Neutral Citation Number: [2023] EWHC 2668 (Ch)

Case No: BL-2022-001801

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

Royal Courts of Justice
Rolls Building, London EC1A 2NL

Date: 30/10/2023

Before :

DEPUTY MASTER BOWLES

- -

Between :

Louisa Mojela	**Claimant**
- and -	
(1) Canmart Ltd	
(2) Akanda Corporation	**Defendants**

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- -

Adam Solomon KC and Alexander Halban (instructed by **Solomon Taylor and Shaw LLP**) for the **Claimant**
Adam Tolley KC and Christopher Monaghan (instructed by **Girlings Solicitors LLP**) for the **Defendants**

Hearing date: 27 June 2023

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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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DEPUTY MASTER BOWLES

Deputy Master Bowles :

1. The Claimant, Louisa Mojela (Ms Mojela) was, from 1st July 2021 until the termination of her contract with the two Defendants, the Executive Chairperson of the second Defendant (Akanda) pursuant to and regulated by a service agreement, dated 24 January 2022 (the service agreement), entered into between Ms Mojela and each of Akanda and the first Defendant (Canmart). Akanda and Canmart contend that Ms Mojela's contract was terminated by a dismissal letter, dated 25 July 2022, which purported to terminate the service agreement without notice on grounds of gross misconduct. Ms Mojela contends that that purported dismissal constituted a repudiatory breach of the service agreement by each of Akanda and Canmart and that the contract was brought to an end by her acceptance of their repudiatory breach, by letter dated 29 July 2022, from her current solicitors, Solomon Taylor and Shaw LLP.

2. By these proceedings, issued on 20 October 2022, Ms Mojela seeks payment of a liquidated sum of £1,832,150.62 and interest; alternatively damages in the same sum, or such other sum as the court might assess, together with a declaration (now historic) that the various post-termination employment restrictions contained in her service contract were not, in the context of the termination of that contract by the Defendants' repudiatory breaches of the service agreement, enforceable against her.

3. The liquidated sum was said to be made up of an amount of £739,452.05, allegedly falling due and unpaid prior to the termination of Ms Mojela's service agreement, and a further amount of £1,092,698.57 arising, allegedly, out of the Defendants' repudiatory breach.

4. In regard to the pre-termination period, the claimed amount was said to be made up of £106,575.34, by way of deferred compensation, pursuant to clause 8.4 of the service agreement, a further sum of £100,000, pursuant to clause 11.3 of the service agreement, and a bonus of £532,876.71, made up of basic salary and deferred compensation, each as defined in the service agreement, pursuant to clause 11.4 of the service agreement.

5. In regard to the sums allegedly falling due by reason of the Defendants' repudiatory breach, the claimed amount was said to be the sum to which Ms Mojela was entitled pursuant to clause 2.2 of the service agreement, namely the salary and contractual benefits to which she would have been entitled had the service agreement continued in force until the first date at which she asserts the agreement could have been lawfully terminated (1 July 2023). That sum would have been made up of salary, including deferred compensation, of £467,123.29, an identical sum by way of bonus, medical insurance of £10,759.69 and unpaid holiday pat of £147.692.3.

6. By the current application, issued on 31 January 2023, pursuant to CPR 24, Ms Mojela seeks summary judgment in respect of some, but not all, of the amounts set out above.

7. In particular, she seeks a summary determination of the question, or issue, as to whether, on the true construction of the service agreement and in the events that have occurred the purported termination of Ms Mojela's employment under the service agreement was unlawful and a repudiatory breach of her contract and/or whether, notwithstanding any repudiatory conduct on her part, she was, nonetheless, entitled,

pursuant to clause 2.2 of the service agreement to all such sums as she would have been entitled had she been given notice in accordance with that clause.

8. Reflecting the foregoing, summary judgment is sought in respect of the sum of £477,882.98, being the core salary, including deferred compensation, together with medical insurance in the sum of £10,759.69, said to be payable in respect of the period between the date of the unlawful termination of Ms Mojela's contract and the date upon which she alleges that that contract could have been lawfully terminated.

9. Summary judgment is also sought in respect of deferred compensation, in the sum of £206,575.24 allegedly due and unpaid prior to the termination of the service agreement.

10. As appears from these figures, it is not contended that Ms Mojela's claims for bonus and holiday pay are susceptible of summary determination.

11. It is, however, contended that summary judgment should be given in favour of Ms Mojela in respect of the entirety of the Defendants' Counterclaim, alternatively such parts of the Defence and Counterclaim as set up a defence of set-off in reliance upon the Counterclaim.

12. The Counterclaim referred to in the application notice is the original Counterclaim filed by the Defendants on or about 16 January 2023. As appears later in this judgment, at the hearing of this application, on 27 June 2023, the Defendants relied upon a very fully re-pleaded amended Defence and Counterclaim. Ms Mojela's position, however, was that that amended Counterclaim was also susceptible of summary judgment and that, for that reason, permission to amend should not be given in respect of the proposed amendment.

13. Neither the background nor the primary facts, in respect of Ms Mojela's claim and the current application for summary judgment, are in any significant dispute.

14. Akanda and Canmart are part of a group of companies whose purpose is to grow, produce and distribute ethically sourced medical cannabis. Akanda is incorporated in Canada and has been listed on the NASDAQ stock exchange since 2022. Canmart is a wholly owned subsidiary of Akanda, albeit that, at the dates relevant to these proceedings, Canmart was owned by Akanda via an intermediate holding company, Cannahealth Ltd.

15. In 2018 Ms Mojela had incorporated another company, Bophelo Bio Science and Wellness (Pty) Ltd (Bpthelo), in Lesotho. Ms Mojela was, at that stage, its sole shareholder and director. Until placed in liquidation, in circumstances set out later in this judgment, Bophelo cultivated and produced the Cannabis products latterly marketed by Akanda. In 2019, Bophelo was acquired by Halo Collective Inc., another Canadian company, at which point, while remaining a director of Bothelo, Ms Mojela became a shareholder in Halo and Executive Chair of Halo.

16. By a further restructuring, in 2021, Bophelo, via two intermediary subsidiaries, Cannahealth Ltd and Bophelo Holdings Ltd, was acquired by Akanda and became a wholly owned subsidiary of Akanda. Ms Mojela became the Executive Chair of Akanda and a director of and shareholder in Akanda. She remained a director of

Bophelo. Her role, as Executive Chair of Akanda was, as already stated, governed by the service agreement. In that role she was employed by Canmart.

17. As the producer and cultivator, in Lesotho, of the cannabis products marketed by Akanda, Bophelo, until its liquidation, was a key subsidiary of Akanda. Ms Mojela, herself, was, as I understand it, based, primarily in Lesotho and, as director of Bophelo, as well as Executive Chair of Akanda, directly involved in the management of Bophelo. The land used by Bophelo for the cultivation and production of its cannabis production was leased by Bophelo from an entity called the Mophuthi Matsoso Development Trust (MMDT), pursuant to a lease agreement, commencing 1st April 2019. Ms Mojela had been the founder and was the trustee of MMDT. It is at issue in these proceedings whether she was also the beneficial owner of the trust.

18. By the service agreement, Ms Mojela was, as from 21 July 2021 and until the termination of the service agreement, as already set out, employed by Canmart to serve Akanda as Executive Chairperson.

19. By clause 5.1 of the service agreement, Ms Mojela acknowledged that she would, in her role as Executive Chair, be a fiduciary, in a position of seniority and trust and, by clause 5.2 (a) of the service agreement, that, at all times during the course of her employment, she would 'faithfully and diligently serve Akanda, (Canmart) and the Group and exercise such powers and perform such duties as might from time to time be assigned to (her) by Akanda or the Board or perform such other duties as (Canmart) might reasonably require'.

20. By clause 1 of the service agreement, the Group included, as a Group Company, any company which was from time to time a subsidiary or holding company of Canmart and any subsidiary of any holding company of Canmart, including but not limited to Akanda. The Board meant the board of directors of Canmart and any committees duly constituted by the board.

21. By clause 5.2 (c) and (d) of the service agreement, Ms Mojela further agreed to devote all her working time, attention and abilities to the business and affairs of Akanda, Canmart and the Group, to comply with all reasonable directions of Akanda, Canmart and the Board and to keep Akanda, Canmart and the Group fully informed of all matters relating to the business and affairs of Akanda, Canmart and the Group.

22. Clause 5.2 (e) further provided that Ms Mojela would, immediately upon becoming aware, report any wrongdoing, including her own wrongdoing, whether committed, contemplated, or discussed by any person employed, or engaged, by Akanda, Canmart or any Group Company and would, likewise, report any plans, proposals, or discussion, by any person employed, or engaged, by Akanda. as a senior executive, or senior member of management of Canmart, or any Group Company, to leave the employment, or engagement of Canmart or the Group Company, whether alone or in concert with others and whether to join a competitor or any other business, and any misuse of confidential information by any person (including Ms Mojela). Ms Mojela further agreed, by clause 5.2(f), to use all her reasonable endeavours to promote, protect, develop and extend the business of Akanda, Canmart and the Group Companies.

23. Ms Mojela was further bound by the provisions of clause 17.1 of the service agreement. Under that provision. Ms Mojela agreed that she should not at any time during her employment be directly or indirectly engaged, concerned or have any financial interest in any other business, trade, profession, or occupation other than that of Canmart and the Group, whether paid or unpaid and should not hold any directorship, or other office, in any company other than Canmart or any Group Company, whether paid, or unpaid.

24. That bar, on outside, or external, activities was, however, subject to exceptions.

25. Relevantly to this application, the bar did not apply to those external activities which had been disclosed to Akanda and Canmart in Schedule 2 to the service agreement. The service agreement (by clause 17.2(b)) recorded the Defendants' consent to Ms Mojela carrying on those activities, subject to Canmart reserving the right to require Ms Mojela to cease those activities if and to the extent that in the view of Canmart those activities interfered with Ms Mojela's performance of her obligations to Canmart or the Group or gave rise to a conflict of interest or a perceived conflict of interest.

26. By clause 17.2(c), the bar on outside activities, likewise, did not preclude Ms Mojela from engaging in external interests or activities provided that those activities did not interfere with her performance of her duties to Canmart.

27. By clause 8 of the service agreement Ms Mojela was to be paid an annual salary of £400,000. In addition to that salary (referred to in the service agreement as her Basic Salary), clause 8.4 of the service agreement provided that Ms Mojela should be entitled to a further amount of £100,000 per annum in, so-called, deferred compensation, such sum to be 'settled in arears on the six-month anniversary of (21 July 2021)'. Settlement of the deferred payment was to be by an equity award of shares, share options, or restricted share units in Akanda, save that, at the election of Ms Mojela, she had the right to convert the deferred compensation to Basic Salary to be settled by a cash payment.

28. Additionally, by clause 11.3 of the service agreement, in the event that incentive payments fell due to Ms Mojela and were paid to her, as they were, under clause 11.1 and 11.2 of the service agreement, Ms Mojela was entitled to receive a further sum of £100,000 by way of deferred compensation to be settled, as under clause 8.4, by way of an equity award, to be made no later than 6 months following the dates upon which the incentive payments under clause 11.1 and 11.2 of the service agreement had been made. As under clause 8.4, Ms Mojela had the right to convert the equity award, in this instance, to an incentive payment, to be settled by a cash payment.

29. By clause 11.8 of the service agreement, however, payment of any incentive payment, or bonus, under clause 11 were conditional on notice not having been served by Ms Mojela at the payment date in respect of the payment in question, on Ms Mojela, at the relevant payment date, not being subject to any disciplinary investigation which could result in her dismissal for gross misconduct and on Ms Mojela not, at the relevant payment date, having committed a repudiatory breach of this agreement.

30. By way of additional benefits, Ms Mojela, was entitled, under clause 13 of the service agreement, to participate in a private medical insurance scheme to be put in place by Canmart.

31. Lawful termination of the service agreement was governed by clause 2.2 of the service agreement and by clauses 20 and 21 of the service agreement.

32. The service agreement did not give rise to a fixed-term contract. By clause 2.2 (a provision central to the current application), Ms Mojela's employment under the service agreement was to continue, subject to the remaining, or other, terms of the service agreement until terminated by either Ms Mojela or Canmart giving the other not less than six months written notice. The clause, however, went on to provide that, in the case of Canmart, notice could only be given by Canmart 'after 18 months following (1 July 2021) except in respect of termination rights under Clause 21.1(a) (c) or (g)' of the service agreement. In the event that Canmart did, notwithstanding the foregoing, give notice sooner than as provided for, then Ms Mojela would be entitled to her Basic Salary and contractual entitlements as if the service agreement had been terminated on the first day upon which it could have been terminated if the foregoing limitation upon Canmart's right to give notice had been complied with, such payment to be made within 28 days of the date upon which the service agreement came to an end. Clause 2.2 went on to provide that '(f)or the avoidance of doubt nothing in (the clause)' should 'prevent or limit (Canmart's) 'right to terminate (the service agreement) without notice and without payment for any Basic Salary and contractual benefits for any reason that falls within Clause 21,1(a), (c) or (g)' of the service agreement.

33. Clause 21 of the service agreement provided that Canmart might terminate Ms Mojela's employment 'with immediate effect without notice and with no liability to make any further payment' to her in a number of identified circumstances (a) to (h).

34. Clause 21.1(a) (one of the so-called termination rights referred to in clause 2.2 of the service agreement) applied if Ms Mojela was disqualified from acting as a director.

35. Clause 21.1(b) applied if Ms Mojela were, in the reasonable opinion of the Board, to commit an act of gross misconduct.

36. Clause 21.1(c) (also referred to in clause 2.2) applied in circumstances where Ms Mojela committed, in the reasonable opinion of the Board, any serious or repeated breach, or failure to observe, of any of the provisions of the service agreement, or the policies or procedures of Canmart applicable to its officers or employees, or any anti-bribery and corruption policies and where she had previously been given reasonable notice of such matters and a reasonable opportunity to comply or improve.

37. Clause 21.1(d) applied in circumstances where Ms Mojela refused to comply with any reasonable and lawful direction of the Board.

38. Clause 21.1(e) applied in the event that Ms Mojela was declared bankrupt, made an arrangement with creditors or had a county court judgment or administration order made against her under the County Courts Act 1984.

39. Clause 21.1(f) applied in the event that Ms Mojela was convicted of any criminal offence, other than a traffic offence for which a non-custodial sentence was imposed.

40. Clause 21.1(g) (again referred to in clause 2.2) applied in the event that Ms Mojela was guilty of fraud or dishonesty, or acted in any manner which, in the reasonable opinion of the Board, brought or was likely to bring Ms Mojela, Canmart, or any Group Company into disrepute, or was materially adverse to the interests of Canmart or any Group Company, in each cases whether or not in the course of her employment.

41. Clause 21.1(h) applied in circumstances where Ms Mojela ceased to hold any qualification, approval, authorisation, or registration required for the proper performance of her duties.

42. By clause 21.2 of the service agreement, the specific circumstances set out in clause 21.1 were agreed to be without prejudice to any other rights that Canmart might have at law to terminate Ms Mojela's employment, or to accept any breach of the service agreement by Ms Mojela as having brought the service agreement to an end.

43. By clause 20.1 of the service agreement, Canmart reserved the right, notwithstanding any other provision of the service agreement, to terminate Ms Mojela's employment under the service agreement summarily, by giving her written notice of its exercise of this right. In that circumstance, Canmart's obligation was to pay to Ms Mojela her Basic Salary and her contractual benefits, in lieu of the notice to which she would otherwise have been entitled under clause 2.2 of the service agreement, subject to such deductions as required by law.

44. By clause 20.2 of the service agreement, however, Ms Mojela's rights under clause 20.1 to payment in lieu of notice did not arise if, instead of making such payment, Canmart would have been entitled to terminate Ms Mojela's employment without notice in accordance with clause 21. In that event Canmart was entitled to claw back from Ms Mojela any payment in lieu of notice already made.

45. On 23 June 2022, Ms Mojela, having been in post as Executive Chairperson under the terms of the service agreement since 1st July 2021, was removed from her directorship of Akanda by 51% of the shareholders in Akanda. Only one director, a Mr Tejinder Virk (Mr Virk) remained in place. Ms Mojela's case is that she and the other ousted directors only learnt of their removal by the medium of a press release. The Defendants' case (immaterial in the context of the current application) is that Ms Mojela's performance had been inadequate, that Akanda's share price on NASDAQ had plummeted and that the decision to remove Ms Mojela and others as directors had resulted from pressure from an activist shareholder.

46. In consequence of her removal as a director of Akanda, Ms Mojela was, from 23 June 2022 excluded from the management of Akanda and Canmart and her corporate email was terminated.

47. On 27 June 2022, Mr Trevor Scott, the Chief Financial Officer of Akanda, emailed Ms Mojela, on behalf of Mr Virk instructing her, in effect, to give Mr Virk control of Bophelo's management and finances, in her place, including the remission of funds from Bophelo to Akanda and Canmart.

48. On the same day and within two hours, Ms Mojela, by email to Mr Scott, indicated her refusal to comply with those instructions, on the footing, among other things, that, as director of Bophelo, she had to exercise her judgment, in respect of Bophelo, independently of any instructions received, as she put it, from a shareholder in Bophelo.

49. In response to that refusal, by email letter to Ms Mojela, dated 9 July 2022 Mr Virk reiterated the instructions contained in the letter of 27 June, drew attention to Ms Mojela's obligations under clause 5.2 of the service agreement and, in particular, her obligation to comply with reasonable instructions and, for the avoidance of doubt provided her with resolutions and board minutes of Akanda, Bophelo Holdings Ltd and Canmart confirming the authority of Mr Virk, to issue the instructions in question. The letter required Ms Mojela to confirm her agreement to comply with those instructions in writing by no later than 12 July 2022 and informed her that in the absence of that agreement Canmart reserved the right to terminate the service agreement and Ms Mojela's employment without notice and with immediate effect.

50. Ms Mojela did not provide her requested agreement. Rather, by letter dated 12 July 2022 from her Lesotho lawyers, Mei & Mei Attorneys Inc., Ms Mojela again refused to comply with Akanda's and Canmart's instructions. That letter, again, advanced the proposition that it was not open to Canmart to issue instructions to Ms Mojela bearing upon her management of Bophelo as a director of Bophelo.

51. On the same day, as it transpires, that Mei & Mei wrote to Akanda and Canmart refusing, again, to comply with the instructions that she had been given, Mei & Mei, acting for Ms Mojela and MMDT, applied to the High Court of Lesotho for an order placing Bophelo in liquidation and requested the application be listed on 15 July 2022 as unopposed. The application was said to be founded upon Bophelo's inability to pay its debts and upon the assertion that it was just and equitable that Bophelo be wound up and placed in liquidation.

52. In support of that request and on the same date (12 July 2022), Mei & Mei lodged a 'Certificate of Urgency' and Ms Mojela swore an affidavit.

53. In that affidavit, in which Ms Mojela described herself, among other things, as the sole trustee and beneficiary of MMDT, Ms Mojela asserted that the relevant debt relied upon to ground the liquidation was rent allegedly unpaid by Bophelo to MMDT, in the sum, as at the date of the application, of 5,950,000 maloti (circa £317,000). Ms Bophelo, presumably as trustee of MMDT, had 'on several occasions' asked Bophelo (of which she was, of course a director) to make payment. Although a series of unpaid invoices, going back to 2019 were produced, no explanation for non-payment was provided, nor did Ms Mojela, seemingly, exhibit any written demand for payment. The urgency of the application and the basis upon which it was said to be just and equitable to liquidate Bophelo was that Akanda was 'intent upon taking control of Bophelo to advance its own agenda to the detriment of Bophelo, its employees, creditors and the community'. That last assertion was said to be founded upon the email correspondence already set out in this judgment and was described in the affidavit as 'The fraud and the attempt by Mr Virk and Akanda to take control of Bophelo'.

54. Notwithstanding Ms Mojela's assertion, at paragraph 108 of her affidavit, that the date sought for hearing (15 July 2022) provided enough time for opposition it is not, I think, in any dispute that no steps were taken to serve, or inform, Akanda, or Canmart, of the application. Nor was the court informed that Canmart itself was a considerable creditor of Bophelo, having, in December 2021, provided Bophelo with a $3m dollars lending facility, repayable by November 2022, and there having been some $2.3m drawn down at, or prior, to the date of the application. Bophelo, itself, was unrepresented at the hearing of the application and it is not at all clear, even, that Bophelo was ever formally served.

55. At the same time as Ms Mojela was taking action to liquidate Bophelo, on the basis just set out, she continued, on 12 and 19 July 2022, to present executive updates in respect of Bophelo's operations. Although those reports made some reference to the instructions that Ms Mojela had received and to the possibility of her removal as chair of Bophelo and to requests for information received from Mr Virk, there was nothing in the updates to reflect, whether to the Defendants, or to other concerned in Bophelo's operations, that Bophelo was in any kind of financial difficulty, nor that any steps had been, or needed to be, taken to liquidate Bophelo

56. The application was heard in the Lesotho High Court on 15 July 2022. Bophelo was placed in liquidation and a Mr Chavonnes Cooper was appointed as liquidator. As liquidator, Mr Cooper was entitled, as I understand it, to take control of all the assets and property of Bophelo and to continue to carry on the totality of Bophelo's business. The Defendants became aware that Bophelo had been placed in liquidation on 21 July 2022 and learnt of the circumstances of that liquidation upon 23 July 2022.

57. On 25 July 2022, Canmart and Akanda, by Mr Virk, wrote to Ms Mojela the dismissal letter referred to in paragraph 1 of this judgment. The letter, headed Summary Dismissal, referred back to the 9 July 2022 letter, to the opportunity afforded Ms Mojela, by that letter, to comply with the directions that she had been given and to the fact that she had not taken up that opportunity. It reiterated that the 9 July 2022 letter had warned her that in the event of her continued non-compliance with those directions, contrary, it was said, to clauses 5.2(a) (c) and (d) of the service agreement, Canmart had reserved the right to terminate the service agreement and her employment without notice and with immediate effect. By its operative part and by reference, specifically, to clauses 21.1(b) (gross misconduct) and 21.1(d) (refusal to comply with reasonable and lawful directions) of the service agreement, the letter informed Ms Mojela that Canmart had determined to terminate her employment for gross misconduct, without notice and without further warning. By way of further explanation, the letter stated that Canmart had considered Ms Mojela's refusal to acknowledge her duty and responsibility to follow the reasonable instructions of Canmart and to accept the authority of the board of Canmart. Ms Mojela's dismissal was to take immediate effect, with 25 July 2022 being her final day of employment.

58. As set out in paragraph 1 of this judgment, Ms Mojela denies the validity and lawfulness of her dismissal, asserts that it constituted a repudiatory breach of the service agreement and her contract of employment and that the service agreement was, in fact, terminated by her acceptance of the Defendants' repudiatory breach, by her solicitors' letter of 29 July 2022. These proceedings and the current application for summary judgment are, primarily, based upon that assertion.

59. As foreshadowed in paragraph 12 of this judgment, there is before the court, in addition to the summary judgment application, an application by the Defendants to amend their Defence and Counterclaim. In accordance with good practice and principle it was common ground that, in considering the summary judgment application, I should have regard to the matters advanced in the amended Defence and Counterclaim, such that if those matters gave rise to a realistic answer to the summary judgment application then the application would fail and, correspondingly and to the like extent, permission to amend should be granted. The merits of an application under CPR 24 are not determined by the pleadings but whether, irrespective of the pleadings, or the absence of pleadings, a respondent is able to develop a realistic answer to the application for summary disposal.

60. It was also common ground that, in accordance with well-established principles applicable to summary judgment applications, it was appropriate, if matters turned upon a point, or points, of law, or of construction, and if the court was satisfied that all material evidence was available and that the parties had had sufficient opportunity to address the matters in question, for the court to resolve those matters. If the respondent to an application for summary judgment has no answer to the relevant point of law, or construction, as determined by the court, then he will have no realistic prospect of succeeding at a trial. Conversely, if it transpires that it is the applicant's case that is bad in law, or as a matter of construction, then, irrespective of whether there is a formal cross-application, the sooner that the matter is determined the better. No suggestion has been made in this case that the materials before me are insufficient to resolve any of the matters of law, or construction, argued out before me, or that the parties have had insufficient time to deal with and address those matters.

61. The primary issue argued before me and, in the submission of Mr Solomon KC, leading Mr Halban, for Ms Mojela, one readily susceptible of summary determination is that set out at paragraph 7 of this judgment, namely whether, on the true construction of clause 2.2 of the service agreement and in the events that have occurred and notwithstanding any conduct on the part of Ms Mojela which might otherwise have founded her summary dismissal, her dismissal, because it was non-compliant with clause 2.2 of the service agreement, constituted a repudiatory breach of the service agreement, pursuant to which and pursuant to clause 2.2 itself, she is entitled to recover such sums of money as she would have been entitled if her contract had been lawfully terminated in accordance with clause 2.2

62. The essence of Ms Mojela's case, as set out in paragraph 27 of her Particulars of Claim, is that, properly construed and notwithstanding the provisions for dismissal without notice under clause 21 of the service agreement, the service agreement could only be lawfully terminated within the first 18 months following the commencement date (i.e. prior to 1st January 2023) if terminated under clause 21.1(a), (c) or (g) of the service agreement. Because termination, or purported termination, had taken place within that period and because the rights to terminate relied upon had not been one of those rights exempted from the bar on termination, the termination had been unlawful and repudiatory. Further, because termination had been, or purported to have been, pursuant to clauses 21.1(b) and (d) of the service agreement, it was not open to Canmart or Akanda to justify, or seek to justify Ms Mojela's dismissal on other grounds not specified in the dismissal letter.

63. The consequence of the foregoing, as pleaded on her behalf, was that, whether under the terms of clause 2.2 itself and the provision made in that clause for payment of Basic Salary and other contractual benefits to Ms Mojela if her employment was terminated sooner than as stipulated in clause 2.2, or as damages for breach of contract in purporting to terminate the service agreement other than in accordance with clause 2.2, Ms Mojela was entitled to summary judgment in respect of the Basic Salary and other contractual entitlements which would have been due to her if the service agreement had been terminated at the first date at which in accordance with clause 2.2 it could have been lawfully terminated.

64. The essential premise underlying the foregoing is that clause 2.2 precluded any termination of the service agreement during the first 18 months of its lifetime other than on the grounds set out at 21.1(a) (c) or (g). In my view that is not the correct construction of clause 2.2.

65. Clause 2.2 is concerned and, as I see it, solely concerned with the circumstances in which and the time scale within which the service agreement can be terminated by notice. It does not touch upon, or affect, the circumstances in which the service agreement can be terminated without notice. Those circumstances are set out in clause 21, to which, along with the other provisions of the service agreement, clause 2.2 is expressly subject.

66. The purpose of clause 2.2, as I see it, was to provide Ms Mojela with a protected period at the commencement of her employment, during which that employment could only be terminated on 6 months. notice if termination was sought under one of the grounds (21.1(a) (c) or (g)), in respect of which the 18 month bar on notice was not applicable. In the event that it was sought to give notice during that 18 month period, other than pursuant to one of those grounds, then the consequence of that repudiatory breach of the service agreement would be to entitle Ms Mojela, pursuant to the express terms of clause 2.2, to be placed in the same position as if clause 2,2 had been complied with.

67. None of that, however, precluded Canmart from terminating Ms Mojela's employment without notice under clause 21.

68. The flaw in Ms Mojela's case on construction is that it equates notice and termination. Clause 2.2 does not provide that the service agreement cannot be terminated during the first 18 months from the commencement date. It provides, only, that, save in the three excepted cases, notice of termination cannot be given during that protected period. It does not touch upon termination under clause 21. Correspondingly, the provisions applicable, if, contrary to the terms of the clause, notice is given sooner than allowed by the clause, are themselves confined to the circumstance in which premature notice is given. Again, the provision does not touch upon termination under clause 21.

69. That clause 2.2 was not intended to interfere with the operation of clause 21 is, I think, made clear by the last sentence of the clause, dealing with what I have called the three excepted cases, in respect of which notice could be given during the 18 month protected period. The purport of that sentence, as I see it, was to clarify, as it is put 'For the avoidance of doubt' that the fact, that clause 2.2 contemplated that a termination by notice could take place within the protected period in respect of one, or

more, of the excepted cases, should not be taken as signifying that, in those excepted cases, the right to terminate without notice had been modified, or foregone. In short, even in the excepted cases, Canmart's right to terminate without notice was preserved.

70. I add, perhaps tangentially, that the reason, as I see it, why the parties may have contemplated that termination under one of the excepted cases during the protected period might be effected by notice rather than by an immediate termination without notice, notwithstanding Canmart's entitlement in that regard, is that, in those instances (21.1(a) disqualification as a director; 21.1(c) commission of a serious or repeated breach of the service agreement or of Canmart's policies, procedures, regulatory or anti-corruption requirements after written notice of such breach and after opportunity to comply; 21.1(g) fraud, dishonesty or actions likely to bring Canmart into disrepute or to adversely the interest of Canmart or any Group Company, whether or not in course of employment) the level and variety of behaviour, including the circumstances giving rise to a disqualification, which give rise to a right to terminate under these provisions, is so wide that, where conduct falls at the lower end of the range, a fair minded employer, while wishing to terminate and while entitled to terminate peremptorily, might wish to choose to bring the agreement to an end on notice rather than summarily.

71. Be this last as it may, what, I think, is clear is that, contrary to Ms Mojela's submission, the parties did not agree a protected period within which, otherwise than in respect of the excepted cases, the service agreement could not be terminated at all.

72. Me Solomon KC adverted to the factual matrix out of which the service agreement arose, namely the fact that Ms Mojela's role with Akanda and Canmart, via Halo, had developed out of her position as the founder and original shareholder in Bophelo and submitted that, in that context, it was not at all surprising that Ms Mojela was given, as he contended, the level of protection from termination which flowed from his construction of clause 2.2 of the service agreement.

73. I cannot agree. It is entirely unrealistic to think that either Canmart or Akenda would have agreed to a provision which precluded them from terminating Ms Mojela's employment during the protected period, even in circumstances where she was guilty, for example, of gross misconduct, or serious criminality, or, indeed, as alleged, a persistent non-compliance with instructions given by her employer. It is equally unlikely, in that context, that the only excepted grounds for termination should be those identified in clause 2.2, rather than the much graver grounds for termination set out in, again for example, clauses 21.1(b) and (f). I am quite satisfied that that was nor the case.

74. The foregoing conclusions carry with them significant repercussions, in respect of the shape of this case.

75. As set out in paragraph 62 of this judgment, the only ground of repudiation relied upon by Ms Mojela, in respect both of her claim and the current summary judgment application, is the allegedly wrongful conduct of Canmart, endorsed by Akanda, in purporting to terminate the service agreement, without notice, during the protected period.

76. In the light of my conclusions, as to the construction of clause 2.2, that breach is, simply, not made out, with the result that not merely does the summary judgment application fail, to the extent that it asserts claims against Akanda and Canmart arising out of the alleged repudiatory breach, but also the entire claim in repudiatory breach, as currently pleaded, fails, including those parts not included within the summary judgment application.

77. The further consequence is that the question, as to whether, if Canmart had, contrary to my conclusion, been in repudiatory breach, for seeking to terminate the service agreement within the protected period and other than on the excepted grounds, it could, nonetheless, seek to justify the dismissal upon grounds not raised in the dismissal letter and, thereby, avoid payment of the monies otherwise falling due in respect of the repudiatory breach and pursuant to clause 2.2 of the service agreement, is not now one that requires an answer. The matter, however, having been fully argued, I consider that the question, albeit, obiter, deserves resolution.

78. It seems to me that, if the construction of clause 2.2 was as contended for by Ms Mojela, such that the parties had agreed that, other than on the three excepted grounds, the service agreement could not lawfully be terminated by Canmart during the protected period, then it necessarily follows that the substitution of an additional ground, purportedly justifying the termination, but, itself, not one of the excepted grounds, would be merely to substitute one unlawful repudiatory ground for another, with the result that that substitution could not constitute an answer to the claim for repudiatory breach, or afford a defence to that claim. The starting point, then, on this premise, is that any alternative grounds justifying dismissal advanced, or pleaded, by Canmart and Akanda must fall within the excepted cases.

79. Akanda and Canmart's case, based upon what I regard as the true construction of clause 2.2 of the service agreement, namely that it did not preclude any of the grounds of dismissal without notice set out in clause 21 of the service agreement, is that the grounds of dismissal set out in the dismissal letter were, in themselves, good grounds justifying the termination of Ms Mojela's employment and the termination of the service agreement. Their further contention, however, is that, in justifying Ms Mojela's dismissal, they were entitled, even if those grounds were not stated in the dismissal letter, or, even, if the stated grounds fell foul of Ms Mojela's construction of clause 2.2 of the service agreement, to rely upon any further and available grounds justifying that dismissal. In the latter scenario, however, as explained in paragraph 78 of this judgment, the alternative grounds would have to fall within the excepted cases.

80. Three such grounds are advanced.

81. The first, falling within clause 21.1(c), is said to derive from Ms Mojela's failure, as set out in paragraphs 47 to 50 of this judgment, to comply with the instructions that she had been given, having been given an opportunity to comply, and to her comprehensive breach, thereby, of her obligations under clause 5.2(c) of the service agreement.

82. The second, falling within clause 21.1(g) is said to arise from Ms Mojela's conduct in respect of the liquidation of Bophelo. That conduct, having the effect of removing Bophelo as a Group asset, without reference to, or the consent of, Canmart, or Akanda, and behind their back, is advanced as conduct of a nature seriously adverse

to the interests of Canmart and Akanda and a blatant breach of Ms Mojela's obligations, under clause 5.2 (a) of the service agreement, to faithfully and diligently serve Akanda and Canmart, under clause 5.2 (d), to keep Akanda fully informed as to all matters relating to the business and affairs of Akanda and Canmart and, under clause 5.2 (f) of the service agreement, to promote, protect develop and extend the business of Akanda, Canmart and, as a Group Company, Bophelo.

83. The third, also falling within clause 21.1(g), although, as I read the pleading, additionally said to fall within clauses 21.1(b) and 21.2, relates to Ms Mojela's alleged breach of clause 17.1(a) and 17.2(c) of the service agreement. What is said is that Ms Mojela's failure to inform Akanda and Canmart of the fact, asserted in her affidavit in support of Bophelo's liquidation, that she was the beneficial owner of MMDT rendered her position with MMDT, as beneficial owner, one whereby she was engaged, or concerned, or had a financial interest in another business, namely MMDT, and further that, in so doing, she had engaged in external activities, via MMDT, as Bophelo's landlord, which, because of the conflict between those activities and the interests of Bophelo, were materially adverse to the interests of Canmart and Akanda.

84. The merits of each of these three grounds are disputed by Ms Mojela.

85. In regard to MMDT, she asserts that her statement that she was the beneficial owner of MMDT was no more than a mistake on her part; MMDT being, she says, a charitable trust.

86. In regard to the other two grounds and to those stated in the dismissal letter, itself, Ms Mojela's position, simply put, is that her obligation and responsibilities as a director of Bophelo, including, as she alleges, her duties arising out of its alleged insolvency, overrode, or took precedence over, her obligations to Akanda and Canmart under the service agreement, such that it was not open to Akanda or Canmart to give her instructions in respect of the affairs of Bophelo, or to make complaint as to her actions, in winding up Bophelo.

87. Akanda and Canmart submit, conversely, that the instructions that were given to Ms Mojela were given to her in her capacity as an employee of Canmart, as Executive Chair of Akanda, owing the duties set out in clause 5 of the service agreement, and as, as they submit, a fiduciary, in respect of the affairs of Akanda, Canmart and the Group Companies, including Bophelo. In that capacity, those instructions, in respect of its asset and wholly owned subsidiary, Bophelo, were entirely lawful. Further, that, both as a fiduciary and as an employee, charged with the obligation to faithfully and diligently serve Akanda and Canmart, it was not open to Ms Mojela to put either her own interests, or those of Bophelo, seen as an entity separate from the Group of which it formed part, ahead of those of Akanda, or Canmart, or the Group.

88. In regard to the liquidation of Bophelo, Akanda and Canmart take issue with Bophelo's alleged insolvency and contend that, both as fiduciary and pursuant to her contractual duties and obligations under clause 5 of the service agreement, Ms Mojela's conduct, in taking steps, behind the back of Akanda and Canmart, to orchestrate the removal of Bophelo from the control of Akanda and Canmart and as an asset of the Group, constituted a very serious breach of her fiduciary and contractual obligations.

89. Save in one regard, I was not called upon to explore, in any detail, the relative merits of these conflicting positions, it being Ms Mojela's core submission that Akanda and Canmart, having purported to dismiss her, albeit unlawfully, on the grounds specified in the dismissal letter, were precluded, by that election, from bring into play any other grounds which might have potentially justified her dismissal. In the absence of a detailed exploration of these matters and save that I am not persuaded that the matters advanced by Akanda and Canmart are, intrinsically, unrealistic, or unarguable, I make no further findings as between the positions adopted by the parties.

90. The one matter which was, at least to an extent, argued out, relevant both to Ms Mojela's dismissal and the Defendants' Counterclaim, was the question as to whether Ms Mojela, otherwise in respect of her directorship of Akanda, was a fiduciary and remained such, even after her removal as a director of Akanda.

91. As to that, Mr Solomon KC drew my attention to the familiar decision of Elias J (as he then was), in **Nottingham University v Fishel [2000] ICR 1462** and to the danger, identified in that case, of equating an employee's duty of fidelity with a fiduciary relationship, strictly so called. In particular, he drew my attention to the passage, at **1491 below B**, in which Elias J warned that simply labelling a relationship as fiduciary provided no touchstone as to the particular fiduciary duties which, in any given case, will arise.

92. .Mr Solomon's contention, with which, in principle, I have no difficulty, is that in the employment context (employment not, in itself, giving rise to a fiduciary relationship) any fiduciary duties and obligations both derive from the specific contractual obligations undertaken by the employee and are circumscribed, or limited, by those contractual obligations.

93. The specific contractual obligations which will, or may, give rise to additional, but not conflicting, fiduciary obligations, will be obligations, whether in respect of a part, or the whole, of the contract of employment under which the employee undertakes to act exclusively in the interest of the employer, or agrees terms which place him in a position whereby he is obliged to act single-mindedly in the interest of his employer.

94. Mr Solomon's submission is that the matters pleaded by Akanda and Canmart are insufficient to establish that Ms Mojela's relationship with Akanda and Canmart gave rise, in any respect, to the obligation of single minded and exclusive loyalty which are the requisites of a fiduciary relationship. In particular, the fact that, by clause 5.1 of the service agreement, as set out in paragraph 19 of this judgment, Ms Mojela had acknowledged her status as a fiduciary and that she was employed in a senior position of trust did not, ipso facto, render her a fiduciary, in respect of her performance of her role under the service agreement.

95. In the alternative, Mr Solomon submits that any fiduciary status and any relationship of trust, as between Ms Mojela and Akanda and Canmart, was brought to an end when, on 23 June 2023, she was excluded from the management of Akanda and Canmart. At that point, the Defendant no longer reposed trust in Ms Mojela and could no longer look to her for loyalty.

96. I am not persuaded that the contention that Ms Mojela was a fiduciary, in respect of her performance of her duties and obligations under the service agreement is either

unarguable or unrealistic, or, in particular that Ms Mojela's own acknowledgment that she was a fiduciary can be treated, or regarded, as having no importance.

97. Rather, it seems to me that Ms Mojela's own acknowledgment both of her fiduciary status in respect of her obligations and duties under the service agreement and that she was placed by the service agreement in a senior position of trust, provides, in and of itself, substantial support for the contention that, as she acknowledged, she was a fiduciary. It further seems to me that, as set out in paragraph 17 of this judgment, Ms Mojela's role as the Executive Chair of Akanda, based in Lesotho, at the point of production of Akanda's product, and, as director of the producer company, Bophelo, directly involved in that production, was, as pleaded by Akanda and Canmart, just such an important and senior role as might be expected to carry with it fiduciary obligations. Put another way, there is no inconsistency. as between Ms Mojela's role in Akanda and her acknowledgment, in the service agreement, of her fiduciary status.

98. An acknowledgment by Ms Mojela, within the service agreement, of her fiduciary status, in respect of her role under that agreement, is a very different thing to the conventional express, or implied, term as to trust and fidelity. By acknowledging her fiduciary status and by doing so within the body of the service agreement, it seems to me that Ms Mojela was acknowledging and accepting that she owed, in respect of the service agreement, the core obligations which go with being a fiduciary, namely that obligation of single-minded loyalty and those facets of that loyalty which are set out by Millett LJ (as he then was) in **Bristol and West Building Society v Mothew [1998] 1 Ch 1 (at page 18)**, as cited by Elias J, in **Fishel, at page1490 below A**, and, further, that those obligations arose out of the service agreement.

99. It follows from the foregoing that, in my view, it is highly arguable that Ms Mojela was, in respect of her role as Executive Chair under the service agreement, a fiduciary and that she owed, in respect of her performance of that role and her obligations and duties in that role, the well understood obligations of a fiduciary, as set out in **Mothew**.

100. I am, further, unpersuaded that the fact, that, on 23 June 2022, Ms Mojela was deprived of her management functions in respect of Akanda and Canmart, had the effect, there and then, of absolving Ms Mojela of any fiduciary status and obligations that she may have had.

101. It seems to me that, while Ms Mojela remained Executive Chair, under the terms of the service agreement, any fiduciary obligations, arising from that role, remained in place, such that, both in respect of any residual functions that she was called upon to perform in that role and in respect of any other conduct, on her part, relevant to the business and activities of Akanda and Canmart, such as the liquidation of Bophelo, she was obliged to abide by her fiduciary obligations of loyalty to Akanda and Canmart.

102. All that said, I revert now to Ms Mojela's core submission, namely that, on her construction of clause 2.2, Akanda and Canmart having elected to dismiss her on the grounds identified in the dismissal letter and upon grounds not falling within the excepted cases, where, on her case, dismissal could take place during the protected period, were precluded from raising any other grounds which might have validated

her dismissal; and avoided the making of payment in accordance with clause 2.2 of the service agreement.

103. The starting point, here, is the dismissal letter, itself.

104. It was common ground between the parties that the dismissal letter was to be construed objectively and as it would have been understood by a reasonable recipient of the letter, having regard to the circumstances which would have been known to that recipient. The court is not concerned with the subjective intention of the authors of the dismissal letter; only with the objective construction of the letter, set in its context.

105. The context, in this case, is to be found in the two letters, of 27 June and 9 July 2022, sent to Ms Mojela by Canmart and Akanda, as referred to in paragraphs 47 and 49 of this judgment and which immediately preceded the dismissal letter. Those letters, most specifically the 9 July letter, made it plain that, in the absence of Ms Mojela's compliance with Akanda and Canmart's instructions by 12 July 2022, in accordance with clause 5.2 of the service agreement Canmart reserved its right to terminate the service agreement with immediate effect and without notice.

106. In that context, the dismissal letter, itself, as summarised in paragraph 57 of this judgment, was, or would have been, unequivocally clear to any recipient, in two regards; firstly, that its intent was to bring Ms Mojela's employment and, hence, the service agreement to an end with immediate effect and; secondly, that the core basis of that termination was her non-compliance with the instructions that she had been given and that it was that robust non-compliance which justified her dismissal, both, generically, as gross misconduct (21.1(b)) and under the specific provision in respect of compliance with instructions (21.1(d)).

107. There can be no sensible argument but that Ms Mojela, the recipient of the dismissal letter, was made aware both that she was being dismissed and her service agreement terminated and that the grounds given for her dismissal were those contained in the dismissal letter.

108. The question, therefore, as already foreshadowed, is whether the terms of the dismissal letter had the effect of confining the matters upon which Akanda and Canmart could rely, as justifying Ms Mojela's dismissal, to those contained in the letter, or whether, notwithstanding the terms of the letter, the alternative grounds for dismissal, outlined in paragraphs 81. 82 and 83 of this judgment, were, or would have been, had clause 2.2 borne the meaning contended for on behalf of Ms Mojela, nonetheless available to Akanda and Canmart, for the purposes of justifying Ms Mojela's dismissal and, thereby, defeating her monetary claims, whether for damages for repudiatory breach by Akanda and Canmart, or pursuant to the provisions of clause 2.2 of the service agreement.

109. In support of the proposition that those alternative grounds were, or would have been, available, Akanda and Canmart inevitably place reliance upon the well-known decision of the Court of Appeal, in **Boston Deep Sea Fishing v Ansell (1888) 39 Ch D 339.** In that case the grounds upon which the employee, Mr Ansell, had been dismissed were not made out at trial, but, at the trial, the employer was able to establish another circumstance of repudiatory conduct on the part of Mr Ansell, prior to his dismissal and such as to justify his dismissal. The fact that that conduct had not

been relied upon as a ground for dismissal and had not been known by the employer at the time of the dismissal did not preclude the employer from relying on the conduct in question as justifying the dismissal. As it was put by David Donaldson QC, sitting as a Judge of this Division, in **And So To Bed Ltd v Dixon [2001] FSR 47 at paragraph 35, '**It is well established … that a party who specifies one inadequate reason for his termination of a contract is not precluded from later relying on other facts if they constitute breaches of the necessary importance to amount to repudiation'.

110. While that paragraph was criticised, by Andrew Baker J, in **Phones 4U Ltd v EE Ltd [2018] Bus LR 874 at paragraph 96**, I do not read that criticism as relating to this passage of the paragraph, but, rather to the proposition, which, as discussed later in this judgment, does not survive the decision of the Court of Appeal, in **Leofelis SA v Lonsdale Sport EWCA Civ. 985**, that a party who avails himself of the **Boston Deep Sea Fishing** principle, in order to justify a dismissal, or termination, can, also, rely upon the facts that justified that dismissal, or termination, to advance a claim for the losses arising from the termination of the contract in question, notwithstanding that the breach that justified the dismissal was not, in fact, causative of the termination of that contract.

111. The application of the **Boston Deep Sea Fishing** principle, in the context of a termination based upon the purported exercise of a contractual right of termination, although not explicitly so expressed, was discussed, albeit obiter, by Moore-Bick LJ in **Stocznia Gydnia SA v Gearbulk Holdings Ltd [2010] QB 27 at paragraphs 44 and 45**.

112. Moore-Bick LJ's starting point was that at common law all that is required for the acceptance of a repudiation is for the injured party to communicate clearly and unequivocally his intention to treat the contract as being discharged. In some instances, where the general law and the particular contractual terms as to termination gave rise to alternative and different rights, it would be necessary for the injured party to elect between those alternative rights and for the court to determine what election has been made. Where, however, the contractual rights of termination corresponded with the general law, because the breach giving rise to the right to terminate went to the root of the contract and was, itself, repudiatory, no election was necessary and all that was required to effect a valid acceptance of that repudiatory conduct was for the injured party to make clear that he was treating the contract as discharged. In that circumstance and, as I see it, in application of the **Boston Deep Sea Fishing** principle, even if the injured party gives a bad reason for treating the contract as discharged, that discharge will be effective if the circumstances support it; that is to say, if other good reasons for the discharge exist.

113. In the current case and as already stated, the dismissal letter made it unequivocally clear that Akanda and Canmart were, by that letter, treating the service agreement as discharged and, further, that the grounds of dismissal and of the consequent discharge of the service agreement, although couched in the language of clause 21 of the service agreement, arose out of the potentially repudiatory conduct of Ms Mojela, in, as I have put it, robustly refusing to comply with the instructions of Akanda and Canmart. The rights arising out of her dismissal, under the provisions of clause 21 of the service agreement, namely Canmart and Akanda's right to terminate her employment and the service agreement without notice and without further payment, corresponded, exactly,

with their rights arising out of the acceptance of her alleged repudiatory conduct at common law and, in consequence, no question of election arises. In that circumstance, by making it plain, via the dismissal letter, that the contract was discharged, it seems to me that Akanda and Canmart were accepting Ms Mojela's repudiatory conduct as bringing the service agreement to an end.

114. On that footing and even if, as Ms Mojela, contends. the reasons given for her dismissal and termination were 'bad reasons', it does not, on the face of it, preclude Akanda and Canmart, in this litigation, from subsequently supporting the dismissal and the discharge of the service agreement on the basis of other forms of repudiatory conduct by Ms Mojela, as identified in paragraphs 81. 82 and 83 of this judgment. As explained in paragraph 78 of this judgment, even on Ms Mojela's construction of clause 2.2 of the service agreement, alternative grounds of repudiatory conduct would be available for that purpose if, as is Akanda and Canmart's case, those grounds fell within those excepted categories where, upon her construction, dismissal remained available.

115. Mr Solomon KC, in reliance, however, principally, upon the decision of the Court of Appeal, in **Cavanagh v William Evans Ltd [2013] 1 WLR 238**, submits that that course of action is not open to Akanda and Canmart and that they are not entitled, in this case, were it to be necessary, to substitute a 'good reason' for, in this hypothesis, the 'bad reasons' set out in the dismissal letter and, thereby, avoid the consequences set out in clause 2,2 of the service agreement. Having elected to dismiss on grounds which, on Ms Mojela's construction of clause 2.2 of the service agreement, were not available to them, his case, in essence, is that the financial consequences of that election, as set out in clause 2.2 of the service agreement, cannot be evaded. I, respectfully, disagree.

116. **Cavanagh** was an entirely different case. In **Cavanagh**, the employer terminated the employment of its managing director under the provisions of his service agreement, whereby his employment could be summarily terminated upon payment, in lieu of notice, of the 6 months salary to which he would otherwise be entitled. Having effected the termination, but before payment of the monies to which the managing director was entitled in lieu of notice, the employer became aware of conduct on the part of the managing director which would have justified his dismissal for gross misconduct and the acceptance by the employer of his repudiatory breach. The managing director's service agreement, unlike the equivalent provisions (clauses 20.1 and 20.2) of the service agreement in the current case, contained no provision entitling the employer to refuse, or clawback, the payment in lieu, in the event that the managing director could have been subject to dismissal without notice. In that circumstance, the employer refused payment, arguing that, because, as it transpired, the manager's employment could have been terminated for repudiatory breach, he was not entitled to the contracted payment falling due on the termination of his contract. That argument failed and the managing director was found to be entitled to the contracted amount.

117. The essential reason for that failure is to be found in paragraph 37 of the judgment of Mummery LJ, namely that the employer having elected to lawfully terminate the managing director's contract was not entitled to resile from the contractual consequences of that choice by purporting to rely, after the lawful termination of the

contract, upon repudiatory conduct which would, or might, otherwise have entitled the employer to bring the contract to an end by accepting that repudiation.

118. As explained, in paragraph 39 of the judgment, the **Boston Sea Fishing** principle was simply not applicable in a case where, as was common ground, the employment contract had been lawfully terminated. That principle applied in circumstances, quite unlike those in **Cavanagh**, where a party potentially liable for a wrongful dismissal is entitled to bring into play as justification for that dismissal matters which were not initially advanced in support of that dismissal. It is not applicable, at all, to a case of lawful dismissal, or as an answer to a liability arising from such a dismissal.

119. The foregoing analysis finds support in the judgment of Andrew Baker J, in **Phones 4U Ltd, at paragraph 112**. **Cavanagh** was not a claim for damages for wrongful dismissal that could be defended on the **Boston Sea Fishing** principle and the fact that the managing director could, in other circumstances, have been dismissed for misconduct was not capable of re-characterising as such a dismissal that which had actually happened, namely a lawful termination under an express right of termination unrelated to any possible misconduct.

120. In the result, it seems to me that **Cavanagh** has very little to do with the circumstances with which I am concerned and is certainly not determinative. Ms Mojela's case has nothing to do with lawful dismissal and the rights arising from a lawful dismissal. Her case is that, because dismissed in what I have called the protected period, her dismissal was repudiatory and unlawful. I have already found that not to be the case, but, on the footing that I am wrong and that her dismissal was, on its stated grounds, wrongful I can see no reason why the claim that she has brought cannot be met by reference to the **Boston Sea Fishing** principle, as set out in paragraphs 113 and 114 of this judgment.

121. In that event and in the event that one, some, or all, of the alternative grounds of dismissal set out at paragraphs 81, 82 and 83 of this judgment were made good, then, even on her own case, Ms Mojela's dismissal would have been justified and, in consequence, there would be no question of Akanda and Canmart being liable for the amounts specified in clause 2.2 of the service agreement, or any amounts.

122. It follows that, contrary to the submissions made on behalf of Ms Mojela and even if her construction of clause 2.2 of the service agreement were correct, it would have been wrong in principle, in the absence of findings that the alternative repudiatory grounds were unrealistic, or unarguable, such findings, as out in paragraph 89 of this judgment, having neither been sought, nor made, to grant the summary judgment sought in respect of Akanda and Canmart's allegedly repudiatory breach and I would have declined to make that order.

123. I turn, next, to the contention that Akanda and Canmart's Counterclaim against Ms Mojela, whether in original or amended form, is unarguable and unrealistic and, thus, susceptible of summary disposal in favour of Ms Mojela.

124. In its original configuration, the Counterclaim pleaded a number of breaches of the express or implied terms of the service agreement, treating, as I read it, Ms Mojela's position as a fiduciary as one of the express terms of the contract. Although the Counterclaim repeated and relied upon the matters then pleaded in the Defence, a

number of the breaches which were pleaded were, in themselves, entirely generic and unparticularised, including a broad and unparticularised claim in respect of Ms Mojela's allegedly inadequate performance of her role as Executive Chair. The breaches which were, in any way, particularised were those relating to the liquidation of Bophelo and to Ms Mojela's failure to comply with Akanda and Canmart's instructions. On the basis of these contentions, the relief sought was that Akanda and Canmart should be reimbursed in respect of all payments made to Ms Mojela under the service agreement, as well as in respect of the costs incurred in respect of the negotiation and drafting of the service agreement.

125. Those claims for relief were conceptually unsound. There is no realistic basis upon which it could be contended that it was Ms Mojela's breaches of her contract which gave rise to the payment of her salary or to the costs incurred by Akanda and Canmart in negotiating and drafting her contract. Damages for breach of contract are designed to place the injured party in the place it would have been had the contract been performed. Had the contract been properly performed, then, self-evidently, the costs of negotiating and drawing that contract would have been incurred and Ms Mojela would have received the payments due to her under the contract. Reimbursement of monies falling due under the contract and other incurred costs, might, conceptually, have been recoverable in a case of total failure of consideration. This is not such a case.

126. Unsurprisingly, these reimbursement claims are no longer pursued. The Counterclaim now advanced, by way of the projected amendment, is founded solely upon Ms Mojela's conduct in respect of her orchestration, as I have put it, of the winding up of Bophelo and the loss to Akanda and Canmart which is said to arise from that conduct.

127. Akanda and Canmart's claim, in regard to that conduct has already been set out, in paragraphs 81 and 87 of this judgment. They submit, as already stated, that Ms Mojela's conduct, in securing the winding up of Bophelo and its consequent removal as a Group asset, placed her in serious breach of both her contractual and her fiduciary duties.

128. As to her breach of her contractual duties I have already indicated, in paragraph 89 of this judgment, that I do not regard those claims (for present purposes, most specifically, the projected claims under clauses 5,2(a) and (f) of the service agreement) as unarguable, or unrealistic.

129. As to her fiduciary duties, I have already indicated, at paragraphs 99 to 101 of this judgment, that I consider it highly arguable that Ms Mojela owed fiduciary duties, pursuant to the service agreement, and that those duties subsisted even after she was removed from a management role on 23 June 2022. It follows that, at the date when steps were taken to put Bophelo into liquidation and to do so without informing Akanda or Canmart of her activities, she remained, potentially, under a duty of overriding loyalty to Akanda, Canmart and the Group, such that those activities constituted a serious breach of that duty.

130. In further regard to these alleged breaches, I should note that the breaches in question are not, in this case, the breaches which were relied upon in the dismissal letter and were not, therefore, the breaches which gave rise, directly, to the termination of the service agreement and Ms Mojela's employment. As foreshadowed earlier in this

judgment, at paragraph 110, that fact would, as explained both by Roth J and the Court of Appeal, in **Leofelis,** have precluded Akanda and Canmart from relying on these breaches, not being causative of the termination of Ms Mojela's contract, in respect of any damages claim arising out of that termination.

131. That, however, is not this case. In this case, the damages claim does not arise out of and is not in any way dependent upon the termination of the service agreement. It is, as it was put in argument, an entirely free-standing claim, based upon Ms Mojela's conduct in respect of Bophelo, prior to the termination of the service agreement and while she was still bound by the service agreement and any fiduciary obligations arising out of that agreement.

132. The losses which are said to arise from those breaches relate to the loan facility and advances made to Bophelo, as set out in paragraph 54 of this judgment. Canmart had, in December 2021 granted Bophelo a $3m dollar loan facility, of which, by the date of the application to liquidate, some $2.3m had been drawn down. The drawn down amounts were, under the December 2021 lending agreement, to have been repaid in full by 30 November 2022 and it is Akanda and Canmart's case that the liquidation of Bophelo has put Bophelo out of business with the result that no repayments have been made to Canmart under, or in respect of, the lending agreement. Their loss is, therefore, the amounts which would have been repaid but for the liquidation; alternatively the lost chance of recovering the sums falling due under the lending agreement.

133. Ms Mojela's response to this contention is to pray in aid the fact that, as demonstrated by the order made by the Lesotho court in the liquidation, Bophelo was already insolvent at the date of the application to wind up and, hence, could not, even absent its liquidation, have made any repayment to Canmart in respect of the advances which had been made. The submission is made that Akanda and Canmart, not having challenged the winding up order, are estopped from denying the validity of the order, or the facts upon which the order is said to be based, including, therefore, the insolvency of Bophelo.

134. Whether, in fact, Bophelo was insolvent and whether, as a matter of law, Akanda and Canmart are estopped from denying that insolvency, seem to me to both be matters which require investigation.

135. There is no evidence to support that insolvency other than Ms Mojela's evidence to the Lesotho court. That evidence, itself, as set out in paragraph 53 of this judgment, seems to boil down to little more than Ms Mojela, in one capacity, as trustee of MMDT, making a 'request' for payment to herself, in another capacity, as director of Bophelo. There is no evidence of any written demand and no explanation of the series of apparently unpaid invoices going back to 2019. Nor is there any explanation as to why Bophelo was unable to pay an allegedly unpaid debt in the order of £317,000 at a time when it had an undrawn down credit facility in the order of $700,000. As set out in paragraph 55, the reports emanating from Ms Mojela and Bophelo, at or about the date of the application, made no reference at all at all to Bophelo being in any financial difficulty, or as to any application to liquidate Bophelo, or the need for any such application. Given these circumstances and given, further, that, on the face of Ms Mojela's affidavit in the Lesotho proceedings, her purpose was to stop Mr Virk and Akanda taking control of Bophelo, the court, as it seems to me, is entitled to be

sceptical as to whether the application for liquidation was founded upon a genuine insolvency or whether the alleged insolvency was a device devised by Ms Mojela in order to achieve that purpose.

136. As to the effect of the order made by the Lesotho court, there are, as it seems to me, legitimate questions to be answered as to whether a judgment obtained in the circumstances set out in this judgment and, in particular, as Akanda and Canmart would submit, deliberately without notice and behind their back, would be recognised by the English court as conclusive on the question of Bophelo's insolvency.

137. In all these circumstances, I am not disposed to determine, at this stage and with the information available to me, that Bophelo was, or must be held to be, insolvent as at the date when it was placed in liquidation, or, therefore, that even had the liquidation application not been made by Ms Mojela, Bophelo would not have been able to carry on its business or take any steps to repay the monies that it owed under the lending agreement.

138. Rather, it seems to me, again, on the available information, that, but for Ms Mojela's election to wind up Bophelo, Bophelo would have traded on with the consequent prospect that it would have been able to repay all, or some, of its debt to Akanda and Canmart, or, at the least that there was realistic chance of a measure of such repayment.

139. In the event, therefore, I shall give permission to Akanda and Canmart to amend their Counterclaim in order to pursue what I will call the 'liquidation claim'

140. The final matter for determination, arising out of the summary judgment application, is Ms Mojela's claim that she is entitled to judgment in respect of deferred compensation, in the sum of £206,575.34, said to have fallen due under the service agreement prior to its termination, as set out in paragraph 9 of this judgment.

141. That sum is, in turn, said to be made up as to £106,575.34, as deferred compensation, pursuant to clause 8.4 of the service agreement and as to $100,000, as further deferred compensation, pursuant to clause 113 of the service agreement.

142. As set out in paragraph 27 of this judgment, clause 8.4 entitled Ms Mojela, by way of deferred compensation, to 'a further amount of £100,000 per annum … settled in arrears on the six month anniversary of' 1st July 2021. That sum was to be settled by Akanda as an equity award, but subject to a right, in Ms Mojela, to elect. in her sole discretion, to convert this deferred compensation to basic salary, to be settled by a cash payment. The first such settlement date would, accordingly, have been 1st January 2022 and the next settlement date, had the service agreement continued, would have been 1st January 2023.

143. As set out in paragraph 28 of this judgment, in the event that incentive payments were made to Ms Mojela under clauses 11.1 and 11.2 of the service agreement, as they were, clause 11.3 entitled Ms Mojela to a further tranche of deferred compensation in the amount of £100,000. As under clause 8.4, this additional element of deferred compensation was to be settled by Akanda by way of an equity award, but subject to the same entitlement to elect for cash as was provided for, in clause 8,4. In the event of such an election the cash payment was to be regarded as an incentive payment.

Settlement of this tranche of deferred compensation was to be made no later than six months after the payments made under clauses 11.1 and 11.2, which payments were made in April 2022. Accordingly, the date for settlement of this element of deferred compensation was, or would have been, October 2022.

144. It is common ground that no deferred compensation, either pursuant to clause 8.4 or clause 11.3 of the service agreement, has been provided to Ms Mojela, whether by way of equity award, or at all. It is, accordingly, Ms Mojela's case that she has and had at the date of the termination of the service agreement, accrued rights, in respect of deferred compensation, both under clause 8.4 and clause 11.3. In respect of clause 8.4 she contends that those rights embrace the entire period from 1st July 2021 to the date of the termination of the service agreement; on her case 25 July 2022; and have a value, determined pro rata, of £106,575.34. In respect of clause 11.3, she has an accrued right, under the clause, to the value of £100,000.

145. In respect of both sets of accrued rights, Ms Mojela contends that, although no election for cash was made, either in respect of her rights under clause 8.4 or her rights under clause 11,3, prior to the termination of the service agreement, she is, nonetheless, entitled to make and has, by her pleading in this case, made valid elections.

146. Akanda and Canmart deny that Ms Mojela has any right to deferred compensation, whether under clause 8.4 or clause 11.3 of the service agreement. They submit, both in respect of the clause 8.4 claim and the clause 11.3 claim, that the effect of clause 21.1 is that where, as here, there has been, as they, submit a valid termination without notice, Canmart has 'no liability to make any further payment' to Ms Mojela, including, therefore, any payments in respect of previously accrued rights.

147. I am not persuaded that clause 21.1 is as extensive in its meaning as Akanda and Canmart contend. It seems to me that to deprive a contractual party of rights already accrued under the contract at its point of termination would require very clear and explicit wording and that, in this case, the wording is not sufficient to evince that intention. Rather and as indicated earlier, in paragraph 113 of this judgment, it seems to me that the intention of the clause was simply to replicate the common law position, whereby rights which have accrued prior to termination remain enforceable but whereby, following termination, all rights to further payment are discharged.

148. Akanda and Canmart's alternative case is that Ms Mojela's right to elect for cash, whether in respect of her rights under clause 8.4 or her rights under clause 11.3 do not survive the termination of the service agreement and, therefore, that her purported elections in her pleading are invalid and ineffective.

149. It seems to me that that contention is correct.

150. I agree with Ms Mojela that, as at the date of the termination of the service agreement, she had accrued rights under clause 8.4 and clause 11.3 of the service agreement. Under clause 11.3, it was an accrued right to an equity award to the value of £100,000, to be settled by October 2022. Under clause 8.4, she had an accrued right, as at 1st January 2022, to an equity award, determined, pro rata to her annual entitlement to deferred compensation of £100,000, in respect of the period of her service agreement from commencement to 1st January 2022. She, also had, as at the

date of the termination of the service agreement, an accrued right to such part of her annual entitlement to £100,000, pursuant to clause 8.4 of the service agreement, as had accrued between 1st January 2022 and the discharge of the agreement, in July 2022. What, however, she did not have, either in respect of clause 8.3 or clause 11.3 was an accrued right to receive those entitlements in cash.

151. That entitlement required the exercise by Ms Mojela of her election for cash. No such election had been made at the date when the service agreement was discharged and, in consequence, as at that date, Ms Mojela's accrued rights did not include a right to take either tranche of deferred payment in cash.

152. There is no basis, that I can see, upon which Ms Mojela's right to elect for cash could survive the discharge of the service agreement. The termination of the service agreement had, in principle, the effect of terminating, or bringing to an end, all Ms Mojela's rights under the service agreement, including her unexercised right to elect for cash in respect of her accrued rights to deferred compensation.

153. If, as Akanda and Canmart, contend, the termination arose from Ms Mojela's repudiatory conduct then the position is a fortiori. If, however, the termination arose from Akanda or Canmart's repudiatory breach, then it would be open to Ms Mojela, as part of her claim arising from that breach, to assert that, had the contract been properly performed by Akanda and Canmart, it would have remained in being, and she would have elected for cash. On that basis, the loss of her entitlement to cash, arising from the early termination of the service agreement, would, or could, have formed part of her claim for damages.

154. None of the foregoing, however, arises in this case, as it is currently formulated. As already determined, Ms Mojela has not pleaded an actionable repudiatory breach. Nor has her claim for deferred payment been formulated as a claim in damages.

155. Two further points arise.

156. Firstly, in respect of the claim for deferred compensation, both under clause 8.4 and under clause 11.3, it seems to me that the scheme of each clause contemplates that any election for cash must be made no later than the point where, but for such an election, the entitlement to deferred compensation would be settled by way of the equity award, which, under each clause, was the primary medium whereby that compensation would be paid. I do not think that it can have been in the contemplation of the parties that, in circumstances where, in accordance with each clause, the claim for deferred compensation had been settled by the payment date, by way of an equity award, Ms Mojela could, nonetheless and ex post facto, require the substitution of that award by way of a cash payment.

157. The consequence of that construction, on the facts of this case, is that, in respect of clause 8.4, any election for cash, in lieu of the equity award otherwise falling due on the first six month anniversary of the commencement of the service agreement (1st January 2022) must have been made by that date, No such election having been made, then, irrespective of whether the right to elect cash survived the termination of the service agreement, the right to elect cash in respect of Ms Mojela's pro rata entitlement to deferred compensation for the first six months of the service agreement has, in my view, been lost.

158. The second point relates, only to clause 11.3 and the rights potentially arising thereunder.

159. Under clause 11.3, in the event that an election for cash were made, the effect of the election would be to translate the right to an equity award to the right to a cash incentive payment, which payment would then fall within the purview of clause 11.8 of the service agreement. As set out in paragraph 29 of this judgment, the payment of any incentive payment was conditional upon Ms Mojela not having committed a repudiatory breach of the service agreement, as at the date when the incentive date would otherwise be payable.

160. In this case, the payment date for any incentive payment, under clause 11.3, on the footing that a valid election for cash had been made and on the footing that the right to elect for cash had survived the termination of the service agreement, would have been October 2022. By that date, Akanda and Canmart's case is that Ms Mojela had committed the repudiatory breaches of the service agreement discussed in this judgment and that Ms Mojela was, accordingly, disentitled to that payment.

161. Bringing together the various strands of this judgment, I am satisfied that the entirety of the application for summary judgment fails.

162. I am satisfied that the one matter, currently, pleaded by Ms Mojela as a repudiatory breach is reliant upon an erroneous construction of clause 2.2 of the service agreement and is not made out. The consequence of that is that, as matters stand, the entirety of her claim in repudiatory breach falls away. I am further satisfied that, even were Ms Mojela's construction of clause 2.2 of the service agreement correct and even if, therefore, on the grounds advanced in the dismissal letter, her dismissal was potentially repudiatory, that circumstance would not preclude, or prevent, Akanda and Canmart from advancing realistic and arguable alternative grounds, falling within the parameters of her construction of clause 2.2, such as to potentially justify her dismissal and, thereby, absolve them of the liabilities otherwise arising from that clause.

163. I consider that, as amended, Akanda and Canmart have an arguable and realistic Counterclaim, which should proceed to trial, that permission to amend should, therefore, be granted and Ms Mojela's application for summary judgment dismissing the Counterclaim, should, correspondingly, be dismissed.

164. For the reasons set out in paragraphs 148 to 154 of this judgment, I consider that the summary judgment application, as it relates to Ms Mojela's entitlement to a money judgment for unpaid deferred compensation, fails and, further, that, as currently pleaded, that entire claim fails in limine. That is not to say, however, that Ms Mojela may not have accrued rights in respect the equity award to which she is prima facie entitled both under clause 8.4 and 11.3 of the service agreement.

165. Even if my reasoning in paragraphs 148 to 154 is incorrect, I am satisfied that Ms Mojela has lost her right to elect for cash in respect of the deferred compensation to which she is entitled under clause 8.4 of the service agreement for the period up to 1st January 2022. I am likewise satisfied, even if that reasoning is incorrect, that her entitlement to a cash incentive payment under clause 11.3 of the service agreement will depend upon whether the various repudiatory breaches asserted by Akanda and

Canmart are made out at a trial and, consequently, that that entitlement is not susceptible of summary judgment.

166. In light of the ramifications of this judgment and, in particular, its effect upon Ms Mojela's claim, as currently pleaded, the parties should carefully consider their next steps; Akanda and Canmart, to what extent the matters pleaded in their amended Defence remain 'live; Ms Mojela, what, if any, amendments she might wish to pursue.

167. This judgment is sent to the parties as a draft. The court can take steps to hand down the judgment without attendance and put over consequentials if that is the parties wish. Alternatively, the parties should agree an appointment for judgment to be handed down and for the court to determine the form of order and all ancillary matters.