Neutral Citation Number: [2022] EWCA Civ 901

Case No: CA-2021-001729

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ANTHONY METZER QC (SITTING AS A DEPUTY HIGH COURT JUDGE)
QB-2019-003081

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE STUART-SMITH

- -

Between :

ROBERT MACKENZIE	**Appellant**
- and -	
AA LIMITED (formerly AA PLC) **AUTOMOBILE ASSOCIATION DEVELOPMENTS LIMITED**	**Respondents**

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- -

Gavin Mansfield QC and **Hugh Jackson** (instructed by **Shakespeare Martineau LLP**) for the **Appellant**
James Laddie QC and **Andrew Smith** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondents**

Hearing dates : 4 May and 20 June 2022

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Approved Judgment

Lord Justice Bean:

1. The Appellant Robert Mackenzie was until 1 August 2017 the Chairman and Chief Executive of what was then AA plc (now no longer listed, and known as AA Ltd). He had a contract of employment with Automobile Association Developments Ltd, a subsidiary of AA plc. He was a director of both companies and of some other subsidiaries. I shall refer to the group by its well known name of "the AA" and to the employing company as "AADL". In this appeal brought with permission granted by Lewison LJ Mr Mackenzie challenges the decision of Anthony Metzer QC, sitting as a deputy judge of the Queen's Bench Division ("the judge"), to strike out or dismiss certain elements of his claim for wrongful dismissal.

2. The Appellant's contract of employment with AADL provided for three ways (other than mutual consent) by which it might be terminated. The first alternative, contained in clause 2.3, was that either party could give to the other not less than 12 months' written notice. The second was clause 11.2, which provided:-

> "The Company may, at its sole and absolute discretion, terminate the Executive's employment forthwith at any time and undertaking to pay to the Executive within 14 days pay to the Executive a sum equal to basic salary in lieu of any required period of notice under clause 2.3 or unexpired part thereof (subject to tax and national insurance) together with any accrued holiday entitlement pursuant to clause 8.2…"
>
> [There is some curious repetition of the wording in this clause but its meaning is clear and it was not suggested otherwise].

This provision for dismissal with pay in lieu of notice may conveniently be referred to as the PILON clause.

3. The third alternative was summary dismissal under Clause 11.3 which permitted AADL to terminate the Agreement and the Executive's employment forthwith "without any payment by way of compensation, damages, payment in lieu of notice or otherwise" if the Executive were (inter alia) to commit any act of gross misconduct.

4. On 24 July 2017 Mr Mackenzie attended a strategy awayday for senior managers and directors of the AA's insurance subsidiary held at the Pennyhill Park Hotel in Bagshot, Surrey. There was a dinner in the hotel restaurant in the course of which he drank heavily. After dinner many of the participants moved from the restaurant to the hotel bar which was open to members of the public. Shortly before 00:50am on 25 July 2017 he engaged in what was described as an "unprovoked assault on a subordinate colleague", Michael Lloyd, in the bar. The incident lasted approximately two minutes and was captured on CCTV. Unsurprisingly, Mr Mackenzie was placed on paid leave and an investigation was begun.

5. Mr Mackenzie took both medical and legal advice. On 28 July he saw a consultant clinical psychologist, Dr William Mitchell, who wrote as follows on 31 July:

> "Mr Bob Mackenzie was referred to me by his general practitioner, Dr Peter Dorrington Ward, and I saw him for an assessment on Friday, 28th July. I also had a short telephone conversation with his wife over the weekend.

> For some months Bob has been experiencing symptoms which include raised anxiety, sleep disturbance, concentration loss, forgetfulness, increased emotionality and reduced emotional self regulation with irritability and outbursts of anger.
>
> These symptoms could be the consequence of a progressive neurological illness but the symptoms could also be the consequence of a toxic combination of extremely high stress levels over the last few years including feeling completely undermined by his executive colleague and taking on unreasonable levels of responsibility combined with exhaustion from sleep deprivation, excessive alcohol consumption as a form of self medication and poorly controlled diabetes which in itself can lead to concentration difficulties and poor emotional control.
>
> Further investigations of his cognitive functioning should be carried out but the first step is for Bob to take part in a programme of recovery from exhaustion and stress, abstinence from alcohol, and physical exercise together with psychological therapy. I am hopeful that this combination should result in a significant improvement in his mental state but for this programme to be effective Bob needs to be treated as if he has had a heart attack and take a total break from the work demands for approximately 6 months."

6. This medical report was sent to the AA by the solicitors then acting for Mr Mackenzie, Bird & Bird.

7. On 1 August 2017 the Appellant wrote two letters to the AA. The first, headed "Resignation from my employment and directorships" stated:

> "I am writing to resign from my position as CEO and Chairman of Automobile Association Developments Ltd (the Company).
>
> Because of my ill-health, I am unable to continue to perform my employment duties. I therefore believe that it is in the best interests of the Company that I step down with immediate effect and, although I am required to give the Company 12 months' notice, I request that the Company releases me from my employment with immediate effect.
>
> Because I am unable to perform my employment duties, I have therefore with this letter included a letter of resignation from my various directorships in the AA group."

8. The second letter stated "I hereby resign from my office as a director of the companies listed below with immediate effect". The five companies listed were the two Respondents to this appeal and the three other subsidiaries of AA plc of which Mr Mackenzie had been a director.

9. AADL did not agree to Mr Mackenzie's request in the first letter that he should be released from his obligation to give the company 12 months' notice of resignation. Instead they resolved to dismiss him from his employment as CEO and Chairman of AADL with immediate effect on the grounds of gross misconduct.

10. The claim in this case was issued on 6 March 2018. In its original form it was brought against not only AA plc and AADL but also seven individuals, and alleged that the Defendants had conspired together to effect Mr Mackenzie's summary dismissal for an improper and/or unreasonable and/or unconscionable purpose, in order to exclude him from the business of the AA and/or to obtain for a notional value the benefit of certain shares which he had held. There was also a claim for wrongful dismissal. By an amendment to the Particulars of Claim made on 8 July 2019, the Defendants were reduced to the two companies and the allegation of conspiracy was deleted, leaving the claims for wrongful dismissal. The Claimant also raised, for the first time, a claim for damages for personal injury..

11. The wrongful dismissal claim had three aspects. The first was a claim for 12 months' salary. The second was a claim for loss of benefits ancillary to the Claimant's employment, including his entitlement to participation in a discretionary annual bonus scheme. The third was a claim for the loss of certain shares which had been allocated to him under a performance incentive scheme, known as the Management Value Participation ("MVP") shares.

12. The basis of the claim for wrongful dismissal was that the Pennyhill Park Hotel incident was not gross misconduct at all. The conduct in question was not sufficiently grave as to amount to gross misconduct and, in any event, Mr Mackenzie's conduct was neither deliberate nor the result of gross negligence: he lost control of his actions because he was physically and/or mentally unwell and was therefore temporarily unable to exercise full self control

13. It was common ground before the judge that the lawfulness of the dismissal is a matter for trial. For the purposes of the Defendants' applications, the judge was asked to proceed on the assumption that the wrongful dismissal claim would succeed at trial on the issue of liability.

14. The Defendants applied before the judge to strike out the other aspects of the claim, that is to say (a) the benefits and bonus claim, (b) the MVP shares claim, and (c) the personal injury claim, under CPR 3.4(2)(a) on the basis that there were no reasonable grounds for bringing them; alternatively, to give summary judgment under CPR 24.2 on the grounds that the relevant head of claim had no real prospect of success. The judge noted in the course of his judgment that there are subtle distinctions between the two powers and, in fact, he struck out the bonus and benefits claim but gave summary judgment for the defendants on the MVP shares and personal injury claims. It was not suggested in argument before us that such subtle distinctions as there are between the two powers make any difference for present purposes and I shall therefore refer to all the judge's orders as strike-outs.

15. Mr Mackenzie does not appeal against the decision to strike out the personal injury claim. He does, however, appeal against the judge's decision on the other two applications.

16. Gavin Mansfield QC for the appellant accepted before us that if the judge was right in his decision on the bonus and benefits issue the appeal against his decision on the MVP shares claim must fail. I will therefore consider the bonus and benefits issue first.

The judge's reasoning on the bonus and benefits issue

17. The judge said:-

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

33. I am assisted by the relevant authorities, which I consider are binding and cannot be distinguished, to conclude that the authorities which identify the least burdensome course of action for the employer in a wrongful dismissal claim involves an assumption of the earliest possible lawful termination. To suggest that the employer should not benefit from their wrongdoing by relying upon this clause is a misnomer. The employer, as here, would be contractually obliged to pay the loss of salary as damages for the wrongful dismissal *simpliciter*. I do not accept R's suggestions as to why the exercise of the PILON clause would not be the "least burdensome" option. They are a combination of speculative and vaguely defined counter-factual scenarios which I do not consider the As would or should be expected to embark upon. First, I do not consider the argument that the As would have exercised its discretion to make a payment in respect of bonus in light of R's long service has any foundation. This is the same argument as was expressly rejected in *Lavarack*. R does not show why any other means of termination would be "less burdensome" save the rather tenuous suggestion that a single lump sum payment would be more expensive than monthly payments which if operated would potentially open up the As to further payments owed to R.

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

35. Finally, I reject the suggestion that summary dismissal would have reduced the period during which the As would have

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

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

37. It is significant in my judgment that none of the possible scenarios envisaged by R contends for a cheaper alternative for the As than the exercise of the PILON clause which would have been the earliest lawful termination and which in my view was clearly the "least burdensome" contractual alternative for the As which would have enabled them to achieve the same summary dismissal as they did on 1 August 2017.

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

The bonus and benefits issue

18. The grounds of appeal allege that the judge erred in striking out the relevant paragraphs of the claim for the following reasons:

> "(1) the judge regarded himself as bound by the "least burdensome mode of performance" principle ("the Rule"). The Rule is unsound and ought no longer to be followed.
>
> (2) the judge erred in his application of the Rule in that he:
>
> a) erred in interpreting "least burdensome" necessarily to mean "cheapest" as a matter of principle;
>
> b) erred in interpreting "least burdensome" performance necessarily to entail termination of the contract at the earliest lawful opportunity;
>
> c) erred in rejecting the submission that factual enquiry was necessary to determine what the least burdensome mode of performing the contract was;
>
> d) erred in rejecting the points advanced, demonstrating that the payment of a payment in lieu of notice at the date of summary termination would not have been the least burdensome mode of performance.
>
> 3) the judge erred in holding the first application to be appropriate for summary determination and therefore depriving the Claimant of the opportunity to have the scope and application of the Rule determined on the basis of the facts as found at trial."

The Appellant's submissions

19. Mr Mansfield characterises the Defendants' application to strike out as being based on *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, a majority decision of this court which has attracted academic debate for more than half a century. The Claimant in that case was employed by the Defendant for a five year fixed term. The Defendant dismissed him part way through year three. The Claimant obtained summary judgment for wrongful dismissal. The claim brought was for damages in respect of the period from termination until expiry of the fixed term. The issue concerned the basis of assessment of damages in that period. In the period between the wrongful dismissal and what would have been the end of the fixed term the Defendant negotiated pay increases with other employees. The question was whether the Claimant's damages for the remainder of the fixed term were to be assessed on the basis of his contractual salary, or on the basis of the reasonable expectation that his salary would have been increased if he had remained in employment.

20. Diplock LJ (with whom Russell LJ agreed) applied the principle that where there are several ways in which a contract might be performed, that mode is adopted which is the least burdensome to the Defendant. The Claimant had no contractual entitlement to be paid anything other than his agreed salary, and damages could not confer benefits which the contract did not oblige the employer to confer. Lord Denning MR, dissenting, held that the employee was entitled to the full amount he would have earned but for the

breach of contract; he was entitled to damages for loss of the chance of future bonuses or pay increases.

21. Mr Mansfield's first and boldest submission is that the "least burdensome performance" rule should no longer be followed. The skeleton argument for the Appellant states:

> "28. The Rule should no longer be followed. It departs from the fundamental approach to the assessment of damages for breach of contract, yet there is no principled reason for doing so. Further, exceptions and qualifications to the rule leave it without proper justification. Instead, the Court should approach each case on the basis of a factual assessment of what would have happened if the contract had been performed, rather than the application of a hard-edged rule. "
>
> 29. It is accepted that the Court of Appeal is bound by its own earlier decisions (absent narrowly defined exceptions). However:
>
> a) Care is needed in defining the ratio of such earlier decisions.
>
> b) The Rule is a matter of general principle and not an immutable rule.
>
> c) The Rule is sufficiently unprincipled, and subject to exceptions and qualifications, that the Court is not bound to apply it as formulated by the Defendant in this case.
>
> d) The Judge ought properly to have left determination of the scope of the Rule and its application to trial on the basis of the facts as found.
>
> 30. The parties agreed the fundamental objective of damages for breach of contract is to compensate the innocent party by putting him in the position he would have been in had the contract been lawfully performed. They agreed that it requires a comparison of the "actual" position of the innocent party following breach and the counterfactual, or but for position he would have been in had the contract breaker performed the contract. The fundamental principle is long standing, and clear as matter of the highest authority……. The Rule represents a departure from the fundamental compensatory principle. The Rule places a wholly artificial limit on an innocent party's ability to obtain compensation.
>
> 31. The Rule represents a departure from the fundamental compensatory principle. The Rule places a wholly artificial limit on an innocent party's ability to obtain compensation.
>
> 32. A rigid operation of the Rule requires the Court to close its eyes to assessment of the factual question of what a contract breaker would have done, in favour of an analysis of what the contract permitted him to do

> (i) despite the fact that the contract breaker had the opportunity to do that, but did not do so;
>
> (ii) regardless of the probabilities of whether he would in fact have done that."

22. The Appellant then goes on to submit:

> "There are numerous instances where the Rule does not apply, and where the Court has to assess loss on the basis of what would have happened if the contract breaker had not breached the contract. These instances are difficult to distinguish on a principled basis from the instances where the Rule does apply. The existence of so many qualifications and exceptions undermines the rationale for the Rule, and render its continued application unsound. In particular, there are a number of exceptions in the employment context which render the application of the Rule to cases of wrongful dismissal anomalous and unprincipled".

23. The Appellant notes that in a number of academic articles the Rule has been subject to criticism. Mr Mansfield and Mr Jackson write in their skeleton argument that:-

> "The normal justification of the Rule is that X is not liable for damages in failing to do what X did not promise to do. However, having failed to do what they promised to do, X ought to be liable for damages that are measured by X's failure to do something more than they promised to do, if X would in fact have done more than they promised to do had X not breached their promise. The justification for the Rule fails to distinguish between the scope of the promise and the extent of the damages for its breach. The scope of the promise defines the primary obligation to perform, but does not define the extent of the secondary obligation to pay damages."

24. Mr Mansfield cited a number of criticisms by academic lawyers. I will confine myself to a passage from "Remedies for torts, breach of contract and equitable wrongs" by Professor (the future Lord) Burrows. After referring to the dissenting judgment of Lord Denning MR in *Lavarack*, he wrote:

> "Although the rationale (as set out in the penultimate paragraph) for the traditional view is a powerful one, it would appear that the courts are moving towards Lord Denning's position. In particular, what we have described above as the second qualification on the minimum obligation principle operates to limit significantly its scope. At the level of principle, there is much to be said for assessing the factual evidence as to what the defendant would have done rather than considering merely what the defendant could legally have done. Perhaps the best way forward, which goes some way to reconciling the two approaches, is to say that, while one is concerned with what the defendant would have done, the "minimum obligation" principle is a helpful default rule. In general, it reflects the defendant's most likely performance (that is, a party does not in general exceed its minimum legal obligations). But that default rule may

> be departed from where the claimant can establish to the required standard of certainty (i.e. applying the approach set out earlier in this chapter, on the balance of probabilities, or, for loss of a chance damages, proportionality in line with the chances) that the defendant would have exceeded its minimum obligation."

25. Mr Mansfield submitted that the judge was wrong to find on the facts that the Claimant's argument had no real prospect of success. On the assumption which the judge was asked to make that summary dismissal on the grounds of gross misconduct was wrongful, there was a viable argument that giving 12 months' notice would have ensured a smoother transition to new management than immediate dismissal with pay in lieu of notice.

Respondents' submissions

26. James Laddie QC submitted that the least burdensome rule does not derive from *Lavarack* – indeed, it has been a fixture in English contract law since the mid-19th century - but, since it has been approved not only in *Lavarack* but in other appellate decisions, this court is bound to follow it. He argued that where, as in this case, a contract of employment expressly provides for termination by making a payment in lieu of notice, it is always open to the employer to use that method of termination. It is well-established that in wrongful dismissal cases damages are assessed on the basis that the employee would have been dismissed on whatever was the minimum period of notice provided by the contract (unless this was less than the statutory minimum). Mr Laddie submitted that "any legitimate criticisms of the Rule operate at its penumbra. They have no place in a simple case such as this one where the contract establishes a straightforward alternative mode of performance which limits the Claimant's loss."

27. As to the facts, Mr Laddie and Mr Smith write in their skeleton argument for the Respondents:-

> "38. The extraordinary position advanced by the Claimant is that it would somehow have been less onerous for the Second Defendant to have assumed an obligation to pay him (instead of not paying him) the very sums which he is claiming by way of damages…In essence, he suggests that the Second Defendant would have been in a better position, from its perspective, had it paid him a bonus of up to £900,000, plus other ancillary benefits. That proposition is self-evidently illogical and unsustainable."
>
> 39. To recap, the Claimant, after drinking a substantial volume of alcohol, had assaulted a subordinate employee in a public place. The Board of Directors had concluded that his position was untenable. The Claimant was, by his own admission, unable to fulfil his employment duties any longer. The Defendants would obviously have exposed themselves to enormous criticism and damage (both internal and external) had the Claimant been retained in post. There is no conceivable substance to the suggestion that continuing to employ the Claimant in such circumstances would have been less burdensome than terminating his employment with immediate effect under the PILON clause.

40. The Claimant's proposed 'counterfactual' is also fundamentally inconsistent with the fact and terms of his written resignation of 1 August 2017, in which he stated:

> "…Because of my ill-health, I am unable to continue to perform my employment duties. I therefore believe that it is in the best interests of the Company that I step down with immediate effect and, although I am required to give the Company 12 months' notice, I request that the Company releases me from my employment with immediate effect…"

41. Significantly, given the dismissal of the Personal Injury Claim, it is no longer open to the Claimant to submit that, but for the Defendants' alleged breaches of duty/negligence, he would not have been rendered incapable of performing his duties. The Claimant is accordingly precluded from asserting, before the Court, that had he not been dismissed for gross misconduct on 1 August 2017, he would have continued in active employment beyond that date. On his own evidence, he was unable to do so.

42. …..The Claimant contends that the risk of disturbing market confidence and disturbing the share price militates against treating summary dismissal of a CEO via a PILON as the least burdensome option. This is wrong:

> 42.1. Possible negative impact on the share price is not a reason for retaining any unwanted employee.
>
> 42.2. The risk to the First Defendant's share price existed whether the Claimant stepped down or was dismissed. On his case, he would have had to permanently relinquish all of his responsibilities with immediate effect, and this would have needed to be the subject of a public announcement.
>
> 42.3. Given the circumstances of his misconduct, there would have been a major risk of loss of market confidence had the AA not dismissed the Claimant…….
>
> 42.4. This case is far removed from the 'cutting off one's nose to spite one's face' exception to the Rule referred to in *Mulvenna v Royal Bank of Scotland* [2004] C.P. Rep 8. The only case we know of in which this exception has ever been applied is *Bold v Brough, Nicholson and Hall* [1964] 1 WLR 201: here, the claim for damages for wrongful dismissal included a claim for pension premiums in respect of a pension scheme that, as a matter of contract, could be discontinued; unsurprisingly, the judge did not treat discontinuation of the pension scheme as the least burdensome option when the employer would have had to discontinue the scheme for all employees. As Phillimore J asked, rhetorically, at p.212, "Is it likely that it will take a step so disastrous to its relations with all its employees solely to defeat a claim by this plaintiff… ?".

> 43. It is striking that despite including general statements as to why "making a PILON may not, in a given case, be the 'cheapest' or most cost effective option" for an employer, the Claimant's Skeleton conspicuously fails to explain why, in the circumstances of this particular case, it is asserted that retaining the Claimant in employment and proceeding to pay him the substantial sums claimed at paragraphs 42.2 and 42.3 APOC would have been less burdensome than exercising the PILON clause. Plainly, it could not have been."

Discussion

28. The original and classic statement of the "least burdensome" rule is to be found in remarks of Maule J, sitting as a member of the Court of Common Pleas, in *Cockburn v Alexander* (1848) 6 C.B. 791:-

> "… the question upon a breach of the contract is, what is the condition on which the plaintiffs would be if the defendant had performed the contract. Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant."

29. Similarly, in *Robinson v Robinson* (1851) 1 De GM&G 247 Lord Cranworth, giving the judgment of the Lords Justices in Chancery, said:-

> "Where a man is bound by covenants to do one of two things and does neither, there [sic] in an action by the covenantee the measure of damages is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee…"

30. By the time this court came to decide *Lavarack v Woods of Colchester Ltd* more than a century later the rule was well-established. In that case Diplock LJ accepted as correct the principle (stated by Scrutton LJ in *Abrahams v Herbert Reiach Ltd* [1922] 1 KB 477) that in an action for breach of contract "a defendant is not liable in damages for not doing that which he is not bound to do". He said that the principle expressed by Maule J in *Cockburn v Alexander* was one of the most firmly established applications of this general rule, and noted that each member of the court in *Abrahams v Reiach* had "explicitly accepted as beyond argument the correctness of the rule expounded in *Cockburn v Alexander"*.

31. Diplock LJ continued at 294 B-G:-

> "The general rule as stated by Lord Justice Scrutton in *Abrahams v. Reiach*, that in an action for breach of contract a defendant is not liable for not doing that which he is not bound to do, has been generally accepted as correct and in my experience at the Bar and on the Bench has been repeatedly applied in subsequent cases. The law is concerned with legal obligations only and the law of contract only with legal obligations created by mutual agreement between contractors - not with the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do. And so if the contract is broken or wrongfully repudiated, the first task

> of the assessor of damages is to estimate as best he can what the plaintiff would have gained in money or money's worth if the defendant had fulfilled his legal obligations and had done no more.
>
> Where there is an anticipatory breach by wrongful repudiation, this can at best be an estimate, whatever the date of the hearing. It involves assuming that what has not occurred and never will occur has occurred or will occur, i.e. that the defendant has since the breach performed his legal obligations under the contract, and if the estimate is made before the contract would otherwise have come to an end, that he will continue to perform his legal obligations thereunder until the due date of its termination. But the assumption to be made is that the defendant has performed or will perform his legal obligations under his contract with the plaintiff and nothing more. What these legal obligations are and what is their value to the plaintiff may depend upon the occurrence of events extraneous to the contract itself and where this is so, the probability of their occurrence is relevant to the estimate."

32. Russell LJ said at 298 E-G:-

> "A plaintiff in an action for damages for wrongful dismissal can rely only on the fact that the defendant was obliged to carry out the contract sued upon. His prospects in terms of money or money's worth resulting from the carrying out of the contract may be conditioned by the estimated impact of external events on the results of the carrying out. But it has never been held that the plaintiff can claim any sum on the ground that the defendant might after the repudiation date have voluntarily subjected himself to an additional contractual obligation in favour of the plaintiff. That is not the law nor, with respect, do I think it would be in accord with the sense of the matter so to hold an employer whose attitude to the employee has reached the stage that he is prepared to sack him out of hand is, to say the least, an unlikely source of future generosity."

33. The least burdensome performance rule has been regularly applied in commercial disputes where contracts of sale or carriage commonly provide for a margin on the quantity of goods at the option of the defaulting party. In such cases it has been regarded as settled principle for over a century (see *Re Thornett & Fehr v Yuills* [1921] 1 KB 219) and applied as *ratio* in numerous cases, including at the highest level (see, for example, the cross appeal in *Bunge v Tradax* [1981] 1 WLR 711, 731 B-C, HL).

34. The Rule was cited with approval by Lord Hoffmann in the Judicial Committee of the Privy Council in *Lion Nathan Ltd & others v C-C Bottlers Ltd & others* [1996] 1 WLR 1438 in the following terms:

> "In order to compensate the plaintiff for what he has lost, the court must in such cases determine what benefits the plaintiff would have derived from the performance by the defendant of his outstanding obligations under the contract. It is well settled that the court will assume that the defendant would have

> performed those obligations in the way least onerous to himself…All this makes perfectly good sense when damages depend upon a prediction of how the defendant would have performed outstanding contractual obligations which gave him a choice of what to do".

35. In the Supreme Court in *Geys v Société Générale, London Branch* [2012] UKSC 63; [2013] 1 AC 523 Lord Wilson referred, at [64], to the:

> "…application of the 'least burdensome' principle, namely that damages should reflect only the losses sustained by the employer's decision to repudiate the contract unlawfully rather than by his having hypothetically proceeded, in the manner 'least profitable to the plaintiff, and the least burthensome to the defendant', to terminate the contract lawfully: see *Cockburn v Alexander* (1848) 6 CB 791, 814 (Maule J), and *McGregor on Damages* , 18th ed (2009), para 8-093. So, where under the terms of the contract it had been open to the wrongfully repudiating employer to have taken a course which would have terminated the contract quickly as well as lawfully, the damages will be small."

36. In the present case Mr Mackenzie's contract of employment with AADL could be terminated in one of three ways, other than by mutual consent: by either side giving the other notice (in this contract 12 months' notice) to terminate at the end of that period; by immediate termination with a payment in lieu of notice; or by summary dismissal if the facts justified it. In the context of contracts of employment I find it difficult to imagine a clearer case of the application of the Rule than where the contract expressly gives the employer a choice between dismissal with a requirement that the employee works out his notice and dismissal with payment in lieu of notice. The whole point of a PILON clause is to give the employer that choice and to avoid the argument that dismissal with pay in lieu is a repudiation.

37. The position is less clear cut where an employer is under a single contractual obligation involving a discretion which the contract requires him to exercise in good faith. This has led to differing outcomes in cases about bonuses. In *Lavarack* itself there had been a bonus scheme in force at the time of the plaintiff's dismissal in July 1964. The following year the defendants discontinued the bonus scheme, which they had no contractual obligation to maintain. Diplock LJ said at page 297C:-

> "In the present case if the defendants had continued their bonus scheme, it may well be that upon the true construction of this contract of employment the plaintiff would have been entitled to be recompensed for the loss of the bonus to which he would have been likely to be legally entitled under his service agreement until its expiry. But it is unnecessary to decide this. They were under no contractual obligation to him to continue the scheme and in fact it was discontinued. His legal entitlement under the contract on which he sues would thus have been limited after 31st March 1965 to his salary of £4,000 per annum. And there, in my view, is the end of the matter. I know of no principle upon which he can claim as damages for breach of one service agreement compensation for remuneration which might have become due under some imaginary future agreement which the

> plaintiffs did not make with him but might have done if they wished. If this were right, in every action for damages for wrongful dismissal, the plaintiff would be entitled to recover not only the remuneration he would have received during the currency of his service agreement but also some additional sum for loss of the chance of its being renewed upon its expiry."

38. *Lavarack* is to be contrasted with the later decision of this court in *Horkulak v Cantor Fitzgerald* [2004] EWCA Civ 1287, [2005] ICR 402. In that case it was found as a fact by the trial judge (Newman J: [2004] ICR 697) that the Defendant had repudiated the Claimant's contract of employment and was liable for loss of what was described as a discretionary bonus. On appeal to this court Potter LJ said at [68]:-

> "……Clause 3(b)(ii) embodies a scheme designed to confer a contractual benefit on the employee, ….[which] is to be administered rationally and in good faith. The company is not free to choose from a "range of reasonable methods" of performance. There is only one method of arriving at a decision: that is, negotiation, followed (in the absence of mutual agreement) by a decision by the President of the parent body. The fact that the final decision is to be made by someone other than the employing company, or its officers, emphasises the objectivity of the process. It seems to us implicit that the President will pay due regard to the interests of both employer and employee, rather than simply to that of achieving the "minimum burden" for the company. The task of the court is to put itself in his shoes."

39. In *Durham Tees Valley Airport Ltd v BMIbaby Ltd* [2010] EWCA Civ 485 it was held that where a contract imposed a single obligation, rather than alternative obligations, and gave a party discretion as to how to perform that obligation, the assessment of damages for the breach of the contract should not be limited strictly to what was the minimum level of performance required by the contract. The court had to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Patten LJ, after referring to the judgments in this court in *Abrahams v Herbert Reiach*, emphasised at [69] the difference between "alternative methods of performance" cases and those where "there is only a single obligation to be performed". The *Durham Airport* case was in the latter category.

40. An important decision to which Mr Mansfield drew attention as demonstrating what he says is the anomalous position of the Rule is *Rigby v Ferodo Ltd* [1988] ICR 29. In that case the claim was for failure to pay wages due under a contract of employment. The employers had issued a communication to their staff informing them of a reduction in pay with effect from a particular date. They did not take steps to dismiss the employees concerned. The employees did not accept the reduction but continued to work under protest. Since an unaccepted repudiation by one party is (in the traditional phrase) "a thing writ in water", and the employers took no steps to exclude the employees from the premises or to terminate their contracts, the employees could simply bring a common law claim for the money due to them. The fact that the employers *could have* lawfully terminated the contracts of employment by giving proper notice was irrelevant. This case has nothing to do with one where the employer does terminate the contract and chooses to do so by the less burdensome of two lawful methods.

41. In my view the cases in which there is a single obligation with a range of ways in which it can be performed do not detract from the force and clarity of the Rule in cases involving alternative methods of performance of a contract, and in particular alternative methods of termination of a contract of employment. I do not accept the argument that the Rule is unsound and contrary to principle. In any event, it is simply not open to this court to depart from a consistent line of authority going back 150 years, and recently cited with approval at the highest level.

42. Mr Mansfield's next line of attack is to say that a factual enquiry is required as to what would have been the least burdensome method of performance. There are cases where the employer could in theory have adopted a particular way of terminating the claimant's contractual entitlement to particular benefits but would plainly not have done so because this would involve, in the words of Diplock LJ in *Lavarack,* "cutting off his nose to spite his face". The only reported example of this is the well-known decision of Phillimore J in *Bold v Brough, Nicholson & Co* [1964] 1 WLR 201. In that wrongful dismissal case part of the plaintiff's claim was for loss of the value of employer's pension contributions. The defendant could have ceased to make such contributions, but only if it wound up the pension fund for the whole workforce. Since this had not happened and could not have been expected to happen, the claim succeeded.

43. Mr Mansfield criticises the judge's equating of "least burdensome" with "cheapest". I agree that there is no rule of law that in every case the cheapest or quickest mode of termination of a contract of employment will be the least burdensome. In most cases it will be, but (as Mr Laddie conceded at the resumed hearing of this appeal on 20 June) there is no special free-standing rule to that effect. In some cases it may be open to reasonable debate what is the less or least burdensome mode of performing or of terminating a contract. At paragraph 15 of his judgment in *Lavarack*, Diplock LJ said at 294F:

> "The assumption to be made is that the defendant has performed or will perform his legal obligations under his contract with the plaintiff. and nothing more. What these legal obligations are and what is their value to the plaintiff may depend upon the occurrence of events extraneous to the contract itself and, where this is so, the probability of their occurrence is relevant to the estimate."

44. It is possible (though far from easy) to envisage cases which might raise the question of whether the employer has an entirely free hand, subject only to acting in good faith, to form their own view on which is the less burdensome of two alternative methods of dismissal under the contract: or, putting it another way, whether there is some objective element to be applied to the question. But the present case is not a suitable one in which to consider that possible development of the law, because of its plain and obvious facts.

45. Whether through his own misconduct (the Defendants' case at trial), or because he was physically or mentally unwell (his case at trial) the Appellant on 1 August 2017:

    a) was on his own admission unfit to carry on with his duties;

    b) had been involved in a violent attack on a colleague in public;

    c) had resigned unconditionally from all his directorships within the AA group, a fact which could not properly be kept secret.

Moreover, the supporting medical evidence said that Mr Mackenzie required a complete break from work for six months. The experience of anyone involved in HR is that such periods tend to be elastic and that if there is a return to work after a break of that kind, it is likely to be gradual.

46. On these facts (and still on the assumption that summary dismissal was wrongful) it cannot be said to be reasonably arguable that dismissal with pay in lieu of notice was anything other than the least burdensome mode of terminating the contract. The suggested alternative of giving him 12 months' notice, placing him on sick leave for at least six months, appointing only an "acting" CEO for the time being, and awaiting what would no doubt have been the uncertain prospect of his return to work in the seventh month of the notice period, is wholly implausible. The judge was therefore correct to hold that the Rule applied and that the benefits and bonus claim should be struck out.

47. In those circumstances, as Mr Mansfield rightly accepted, the challenge to the striking out of the MVP shares claim must also fail.

48. I would dismiss the appeal accordingly.

Lord Justice Popplewell

49. I agree that the appeal should be dismissed for the reasons given by Bean LJ.

Lord Justice Stuart-Smith

50. I also agree.