for his finding that sales by Genee to Capital had not contravened the Exclusivity Agreement.

The appeals

25. Northamber appeals on five grounds:

   i) Ground 1 is that the judge erred in law in dismissing Northamber's claim against IES for inducing breach of contract because he wrongly held that there had been no act of inducement on the part of IES.

   ii) Ground 2 is that the judge erred in law in dismissing Northamber's claims against Mr Singh and IES for unlawful means conspiracy.

iii) Ground 3 is that the judge was wrong to hold that Mr Singh had acted bona fide within the scope of his authority as a director of Genee in respect of the period from 1 July 2017 to 10 September 2018.

iv) Ground 4 is that the judge misinterpreted clause 1.1. of the Exclusivity Agreement and therefore wrongly held that sales by Genee to Capital were not in breach of that clause. (Other aspects of this ground were not pursued at the hearing.)

v) Ground 5 concerns the judge's costs orders.

26. In addition, Northamber made two applications to amend its grounds of appeal. The first, by an application notice dated 16 February 2024, was to add a new ground 6. This application was procedurally misconceived, since ground 6 seeks to challenge the order made by the judge on 31 July 2023. It was agreed at the hearing that this would be treated as an application by Northamber for an extension of time for filing an appellant's notice against that order and for permission to appeal. The second application was made orally by counsel for Northamber during the course of argument to add a new ground 7 concerning the conspiracy claim. We heard argument on both applications and indicated that we would rule upon them to the extent necessary at the same time as the substantive appeals.

27. IES has served a respondent's notice seeking to uphold the judge's order in its favour on four additional or alternative grounds:

i) Ground 1 is that IES had a genuine belief that its orders to Genee were lawful.

ii) Ground 2 is that IES has a defence of justification.

iii) Ground 3 is that IES acted independently of Genee and Mr Singh and did not join in their wrongdoing, there was no evidence of a relevant combination.

iv) Ground 4 is that IES's placing of orders with Genee did not cause Northamber's loss.

28. On 5 April 2024 IES filed an application to adduce further evidence in response to Northamber's ground 5, but this application was not pursued at the hearing.

29. Mr Singh appeals on four grounds (permission to appeal having been refused on ground 1 and ground 6 not having been pursued at the hearing):

i) Ground 2 is that the judge's findings against Mr Singh in respect of the period from 11 September 2018 to 12 November 2018 are unjust because of a serious procedural irregularity.

ii) Ground 3 is that the judge's findings against Mr Singh in respect of the period from 11 September 2018 to 12 November 2018 are precluded by issue estoppel arising out of Mr Ashworth's judgment.

iii) Grounds 4 and 5 are that the judge erred in law in finding that Mr Singh had not acted bona fide within the scope of his authority as director of Genee during the period 11 September 2018 to 12 November 2018. It can be seen that this ground is the converse of Northamber's ground 3.

Northamber's ground 1

30. In order for A to be liable in tort for inducing B to breach a contract with C, the following requirements must be satisfied: (1) there must be a breach of contract by B; (2) A must induce B to break the contract with C by persuading, encouraging or assisting them to do so; (3) A must know of the contract and know that their conduct will have that effect; (4) A must intend to induce the breach of contract either as an end in itself or as the means to achieving some further end; and (5) A must have no lawful justification for that conduct. See *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33, [2021] 3 All ER 978 at [21] (Popplewell LJ) citing with approval *Global Resources Group v Mackay* [2004] CSOH 149, 2009 SLT 104 at [11]-[14] (Lord Hodge).

31. Northamber's case was that IES, knowing through Mrs Kaur of the Exclusivity Agreement and intending it to be breached, induced Genee to breach the Exclusivity Agreement by placing orders with Genee which Genee accepted, IES paid for and Genee fulfilled.

32. The judge found that Genee had sold products to IES from 31 March 2018 onwards, and held that all of the requirements of the tort were satisfied in respect of such sales save for element (2). He held that IES had not induced Genee's breach of the Exclusivity Agreement. Having noted at [215]-[217] that the only acts of inducement relied upon by Northamber were IES's acts of placing orders with Genee, the judge held this was not sufficient for the reasons he gave at [219]:

> "(b) by 31 March 2018 … Genee had already supplied a substantial amount of Genee World Products to entities in the UK other than IES. It is difficult to see in those circumstances that somehow, the purchase orders sent by IES to Genee for Genee World Products in March 2018 induced or persuaded Genee to supply Genee World Products to IES in breach of the Exclusivity Agreement, when Genee had already supplied substantial quantities of Genee World Products to other entities in the UK in breach of the Exclusivity Agreement. There is no evidence that, Genee having already breached the Exclusivity Agreement by supplying to other

entities in the UK, in breach of the Exclusivity Agreement, needed any inducement or persuasion to supply IES; and

(c) the height of Northamber's case, that IES induced or persuaded Genee to breach the Exclusivity Agreement, is that IES merely placing purchase orders with Genee for Genee World Products induced or persuaded Genee to breach the Exclusivity Agreement by supplying IES. Any supplier receiving a purchase order, unless contractually bound to accept it (and there is no suggestion of that here) is free to accept it or reject it. Inducement or persuasion amounts to much more than simply giving Genee the opportunity to breach the Exclusivity Agreement, which, on the evidence is all that IES's orders did."

33. Northamber contends that this reasoning is legally erroneous. IES supports the judge's reasoning.

34. The tort of inducing a breach of contract was established in the famous case of *Lumley v Gye* (1853) 2 El & Bl 216, 118 ER 749. As Lord Hoffmann explained in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at [2]-[5], it is important to bear in mind that the decision was based on the general principle that a person who procures another to commit a wrong incurs liability as an accessory. Thus the tort amounts to accessory liability for breach of contract. Lord Nicholls of Birkenhead made the same point at [86], [168]-[172] and [178].

35. Accordingly, as Lord Hoffmann explained at [8], liability under *Lumley v Gye* "requires only the degree of participation in the breach of contract which satisfies the general requirements of accessory liability for the wrongful act of another person: for the relevant principles see *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 and *Unilever plc v Chefaro Proprietaries Ltd* [1994] FSR 135".

36. As Lord Hoffmann went on to explain at [15], *Quinn v Leathem* [1901] AC 495 is nowadays regarded as a case on lawful means conspiracy, but this was not clear at that time and the case contains some discussion of both *Lumley v Gye* and the tort of causing loss by unlawful means. Lord Macnaghten said at 510:

> "I have no hesitation in saying that I think [*Lumley v Gye*] was right, not on the ground of malicious intention - that was not, I think, the gist of the action - but on the ground that a violation of a legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

37. This formulation could be understood to suggest that a person could be liable for "interfering with contractual relations" without being accessory to any breach of contract. Moreover, Lord Lindley went further and suggested that *Lumley v Gye* was an example of causing loss by unlawful means. This paved the way for the "unified theory" adopted in *D.C. Thomson & Co Ltd v Deakin* [1952] Ch 646 which treated the *Lumley v Gye* tort as a species of a broader genus. In *OBG v Allan* the House of Lords rejected the unified theory and held that inducing breach of contract and causing loss by unlawful means were two separate torts, each with its own conditions for liability.

38. One of the reasons given by Lord Hoffmann for rejecting the unified theory was that it had led to a distinction being drawn between "direct" and "indirect" interference which distracted attention from the true questions which had to be asked. As Lord Hoffman explained at [36], the real question to be asked in relation to the *Lumley v Gye* tort was:

> "… did the defendant's acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability? The court in *Lumley v Gye* made it clear that the principle upon which a person is liable for the act of another in breaking his contract is the same as that on which he is liable for the act of another in committing a tort. It follows, as I have said, that the relevant principles are to be found in cases such as *CBS … v Amstrad …,* and *Unilever v Chefaro ….*"

39. Similarly, Lord Nicholls said, in the context of discussing the mental ingredient of the *Lumley v Gye* tort at [191]:

> "… The mental ingredient is an intention by the defendant to procure or persuade ('induce') the third party to break his contract with the claimant. The defendant is made responsible for the third party's breach because of his intentional causative participation in that breach. Causative participation is not enough. A stranger to a contract may know nothing of the contract. Quite unknowingly and unintentionally he may procure a breach of the contract by offering an inconsistent deal to a contracting party which persuades the latter to default on his contractual obligations. The stranger is not liable in such a case. Nor is he liable if he acts carelessly. …"

40. It follows that some caution is required when considering cases on inducing breach of contract decided between *Quinn v Leathem* and *OBG v Allan*, and in particular cases decided between *Thomson v Deakin* and *OBG v Allan*. It does not necessarily follow that such cases are no longer authoritative.

41. One such case is *British Motor Trade Association v Salvadori* [1949] Ch 556. The plaintiff was an association of which all British motor-car manufacturers and authorised dealers were members. It was the policy of the association to prevent the immediate resale of new cars, which, owing to the short supply of new cars after the Second World War, would have led to price inflation. Accordingly, every member of the public who purchased a new car was required to execute a deed of covenant with the association and with the dealer from whom they purchased it undertaking that they would not re-sell the car within a period of twelve months. The defendants were either not members of association or were on their stop list, and accordingly were unable to acquire new cars through authorised channels. They bought cars from persons who had themselves bought the cars only shortly beforehand and who had executed the covenant. Shortly afterwards the defendants re-sold the cars at far above the original prices. There was no dispute that the defendants were well aware of the covenant.

42. The association successfully contended that the defendants were liable for inducing breach of contract. Roxburgh J started his analysis by citing the passage from Lord Macnaghten's speech in *Quinn v Leathem* quoted above. He went on at 563-564:

> "I have already said enough about the defendants and their activities to show that if they interfere knowingly with contractual relations they have no justification for doing so, but Mr. Shelley contends that it is no tort merely to make a price with a man who is offering a car for sale in breach of covenant because a willing seller needs no inducement. The importance of the point is obvious, because if it is well founded the question whether a tort has been committed will depend on whether the buyer or the seller speaks the first word, and as the buyer and the seller may both be hostile to the plaintiffs for obvious reasons, the plaintiffs are likely to be met with unchallengeable evidence that the seller took the initiative.
>
> It is true that the tort is often spoken of as inducing or procuring breach of contract, but I shall adhere to Lord Macnaghten's word 'interfere', and I shall endeavour to interpret that word in the knowledge that Lord Macnaghten in using it had *Lumley v Gye* in his mind."

43. After discussing *Blake v Lanyon* (1795) 6 TR 221 and *De Francesco v Barnum* (1890) 63 LT 514, Roxburgh J went on at 565-566:

> "I cannot doubt that Lord Macnaghten, in using the word 'interference' had such cases in mind. Indeed, it is possible that in choosing that word for his statement of general principle he intended to make some reduction in their ambit, for those cases

> seem to treat something akin to mere passivity as a tort and to require active dissociation from the breach of contract.... Lord Macnaghten preferred the word 'interference' for his statement of the doctrine, and this seems to me to predicate active association of some kind with the breach. But, in my judgment, any active step taken by a defendant having knowledge of the covenant by which he facilitates a breach of that covenant is enough. If this be so, a defendant by agreeing to buy, paying for and taking delivery of a motor-car known by him to be on offer in breach of covenant, takes active steps by which he facilitates a breach of covenant .... The plaintiffs will succeed even if I have construed the word 'interference' too broadly, because even if a further element of inducement must be present, that further element can be found. The covenantor who offers a car for sale is not unconditionally ready to break his covenant but only if the price offered is high enough and, accordingly, a defendant who offers such a price induces the seller to take the final step towards breaking his covenant by making his willingness to sell unconditional."

44. In *Thomson v Deakin* Jenkins LJ said at 694:

> "Direct persuasion or procurement or inducement applied by the third party to the contract breaker, with knowledge of the contract and the intention of bringing about its breach, is clearly to be regarded as a wrongful act in itself, and where this is shown a case of actionable interference in its primary form is made out: *Lumley v. Gye* 2 El & Bl 216.
>
> But the contract breaker may himself be a willing party to the breach, without any persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference: see, for example, *British Industrial Plastics Ld. v. Ferguson* [1940] 1 All ER 479, where the necessary knowledge was held not to have been brought home to the third party; and *British Motor Trade Association v. Salvadori* [1949] Ch 556."

45. In *Rickless v United Artists Corp* [1988] QB 40 the plaintiffs were the executors of the estate of the actor Peter Sellers, who had starred in the Pink Panther films. Sellers had personally contracted with a film production company to make the first film. The plaintiffs had taken assignments of any relevant causes of action from "loan-out" companies which

had contracted to provide Sellers' services to film production companies for the making of four sequels. After the death of Sellers, the defendants had made a sixth *Pink Panther* film purporting to star Sellers, but in fact making use of clips from the previous five films and out-takes from one of them. The plaintiffs successfully brought various claims against the defendants, including claims for inducing breach of contract in respect of the use of material from four of the previous films. It was held that, on the true construction of the relevant agreements, the film production companies had expressly or impliedly undertaken that Sellers' performance would only be used for the purposes of the film to which the contract related and that those undertakings continued after Sellers' death. Hobhouse J found that the defendants had the necessary knowledge and intention to be liable for the tort.

46. Bingham LJ, with whom Sir Nicholas Browne-Wilkinson V-C and Stephen Brown LJ agreed, upheld the judge's decision that the defendants were liable for inducing breach of contract. His reasoning at 58-59 merits quotation almost in full:

> "Having therefore concluded that under the four relevant agreements the production companies did undertake that Peter Sellers' performance would be used only for the purposes of the film to which each agreement related, and that such undertakings survived the death of Peter Sellers, I can turn to question (c). Where those negative covenants were all that survived of the loan-out agreements, which had otherwise been fully performed, could the defendants be held liable (if other ingredients of the tort were present) for inducing a breach of those negative covenants?
>
> The defendants argued that they could not. I found that contention startling, and a familiar example will show why. Take the case of an employment contract containing a valid covenant against competition for 12 months after termination. The contract comes lawfully to an end. The employee has performed all the service required of him and has received all the pay to which he is entitled. The only contractual term remaining in force is the employee's negative covenant not to compete. A third party, knowing of the covenant, induces the employee to work for him during the period of the covenant and in obvious breach of it. It is accepted that an action would lie (and an injunction in all probability be granted) against the employee. But if the defendants are right, no action would lie against the third party. They contend that it would not. I can find no basis in principle for such an anomalous result, which conflicts with both the law and the practice as I have long believed them to be.

I hope I shall not be thought discourteous if I do not discuss the authorities cited by the defendants in support of their submission. It is, I think, enough to say that in my judgment there is no authority which does support it. By contrast, the plaintiffs do gain support from the decision of Roxburgh J. in *British Motor Trade Association v. Salvadori* [1949] Ch. 556. The plaintiff complained, among other things, that the defendants had wrongfully induced or procured breaches of a negative covenant given by buyers of new cars. They succeeded. Roxburgh J. said, at p. 565: [quoting part of the second passage cited above].

This authority was referred to without disapproval by Jenkins L.J. in the leading case of *D. C. Thomson & Co. Ltd. v. Deakin* [1952] Ch. 646, 694, and has never to my knowledge been doubted. I regard it as good law. If, therefore, authority to counter the defendants' argument is needed, it exists."

47. In *Global v Mackay* Lord Hodge discussed *BMTA v Salvadori* at [8] and *OBG v Allan* at [10]-[12]. He went on, when discussing the fourth element of the tort at [13], to say:

> "It is clear from *BMTA v Salvadori* and *BMTA v Gray* that the tort or delict is not confined to circumstances where A has to persuade B to break his contract but can also be committed where A has dealings with B which A knows are inconsistent with the contract between B and C. In either event A induces or assists B to do something (or to refrain from doing something) which involves B breaking his contract with C."

48. In *Lictor Anstalt v MIR Steel UK Ltd* [2011] EWHC 3310 (Ch), [2012] 1 All ER (Comm) 592 David Richards J set out at [48] the argument of counsel for the claimant on this issue:

> "… Mr Boyle QC for the claimant submitted, by reference to a number of authorities, that entering into an inconsistent contract is capable of constituting, and indeed will normally constitute, sufficient participation by the defendant to attract liability in tort. He accepted that there could be cases where the contract breaker has independently of the defendant decided to act in breach of the contract and is able to do so without any necessary involvement by the defendant. But in circumstances where the defendant's involvement or cooperation is necessary to the breach intended by the contract breaker, then the defendant who participates in this way with the relevant knowledge is liable. He submitted that the

> necessary element of causative participation was satisfied if the defendant does an act which enables the contract breaker to breach his contract and without which no breach would occur. In such circumstances the defendant is sufficiently instrumental in causing the breach to be liable. Active persuasion by the defendant is not required."

49. David Richards J went on to cite the passage from *Thomson v Deakin* that I have quoted, saying that nothing in *OBG v Allan* cast doubt on it, to refer to *Rickless v United Artists* and to cite the passages from *BMTA v Salvadori* that I have quoted. He suggested at [51] that an example of what Roxburgh J had called "mere passivity" was *Batts Combe Quarry Ltd v Ford* [1942] 2 All ER 639. In that case a father had sold his quarry business and covenanted not to be engaged, concerned or interested in the business of a quarry within 75 miles for a period of ten years. Three years later the father gratuitously provided funds to his sons to enable them to purchase and operate a quarry in the immediate neighbourhood of the quarry which he had sold. The father was held liable for breach of contract, but a claim against the sons for inducing his breach of contract was dismissed. Lord Greene MR said at 640:

> "… it was said that the sons, by accepting their father's bounty amounting to something over £7,000, did procure him to break his covenant - that is assuming, of course, that the finding of the money by the father was a breach of covenant. … In my opinion, that argument is completely misconceived. The tort of procuring a breach of contract requires something much more than that. Mere acceptance of a proffered bounty given in breach of covenant cannot, it seems to me, be said to be in any sense a procuring of a breach of contract."

50. I am not sure that I agree that the sons' conduct is properly characterised as "mere passivity" given that they not only accepted the money, but also used it to acquire and operate the new quarry. The key point, it seems to me, is that the sons' only involvement in the father's breach of contract was that they accepted a gift from him. This does not detract from David Richards J's analysis of the *BMTA v Salvadori* line of cases, however. Although he did not say so in terms, it is evident that he accepted counsel for the claimant's submission as to the law. This issue did not arise on the subsequent appeal to this Court: [2012] EWCA Civ 1397, [2013] 2 All ER (Comm) 54.

51. In *Kawasaki v Kemball* Popplewell LJ, with whom Henderson and David Richards LJJ agreed, having cited what Lord Hoffmann and Lord Nicholls said in *OBG v Allan* at [36] and [191] and elsewhere, drew the following conclusions:

> "32. First, they make clear that conduct cannot qualify as inducement if it constitutes no more than preventing B from performing the contract with C as one of its consequences. There must be some conduct by A amounting to persuasion, encouragement or assistance of B to break the contract with C.
>
> 33. Secondly, this participation by A in B's breach, must, in Lord Hoffmann's words, have 'a sufficient causal connection with the breach by the contracting party to attract accessory liability' or, in Lord Nicholls' words, so as to amount to 'causative participation'. It is because of the causative requirement that 'inducement requires the defendant's conduct to have operated on the will of the contracting party' in the words of Toulson LJ [in *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244 at [177]]. If A's conduct is not capable of influencing a choice by B whether or not to breach the contract, it is not capable of amounting to inducement; it cannot operate on the mind or will of B so as qualify as causative participation as an accessory to his breach."

52. He went on at [42]:

> "… inconsistent dealings are not some form of inducement which are detached from the principles articulated in *OBG v Allan*. On the contrary, they are simply an example of conduct which may be capable of fulfilling those criteria because they may constitute a form of persuasion, encouragement or assistance. This is how they were treated in Lord Hodge's summary of the ingredients in *Global Resources v Mackay* at paragraph 13: [quoting the paragraph from which I have cited above]."

53. Counsel for IES argued that *BMTA v Salvadori* was no longer good law even though it was endorsed by this Court in both *Thomson v Deakin* and *Rickless v United Artists*. He expressly eschewed any submission that it had been impliedly overruled by *OBG v Allan*, but rather submitted that it had been impliedly overruled by *Kawasaki v Kemball*. This cannot be correct given that *Kawasaki v Kemball* approved *Global v Mackay* and *Global v Mackay* followed *BMTA v Salvadori*. Thus *Kawasaki v Kemball* represents a further, albeit indirect, endorsement of *BMTA v Salvadori* by this Court. Moreover, it amounts to an endorsement of it as still being good law following *OBG v Allan*.

54. Even if counsel for IES had submitted that *BMTA v Salvadori* had been impliedly overruled by *OBG v Allan*, I would not have accepted the submission. Like David Richards J in *Lictor v MIR*, I see nothing in *OBG v Allan* which is inconsistent with

BMTA v Salvadori (as approved by Jenkin LJ in *Thomson v Deakin*). The same goes for *Rickless v United Artists.* On the contrary, as counsel for Northamber pointed out, Lord Hoffmann in *OBG v Allan*, in common with Jenkins LJ with *Thomson v Deakin*, relied upon *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479. That case supports *BMTA v Salvadori* and *Rickless v United Artists*. As Lord Hoffmann explained at [39]:

> "… 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 the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal … MacKinnon 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 held liable for inducing a breach of contract."

All the other ingredients of the cause of action were established: see Lord Russell of Killowen at 481.

55. Perhaps more importantly, counsel for IES also argued that Roxburgh J had been wrong to say that facilitating a breach of contract was enough. In support of this argument he relied upon, although he did not actually cite, the well-known case of *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 referred to by Lord Hoffmann in *OBG v Allan* and upon the judgment of Lord Toulson in *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10, [2015] AC 1229 at [21] (to which I would add the judgment of Lord Sumption at [39] and the judgment of Lord Neuberger of Abbotsbury at [58]).

56. *CBS v Amstrad* and *Fish & Fish* have to be treated with a little care in this context for two reasons. The first is that neither is a case about inducing breach of contract. In *CBS v Amstrad* the claimants relied upon a number of causes of action, including joint tortfeasance, but not inducing breach of contract. In *Fish & Fish* the claimant relied upon joint tortfeasance. Although both inducing breach of contract and joint tortfeasance are forms of accessory liability and are based on the same underlying principle, it does not necessarily follow that statements concerning joint tortfeasance can be directly translated to cases of inducing breach of contract.

57. The second reason requires more explanation. In *CBS v Amstrad* one of the claimants' claims was that Amstrad had procured infringements of copyright by purchasers of its double-headed tape recorders and thus was liable as a joint tortfeasor. This claim was, at its root, based upon the same general principle that had been invoked in *Lumley v Gye*, as can

be seen from the passage from Buckley LJ's judgment in *Belegging-en Exploitatiemaatschappij Lavender BV v Witten Industrial Diamonds Ltd* [1979] FSR 59 at 66 cited by Lord Templeman at 1058. In rejecting this claim Lord Templeman went on to quote with approval, and to apply, Buckley LJ's statement in the same case at 65: "Facilitating the doing of an act is obviously different from procuring the doing of the act". That statement must be understood in context.

58. In *Belegging* the plaintiff owned a patent for a grinding material comprising metal-coated diamond grit embedded in a resin bond. The defendant sold metal-coated diamond grit to a third party which re-sold it to a fourth party. The plaintiff alleged that the defendant was liable for procuring infringement of the patent by the fourth party because the grit was sold "for the sole purpose of" making grinding material in which the grit was embedded in a resin bond. The Court of Appeal held that this allegation did not disclose a viable claim for procuring infringement. It was not alleged that defendant procured or induced the third party to purchase or re-sell the grit. Nor was it was alleged that there was any nexus of any kind between the defendant and the fourth party. It was not even alleged that the fourth party had in fact made grinding material falling within the claims of the patent. At most, therefore, the defendant had sold goods which might subsequently have been used by the fourth party to infringe the patent.

59. In *CBS v Amstrad* itself Amstrad's recorders could be used by purchasers to copy sound recordings the copyright in which was owned by the claimants, but they could also be used for lawful purposes. The decision as to what purpose to use them for was entirely a matter for each purchaser acting independently of Amstrad. Thus Amstrad enabled purchasers to infringe the claimants' copyrights, and was well aware that many purchasers were likely to commit infringements, but it did not procure the infringing acts.

60. The dividing line between mere facilitation of an infringing act and procuring an infringing act (or being party to a common design to infringe) is one that had caused some difficulty in subsequent cases on joint tortfeasance: see for example *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch), [2012] RPC 27 referred to by Lord Sumption in *Fish & Fish* at [38]. It is not necessary to consider that line of cases for present purposes, however.

61. This is because it is plain that IES, like the defendants in *BMTA v Salvadori* and *Rickless v United Artists*, went beyond merely facilitating the relevant breaches of contract. Its involvement was necessary for the breaches to occur, because breach of an exclusivity clause requires a counterparty. Genee could not have breached clause 1.1 of the Exclusivity Agreement without willing purchasers of its goods other than Northamber (or the Excluded Accounts). Just as in *BMTA v Salvadori*, IES did not merely place orders with Genee, it was willing to pay (and did pay) the price charged by Genee. Thus IES induced Genee to commit the relevant breaches of Exclusivity Agreement. In the language of Lord Hoffmann in *OBG v Allan*, IES had a sufficient causal connection with Genee's

breaches; and in the language of Lord Nicholls, there was causative participation by IES in Genee's breaches. In the language of Toulson LJ in *Meretz v ACP* adopted by Popplewell LJ in *Kawasaki v Kemball*, IES operated on the will of Genee. It follows, given that IES had the requisite knowledge and intention, that IES is liable as an accessory for Genee's breaches. It would have been different if IES had had no knowledge of the Exclusivity Agreement.

62. It is immaterial that Genee had already shown itself willing to act in breach of the Exclusivity Agreement by supplying other customers. As counsel for Northamber pointed out, each sale by Genee to a person other than Northamber or the Excluded Accounts was a separate breach of the Exclusivity Agreement and each such sale required a purchaser.

63. It follows in my judgment that the judge was wrong to hold that IES had not induced Genee's breaches of the Exclusivity Agreement by placing orders for Genee's products where those orders resulted in the supply of the ordered goods. Subject to the resolution of grounds 1, 2 and 4 of IES's respondent's notice, I would therefore allow Northamber's appeal against IES on ground 1.

<u>IES's respondent's notice grounds 1, 2 and 4</u>

64. Counsel for IES focused his oral argument on ground 2 of IES's respondent's notice. I did not understand him to pursue ground 1, but in any event that ground is hopeless because the judge found that IES knew and intended that Genee should breach the Exclusivity Agreement and there is no challenge to those findings. It follows that IES could not have had a genuine belief that its purchases from Genee were lawful.

65. As for justification, the judge held that IES's acts were not justified for the following reasons:

> "302. As for IES, Mrs Kaur says that IES needed to obtain Genee World Products to supply to its customers and Northamber was unwilling to supply Genee World Products to IES on credit. Unlike in *Edwin & Partners* [*v First National Finance Corp plc* [1989] 1 WLR 225], IES was not seeking to uphold its own contractual rights but rather (at best) to avoid breaching contracts with its customers. I do not consider that avoiding breaching contracts with its own customers could be a lawful justification for IES inducing Genee to breach the Exclusivity Agreement (had I found that it did induce Genee to breach the Exclusivity Agreement, which I have not). Even if it could be, I am not satisfied, merely because IES has produced some orders dated around March 2018, addressed to it for Genee World Products, that IES has proved that it would have breached contracts with its customers if Genee had not supplied it

with Genee World Products after 23 February 2018. In any event, it appears that Northamber was willing to supply Genee World Products to IES without credit or to supply customers direct, on credit (with the profit accruing to IES) which Mrs Kaur refused. Further IES never went back to Mr Hall after he sent his email on 23 February 2018 to challenge his assertion that IES owed Northamber £169,278.44 and that, of that total amount, £137,332.32 was overdue for payment. It is not clear therefore that, had it been pointed out to Mr Hall that IES only owed £31,945.82 on 23 February, none of which was overdue for payment, that Mr Hall would have maintained Northamber's refusal to supply Genee World Products on credit to IES.

303. In my judgement, the placing of orders for Genee World Products, by IES directly with Genee was again predominantly aimed at the pursuit by IES of its own economic interests in obtaining Genee World Products to supply to its customers at a profit, which would not be, in my judgement, a lawful justification, had I have found that the placing orders by IES with Genee for Genee World Products did amount to IES inducing Genee to breach the Exclusivity Agreement (which I found it did not)."

66. Although counsel for IES argued that the judge was wrong, the argument primarily involved an attempt to undermine the findings of fact summarised in [302], which were based on the judge's analysis of the relevant evidence in earlier parts of his judgment. IES has not directly challenged those findings of fact, however. In any event they were plainly open to the judge on the evidence.

67. Counsel for IES did not challenge the correctness as a matter of law of the judge's conclusion in [303] that the pursuit by IES of its own economic interests was insufficient to amount to lawful justification. On the contrary, he accepted that IES needed to establish an equal or superior legal right to that asserted by Northamber. On the judge's findings, IES had no such right.

68. Ground 4 of IES's respondent's notice does not assist IES. IES relies upon the judge's finding at [218] that IES's placing of orders with Genee cannot have induced Genee to breach the Exclusivity Agreement by supplying other parties because those other parties independently placed orders with Genee. Northamber does not challenge that finding, but it provides no answer to Northamber's claim against IES in respect of IES's own orders for the reasons explained above.

Northamber's ground 2

69. Northamber's case was that Genee, Mr Singh and IES had conspired to use unlawful means, namely the sale by Genee of products to IES in breach of the Exclusivity Agreement. The judge dismissed this claim. Northamber contends that he was wrong to do so. Given my conclusion on Northamber's ground 1 above and my conclusions on Mr Singh's grounds of appeal below, it is not necessary to consider this ground because Northamber's claims for unlawful means conspiracy add nothing to the claims for inducing breach of contract on which Northamber has succeeded. It is not suggested that the quantum of damages recoverable by Northamber for unlawful means conspiracy would exceed those it can recover for inducing breach of contract.

IES's respondent's notice ground 3 and Northamber's application to add ground 7

70. Northamber's ground 2 was predicated upon an assumption that the judge had found that there was a relevant combination between Genee, Mr Singh and IES, but had dismissed the claim for unlawful means conspiracy for other means. Ground 3 of IES's respondent's notice appears to have been predicated on the same assumption. During the course of argument, however, it became clear that the judge had not made any finding on this issue, it not being necessary for him to do so given that he dismissed the claim for other reasons. This led to Northamber's application to add ground 7. This contends that the judge ought to have made a finding on this issue. Counsel for Northamber accepted that this Court was not in position to make a finding on the matter, and submitted that it should be remitted to the judge. This application was on any view made very late, particularly given that IES had argued in its respondent's notice and skeleton argument filed as long ago as 21 July 2023 that IES had acted independently and there was no evidence of a combination. On the other hand, the fact that Northamber only sought a remittal of an issue which the judge did not decide makes it difficult to see that IES was prejudiced by Northamber's omission to include this ground in its original grounds of appeal. Happily it is not necessary to decide where the balance of justice lies for the reasons given in paragraph 69 above.

The rule in *Said v Butt*

71. Northamber's ground 3 and Mr Singh's grounds 2-5 all concern the rule in *Said v Butt* [1920] 3 KB 497, where McCardie J said at 506: "if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken." Although this statement of principle was obiter, it has subsequently been endorsed and applied both in England and Wales and in a number of other common law jurisdictions. It is common ground that the principle extends to a director of a company acting bona fide within the scope of their authority in relation to a breach of contract by the company that the director induces.

Mr Singh's grounds 2 and 3

72. Mr Singh's ground 2 is that the judge's findings against Mr Singh in respect of the period from 11 September 2018 to 12 November 2018 are unjust because of a serious procedural irregularity: Northamber had not pleaded any case that Mr Singh had acted otherwise than bona fide within the scope of his authority as a director of Genee, yet the judge found that Mr Singh had done so.

73. The starting point here is that it is common ground that, as the judge held at [239], the burden lay on Northamber to prove that Mr Singh had not acted bona fide within the scope of his authority as a director of Genee. It is also common ground that Northamber had failed to plead any case on this point.

74. Despite this, it was agreed by all counsel at trial that, as the judge recorded at [29], one of the issues which the judge had to determine (namely, issue 7(c)) was "did Mr Singh act bona fide within the scope of his authority as director and agent of Genee and in accordance with his duties as director to Genee?". Furthermore, as the judge explained at [230]:

> "… At the start of the trial, Mr Brown [counsel then acting for Mr Singh] drew attention to the failure to plead that Mr Singh had acted outside the scope of his authority or in breach of any duty that he owed to Genee and suggested that Northamber's claim against Genee should be struck out for that reason. I said that I would not consider an application to strike out Northamber's claim at that stage, because there was no application before the court and Northamber had not been given notice of Mr Singh's intention to make such an application. I told Mr Brown that he could renew his application at the end of the trial but he chose not to do so. It remains the case however that Northamber has not set out in its pleading or in its evidence any basis upon which it says that Mr Singh did act outside the scope of his authority or in breach of his duties as sole shareholder of Genee, nor was this a point that was dealt with in Mr Falkowski's [counsel for Northamber's] skeleton argument or closing argument."

75. It is common ground that, prompted by the point taken by counsel for Mr Singh, counsel for Northamber prepared and circulated a draft amendment to Northamber's Particulars of Claim to address the omission. When the mooted strike out application was not pursued, Northamber did not apply for permission to make the relevant amendment.

76. Counsel for Mr Singh in this Court submitted that the judge's approach in [230] was flawed: Mr Singh did not need to apply to strike out Northamber's claim since it was not

open to Northamber to advance its claim against Mr Singh without pleading a case that he had acted otherwise than bona fide and within the scope of his authority. I agree with that contention, which is supported by the decision of this Court in *Holding Oil Finance Inc v Marc Rich & Co AG* [1996] CLY 1085. In fairness to the judge, I should note that that authority was not cited to this Court, and I therefore infer that it was not cited to the judge either.

77. The problem for Mr Singh is that counsel appearing for Mr Singh before the judge did not seek or obtain a ruling preventing Northamber from advancing a case that Mr Singh had not acted bona fide within the scope of his authority as a director of Genee without applying for and obtaining permission to amend its statement of case. On the contrary, as noted above, he agreed that the issue was one that the judge needed to decide. It follows that it is not open to Mr Singh to appeal on the ground that the judge was wrong to decide the issue, because counsel for Mr Singh waived the procedural objection: see *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293.

78. Ground 3 is that Northamber was precluded from contending that Genee had made sales to IES in breach of the injunction by an issue estoppel arising out of the judgment of Mr Ashworth. This ground is misconceived. Mr Singh relies upon the fact that Mr Ashworth rejected Northamber's first ground of contempt, which alleged that Mr Singh had caused Genee to supply its products to four identified purchasers (none of whom was IES) in late October and early November 2018. Mr Ashworth found that the relevant sales had not been made by Genee, but rather by a phoenix company set up by Mr Singh called G-Tech. As Mr Ashworth explained earlier in his judgment, however, on 10 October 2019 Northamber made an application to amend its grounds substantially, including by alleging 60 other sales by Genee in breach of the injunction, evidence of which had been obtained from Sage records disclosed by Genee's liquidators. On 24 October 2019 Mr Ashworth refused Northamber permission to make those amendments on the grounds that the application was made very late given that much of the evidence Northamber wished to deploy had been in its possession since February 2019 and that it would have necessitated an adjournment of the hearing. Thus Mr Ashworth never determined the merits of Northamber's claims in respect of the 60 additional sales. By contrast, Northamber was able to deploy evidence concerning those sales, and others, at the trial. The judge's findings did not concern the four sales which Mr Ashworth found had been made by G-Tech.

Northamber's ground 3 and Mr Singh's grounds 4 and 5

79. In determining whether Mr Singh had acted bona fide within the scope of his authority as a director of Genee, the judge considered the position during three periods of time: (i) 1 July 2017 to 31 December 2017; (ii) 1 January 2018 to 10 September 2018; and (iii) 11 September 2018 to 12 November 2018. The judge held that Northamber had not established that Mr Singh had not acted bona fide within the scope of his authority as a

director of Genee during the first two periods, but reached the opposite conclusion in relation to the third period for the reasons he gave at [253]:

> "Insofar as Mr Singh procured that Genee breached the Exclusivity Agreement by causing Genee to supply Genee World Products to entities in the UK other than Northamber and the Excluded Accounts after 10 September 2018 that would not, in my judgment, be consistent with his duty under Section 172 to act in the way that he considered, acting in good faith, would be most likely to promote the success of Genee for the benefit of its members as a whole. The reason is that, Mr Singh would, by causing Genee to breach the Exclusivity Agreement by making those supplies also cause it to breach the Injunction and thereby be in contempt of court and at risk of having a fine imposed upon it, having its assets sequestrated, and would suffer reputational damage, if found out."

80. Northamber's ground 3 is that the judge erred in law by compartmentalising his consideration of the issue in this way. Northamber contends that the judge ought to have held that Mr Singh's behaviour during the third period showed that, when it came to running Genee's business, Mr Singh did not care about duties or legalities. That was his *modus operandi*. There was no transformation of his behaviour after 10 September 2018. Rather, it was Mr Singh's wanton disregard for his responsibilities as a director playing out again.

81. I do not accept this argument for two reasons. First, there was a transformation in Mr Singh's behaviour after 10 September 2018. Prior to that date he did not cause Genee to act in contravention of an injunction because no injunction had been granted. After that date Mr Singh did act in that way. Secondly, and in any event, one of the reasons which the judge gave for rejecting Northamber's claim against Mr Singh in respect of the first two periods was that counsel for Northamber had not put it to Mr Singh in cross-examination that he had not acted bona fide within the scope of his authority as a director of Genee. In my view that was a sufficient reason on its own for the judge to reject the claim. As the Supreme Court has recently confirmed in *Griffiths v TUI (UK) Ltd* [2023] UKSC 48, [2023] 3 WLR 1204, the general rule in civil cases is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point if it wishes to submit to the court that the evidence should not be accepted. This rule is particularly important when the first party intends to accuse the witness of dishonesty (or, I would add, similarly egregious conduct such as bad faith). As the example of dishonesty shows, the rule is applicable not only where the witness has given evidence in chief contrary to the first party's case, but also where the witness has been silent on the issue in their evidence in chief. None of the exceptions to the rule identified in *Griffiths v TUI* applies to Northamber's claim at least with respect to the first two periods.

82. The judge evidently did not consider that this objection to Northamber's claim applied to the third period, but he did not explain why not. It seems to me that the reason why the judge took a different view about the third period was that his finding in respect of that period was based primarily on his determinations of issues on which Mr Singh had been cross-examined, namely that (i) Genee had acted in breach of the Exclusivity Agreement during that period and (ii) Mr Singh had induced those breaches, and upon an objective consideration of the consequences of those findings given the existence of the injunction. In other words, the judge did not think that fairness to Mr Singh required the point about the consequences of findings (i) and (ii) during the period of the injunction to be put to him in cross-examination. That assessment has not been challenged by Mr Singh on his appeal.

83. Mr Singh's grounds 4 and 5 challenge the judge's conclusion in respect of the third period on the basis that he applied the wrong test in law. Ground 4 is that a director should only be exposed to liability for inducing breach of contract where they have acted dishonestly or as part of a conspiracy. Ground 5 is that, even if dishonesty or conspiracy is not required, it is not sufficient for the claimant to show that the director has breached any duty owed to the company.

84. The judge based his analysis of the law on the discussions in two recent first instance decisions: *Antuzis v DJ Houghton Catching Services Ltd* [2019] EWHC 843 (QB), [2019] Bus LR 1532 and *IBM United Kingdom Ltd v Lzlabs GmbH* [2022] EWHC 884 (TCC), [2022] FSR 8.

85. In *Antuzis v Houghton* Lane J cited at [113] a passage from *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] SGCA 17. After reviewing authorities from a number of jurisdictions, Stephen Chong JA giving the judgment of the Court of Appeal of Singapore concluded at [62]:

> "… In our judgment, the *Said v Butt* principle should be interpreted to exempt directors from personal liability for the contractual breaches of their company (whether through the tort of inducement of breach of contract or unlawful means conspiracy) if their acts, in their capacity as directors, are not in themselves in breach of any fiduciary or other personal legal duties owed to the company."

86. As Lane J went on to note, section 172 of the Companies Act 2006 requires the director of a company to act in the way that they consider, acting in good faith, will be most likely to promote the success of the company for the benefit of its members as a whole having regard to various matters; and section 174 requires the director to exercise reasonable care, skill and diligence. Lane J held that, on the facts of that case, the second and third defendants had acted in breach of sections 172 and 174 because they had caused the first defendant to exploit the claimant employees by making them work long hours at below the minimum wage and without overtime or holiday pay. This was not in the best interest of the

company. On the contrary, it had wrecked the company's reputation in the eyes of the community. The second and third defendants had not acted bona fide because they knew that what the company was doing was unlawful. Thus they were not protected by the rule in *Said v Butt*.

87. In *IBM v Lzlabs* Eyre J cited at [27] a passage from the judgment of Gloster J in *Crystalens Ltd v White* [2006] EWHC 3357 (Comm) in which she said at [15]:

> "In my judgment, it would be contrary to the principle of limited liability if, in the circumstances postulated in *Said v Butt*, namely that an employee director is acting within his authority and bona fide in the interests of his company, could be liable in such circumstances for inducing a breach of contract on the part of the company in circumstances absent, additional features, such as conspiracy or dishonesty."

88. Having considered *Antuzis v Houghton*, Eyre J concluded at [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."

89. From those authorities the judge drew the following conclusions at [227]:

> "(a) the general rule or starting point is that a director will not be liable for the tort of inducing the company of which they are a director to breach a contract;
>
> (b) Mr Singh will not be liable for inducing Genee to breach the Exclusivity Agreement if in doing so he was acting bona fide within the scope of his authority as sole director of Genee;
>
> (c) whether Mr Singh was acting bona fide and within the scope of his authority has to be decided after taking into account all the relevant circumstances, including his motivation for inducing Genee to breach the Exclusivity Agreement and the nature of the duties owed by Mr Singh to Genee which he is said to have breached, the focus being on Mr Singh's duties to Genee as its director and not on matters related to the other party to the contract (Northamber); and
>
> (d) Mr Singh will not be acting bona fide, if he acts in breach of his duties under the 2006 Act (including Sections 172 and 174)."

90. Counsel for Mr Singh relied upon *Crystalens v White* as supporting ground 4. Even taken at face value, Gloster J's judgment does not go that far: although she said that "additional features, such as conspiracy or dishonesty" were required, she did not suggest that only conspiracy or dishonesty would suffice. Furthermore, I do think that that was an accurate statement of the law even then, since I do not understand how a director could be acting both bona fide within the scope of their authority and dishonestly. In any event, the law has moved on since then.

91. Turning to ground 5, although the judge could be understood as having held in [226](d) that any breach of a director's duties under the 2006 Act would suffice to deprive the director of the protection of the rule in *Said v Butt*, I do not think that the judge meant to go that far. The judge cited at [223] Eyre J's statement in *IBM v Lzlabs* at [36] that not every breach of section 172 would amount to bad faith for this purpose. It is clear from what the judge went on to say at [236]-[238] that the judge followed that approach. Thus he concluded at [238] that:

> "… there is no bright dividing line [between cases where a director will and will not be found to be liable for inducing their company to breach a contract] and all depends, as Eyre J said in *IBM*, upon all the circumstances of the case and a consideration of whether in all those circumstances the director has breached the duties that he

> or she owes to their company and in particular the duty under Section 172."

92. It is not necessary for present purposes to explore the limits of the rule in *Said v Butt*. The only question which it is necessary to decide is whether the judge erred in law in holding that Mr Singh was not protected by the rule for the reasons he gave at [253]. In my judgment the judge's reasoning is unimpeachable. A director who causes his company not merely to breach its contract, but also to act in breach of an injunction is plainly in breach of his duty under section 172. Even if not every breach of section 172 would suffice to deprive the director of protection, this is a serious breach of duty for the reasons given by the judge.

93. For the reasons given above I would dismiss Northamber's appeal on ground 3 and Mr Singh's appeal.

Northamber's ground 4

94. Northamber's ground 4 is relevant to the quantum of Northamber's claim against Mr Singh in respect of the period from 11 September 2018 to 12 November 2018. The judge held that sales by Genee to Capital did not contravene the Exclusivity Agreement because clause 1.1 only gave Northamber exclusivity in respect of goods to be delivered within the UK and not to customers based in the UK. Although Capital was a company registered in England and Wales, the goods in question were delivered direct from Hitevision in China to Capital's customer NSJ in Vietnam. Northamber contends that the judge misconstrued clause 1.1 of the Exclusivity Agreement.

95. The judge considered that clause 1.1 was ambiguous: the opening words "Northamber will become the 100% source for all Genee World Products in the UK" suggested that exclusivity was in respect of goods delivered within the UK, whereas the closing words "with no sales by Genee to any reseller or other party in the UK" were more suggestive that exclusivity was in respect of UK-based parties. I agree with this, although I would add that the second interpretation also receives some support from the second sentence of clause 1.1.

96. The judge resolved the ambiguity by reference to other provisions of the Exclusivity Agreement and the circumstances known to the parties at the time it was entered into. He reasoned as follows:

> "323. Clause 5 provides for two means by which Genee will supply Genee World Products to Northamber and Northamber will supply Genee World Products to its customers: (i) Genee would supply to Northamber for it to hold in its warehouse based in the UK to deliver to customers and Northamber agreed to endeavour to hold at least 10 days stock at run rate levels at its warehouse; and (ii) Northamber could ask Genee to arrange for

Genee World Products to be delivered direct from the bonded warehouse in the UK (where they were held, until released, to the order of Hitevision, the Chinese manufacturer, in the circumstances set out in clause 5.3).

324. On the available evidence Northamber only ever delivered to addresses in the UK from its warehouse and Genee World Products could only be delivered to addresses in the UK from the bonded warehouse, because, in that case, those goods had to be cleared through customs, for release out of the bonded warehouse for deliver to addresses in the UK.

325. The four telesales heads who were to be jointly funded by Genee and Northamber and were based at Northamber's premises, in accordance with clause 3.2 of the Exclusivity agreement, on the evidence, only marketed to resellers for supply to end-users based in the UK.

326. Clause 1 of the Exclusivity Agreement, whatever its precise meaning, restricted Northamber's exclusivity to the UK and given what I have said in paragraphs 322 - 325 above I consider that the likely intention of Genee and Northamber, when the Exclusivity Agreement was entered into, was that Northamber would have exclusivity for the supply of Genee World Products to addresses of resellers and end users in the UK, rather than its exclusivity being determined by where the customer was based. In coming to that conclusion, I consider that neither party could have intended that Genee would be entitled to deliver goods to a customer outside the UK who then exported them back into the UK to their reseller customer based in the UK."

97. Although counsel for Northamber criticised this reasoning, I agree with it and with the judge's conclusion. Accordingly, I would dismiss this ground of appeal.

Northamber's ground 5

98. Northamber challenges the costs orders made by the judge. Ground 5 encompasses two different challenges. One is only relevant to the costs order which the judge made in favour of IES. Since I have concluded that Northamber's appeal succeeds on ground 1, this order will have to be reconsidered in any event. It is therefore unnecessary to consider Northamber's challenge to it. The other challenge, which is relevant to both costs orders, concerns the failure of both Mr Singh and IES to respond to an offer of mediation made on behalf of Northamber.

99. On 5 October 2021 DJ Rouine made a case management order, paragraph 7 of which provided as follows:

> "At all stages the parties must consider settling this litigation by means of alternative dispute resolution. Any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise."

100. On 16 February 2022 Northamber sent the solicitors acting for Mr Singh and for IES a letter reminding them of this order. The letter went on to refer to the judgments Northamber had obtained against Genee, to invite Mr Singh and IES to consider Northamber's prospects of success and to state that Northamber's incurred costs were about £450,000 and its budgeted costs were £300,000, which were substantial given the claims advanced by Northamber. The letter went on:

> "Whilst the Claimant remains committed to pursuing the action it also remains open to mediation as a method of resolving the dispute.
>
> We would ask you to take instructions from your clients and for an indication, by return, as to their willingness to mediate. You will be aware of the consequences if a party refuses to mediate. Please note we are willing to mediate separately or jointly."

101. On 4 April 2022 IES's solicitors replied saying that they were taking instructions, but there was no further response. Mr Singh's solicitors did not respond at all. Neither party served a witness statement as required by DJ Rouine's order.

102. In his judgment on costs the judge rejected Northamber's contention that Mr Singh's and IES's failure to mediate and to comply with DJ Rouine's order should result in an adjustment of the costs orders that would otherwise be made for the following reasons:

> "25. ... I have no evidence before me that the claimant ever chased either the second or third defendant's solicitors for a reply. I would describe the letter of 16 February 2022 appearing as it did after very considerable costs had been incurred and a long way through the litigation as a half-hearted attempt – if indeed it was an attempt at all – by the claimant to suggest a mediation, enabling the claimant to say at the end of the trial, as it does, that it had suggested mediation but without any expectation that there would be a mediation, but it did not follow it up at all when the second [and third] defendant's solicitors did not reply.
>
> 26. I do take into account the fact that no witness statement has been provided which explains why the second [and third] defendant did

> not engage in mediation and that there was a direction of DJ Rouine that they should do so."

103. Northamber contends that this reasoning amounts to an error of principle. It is almost 20 years since this Court held in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 that an unreasonable refusal to participate in alternative dispute resolution constitutes a form of unreasonable litigation conduct to which the court may properly respond by applying a costs sanction. It is over 10 years since this Court held in *PGF II SA v OMFS 1 Ltd* [2013] EWCA Civ 1288, [2014] 1 WLR 1386 that silence in the face of an invitation to participate in mediate is, as a general rule, of itself unreasonable even if a refusal might have been justified by the identification of reasonable grounds. Furthermore, in the present case, DJ Rouine's order required both Mr Singh and IES to explain their reasons for refusing to mediate, but neither did so. In those circumstances Northamber contends that the judge should have held that Mr Singh's and IES's silence in response to its offer to mediate was unreasonable conduct and that this should have been reflected in the judge's costs order.

104. I agree that the judge fell into error. Mr Singh and IES were silent in the face of an offer to mediate. That was in itself unreasonable. To compound matters, they breached an order of the court requiring them to explain their failure to agree to mediation. If breaches of such orders are ignored by courts when deciding costs, parties will have no incentive to comply with them. That would undermine the purpose of making them, which is robustly to encourage parties to mediate.

105. The judge's reasoning ignores these points. The facts that the litigation had been underway for a long time by 14 February 2022 and that substantial costs had already been incurred were certainly relevant to the exercise of the court's discretion as to how to respond to Mr Singh's and IES's conduct, but the litigation continued for more than eight months after that, including a nine-day trial, and substantial further costs were incurred which could have been avoided by a successful mediation. The judge seems to have considered that the onus lay on Northamber to chase Mr Singh and IES for a response, but I do not see why that should be so. They made a clear offer to mediate and reminded Mr Singh and IES of DJ Rouine's order. After that, the ball was in Mr Singh's and IES's court. That was particularly so in the case of IES given that its solicitors said that they were taking instructions, but did not reply substantively. Northamber was entitled to assume that a chasing letter would not have met with a positive response. Nor do I see why the offer to mediate should be castigated as "half-hearted", particularly in the absence of any reasons whatsoever from Mr Singh and IES explaining their refusal to mediate. Finally, although the judge stated that he was taking the breach of DJ Rouine's order into account, in reality he did the opposite.

106. The more difficult question is how Mr Singh's and IES's conduct should properly be reflected in costs. Although costs sanctions have been imposed in a number of cases for an

unreasonable refusal to mediate or for silence in response to an offer of mediation, it does not automatically follow that a costs penalty should be imposed: see *Gore v Naheed* [2017] EWCA Civ 369, [2017] 3 Costs LR 509 at [49] (Patten LJ). Rather, it is a factor to be taken into account among the other circumstances of the case.

107. Given that the costs order in respect of Northamber's claim against IES must reconsidered anyway, I shall confine attention at this stage to the judge's order that Mr Singh pay 70% of Northamber's costs of the claim against him. He reached this decision taking into account the extent of Northamber's success, the extent to which costs had been incurred on issues where Northamber had succeeded and Mr Singh's conduct. Northamber contends that Mr Singh should be ordered to pay 100% of its costs. In my judgment this cannot possibly be justified by Mr Singh's failure to respond to Northamber's offer to mediate. Equally, however, I do not think that it would be right to impose no sanction at all for Mr Singh's conduct. I consider that the correct response would be to impose a modest, but not insignificant, costs penalty by increasing Northamber's costs recovery by an additional 5% to 75%.

Northamber's application concerning the 31 July 2023 order

108. The first question concerning this application is whether Northamber should have an extension of time for filing an appellant's notice. Even if Northamber's application notice filed on 16 February 2024 is treated as if it were an appellant's notice, it was substantially out of time. On the face of it, this is a serious and significant breach. Moreover, there is no explanation, let alone excuse, for the delay. On the other hand, it is difficult to suppose that any of the defendants have been prejudiced in any way by the delay. Genee was in liquidation for most of that time and has now been dissolved. As for Mr Singh and IES, the appeals against the 3 March 2023 order were pending, permission to appeal having been granted on 23 June 2023. Moreover, the application notice dated 16 February 2024 gave Mr Singh and IES adequate notice before the hearing that Northamber was challenging the 31 July 2023 order.

109. In these circumstances I would be minded to grant Northamber the necessary extension of time if its appeal warranted permission to appeal. Northamber contends that its appeal is well founded for two independent reasons. First, Mr Singh had no standing to make the application. Paragraph 1 of the 3 March 2023 order only affected Genee. Mr Singh was no longer a director of Genee, and the application could only have been made by the liquidators. Secondly, the application could not properly be made under rule 40.12 since there was no obvious mistake in paragraph 1 of the 3 March 2023 order and the judge's order of 31 July 2023 amounted to second thoughts which the judge had no power to give effect to after the 3 March 2023 order had been sealed. Such an application could only have been made, if at all, under rule 3.1(7).

110. While I see the force of these points, the problem for Northamber is that the question of what the correct figure is for the damages payable by Genee is academic. As at 31 July 2023, Genee was in liquidation and the liquidators had accepted Northamber's proof of debt. Since then the liquidation has been completed and Genee dissolved. Even if Northamber is right that the judge should not have amended the figure for damages against Genee, undoing that amendment would not have any practical effect. Counsel for Northamber accepted that the appeal was academic, but invited the Court to hear it anyway. Since the criteria identified in *Hutcheson v Popdog Ltd* [2011] EWCA Civ 1580, [2012] 1 WLR 782 are not satisfied, I am not persuaded that it would be appropriate to take that course.

111. I would therefore refuse Northamber permission to appeal against the 31 July 2023 order.

Overall result

112. For the reasons given above I would allow Northamber's appeal on ground 1. I would invite the parties to try to agree the quantum of Northamber's claim against IES. Ground 2 is moot. I would reject grounds 3 and 4. I would allow the appeal on ground 5 to the extent

of increasing Northamber's costs recovery against Mr Singh from 70% to 75%. I would dismiss Mr Singh's appeal.

Lord Justice Phillips:

113. I agree.

Lord Justice Lewison:

114. I also agree.