IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No 32 of 2019
(Formerly FSD 204 of 2016 (IMJ))

BETWEEN:

STEVEN GOODMAN

Appellant

AND

DMS GOVERNANCE LIMITED

Respondents

BEFORE:	**The Rt. Hon Sir Alan Moses, Justice of Appeal** **The Rt. Hon Sir Jack Beatson, Justice of Appeal** **The Hon Sir Michael Birt, Justice of Appeal**
Appearances:	**Mr. Hefin Rees QC (via video-link in UK) instructed by Mr. Ben Hobden of Conyers Dill and Pearman for the Appellant** **Mr. Ben Valentin QC (via video-link in UK) instructed by Mr. Mark Goodman and Mr. Harry Shaw of Campbells for the Respondent.**
Heard:	**20 February 2020**
Draft circulated:	**14 April 2020**
Judgment Delivered:	**~~27~~ * 30 April 2020**

JUDGMENT

Moses JA

1. This is the judgment of the Court to which all members have contributed.

2. The Appellant, Steven Goodman, is the assignee of certain causes of action by the Joint Official Liquidators of Tangerine Investment Management Limited (In Liquidation) ("Tangerine") which acted for a short time as the investment manager of two funds which collapsed as a result of a significant fraud. He appeals against a judgment of the Honourable Justice Mangatal, dated 2 July 2019, in which she entered summary judgment for DMS Governance Limited ("DMS

Governance") on the whole of his claim against it. Leave to appeal was granted on 28 October 2019. The issue is whether DMS Governance is arguably liable (i) vicariously for the acts of Ms Dawn Cummings, a director of Tangerine, for breach of her common law and fiduciary duties as a director to Tangerine or (ii) for breach of contract.

3. The Appellant brought the proceedings against Ms Cummings, a Certified Public Accountant in Illinois, as first-named defendant and DMS Governance, as the second-named defendant in December 2016. By judgment dated 13 September 2018, Mangatal J made a decision on five preliminary issues, after which the Appellant, who did not appeal that decision, discontinued his action against Ms Cummings. He was permitted to do so only on terms that he pay her costs on the indemnity basis. He was, accordingly, left only with the possibility of continuing his action against DMS Governance.

4. The background to his claim is as follows. The Respondent, DMS Governance, formerly called DMS Offshore Investment Services Ltd from 2012 to 2016, is part of a group with a complex corporate structure which offers a variety of services to investment funds and other companies. The submissions referred to later in, for example, paragraphs 39 and 43, and the documents provided to us refer to a number of other members of the group. DMS Organisation Ltd, a professional fund governance firm which held shares in the Respondent and Offshore Business Solutions Ltd ("OBS") which provided directors, serviced office space, and accounting and administrative services to offshore investment entities. There is also reference to DMS Management Ltd as a company responsible for fund governance. Whilst at one stage we gained the impression from the submissions that this was a separate company, it appears from Ms Cummings' affidavit of 13th October 2017 that this was the name of the Respondent until 2012, so that references in the documents to DMS Management Ltd may well be references to the Respondent DMS Governance. In 2011 Ms Cummings entered into an employment agreement with DMS Organisation Ltd and OBS. Her evidence is that she was employed by DMS Organisation Ltd as an Executive Director and her email signature at that time states that she was the Managing Director of OBS. In 2012 however, her email signature stated that she was an Executive Director of DMS Offshore Investment Services, which according to Ms Cummings was the name of DMS Governance at the time.

5. In November 2011, the law firm Appleby approached DMS Management Ltd as to the availability of a director to serve on the Board of Tangerine, a Cayman Islands exempt company which Appleby's client was seeking to incorporate. The intention was that Tangerine would act as investment manager for two new funds, the Axiom Legal Financing Fund (a feeder fund) and the

Axiom Legal financing Fund Master SP which were to provide loans to English law firms (see Mangatal J's judgment on Preliminary Issues [22]). Tangerine was incorporated on 19 December 2011.

6. A very substantial fraud occurred in which over US$ 120 million invested in the Axiom Legal Financing Fund was subsequently misappropriated by Tim Schools, the owner and controller of Tangerine. Tangerine was placed into official liquidation in the Cayman Islands on April 2013.

7. It was alleged that investors had lost vast sums of money because of the acts and omissions of Ms Cummings. We shall later elaborate on the pleaded allegations against Ms Cummings, who asserted and was said to have had extensive experience of acting as a director, but we should note at this stage that she admitted:

   a. signing nine panel law firm agreements in 2012 on behalf of Tangerine with aggregate commitments of £ 152 million (over 90% of the loans were made to a single law firm, Ashton Fox, owned by Schools); she pleaded that she had no responsibility to carry out due diligence in respect of those firms or of the relevant insurance position;

   b. authorising transactions totalling nearly £22 million on the basis only of instructions from Schools and sight of an invoice, on the pleaded basis that it was not necessary to exercise due diligence in respect of these payments; they were made to numbered Swiss bank accounts and appeared to have nothing to do with Tangerine's business.

8. Ms Cummings relied on indemnity and/or waiver of liability provisions in Tangerine's Articles of Association (see [19] below). In her judgment of 13 September 2018 on the preliminary issues Mangatal J held that:

   a. Ms Cummings had been appointed and served as a director of Tangerine on the footing of the Articles which were therefore incorporated into the terms of her appointment and were applicable to her as a former director.

   b. She was accordingly entitled to rely, as an "Indemnified Person" (as defined in Article 2 of the Articles) on indemnity provisions pursuant to which, in the absence of wilful neglect or default, Tangerine was obliged to indemnify her in respect of any liability or loss incurred in the conduct of Tangerine's business or the discharge of her duties as a director, and waived any claim or right against her.

c. In short, Tangerine and therefore the Appellant had no claim against Ms Cummings unless he established she was guilty of wilful neglect or default of her duties as director.

9. Although the Appellant discontinued his claim against Ms Cummings, he persisted in his claim against DMS Governance, asserting that it is vicariously liable for Ms Cummings' acts which were carried out in the course of her employment with "DMS Governance" or in the course of a relationship akin to employment by which it had assumed responsibility so as to give rise to a duty of care. He contended, additionally, that Ms Cummings was carrying out her duties as a Director of Tangerine "as a direct activity of DMS Governance". He further alleged that there was a contract between DMS Governance and Tangerine which was breached by a failure to monitor and control Ms Cummings' performance; alternatively, there was a relationship akin to a contract on the basis that there was an assumption of responsibility on the part of DMS Governance which gave rise to a duty of care in similar terms to the alleged contract.

10. The judge summarily dismissed all the Appellant's claims against DMS Governance. She held that Tangerine had no cause of action against DMS Governance, and could, therefore, not assign an action which it did not have. Since Ms Cummings was indemnified, and was not liable for anything other than wilful default or neglect, her employer, assuming DMS Governance was her employer, could not be vicariously liable for Ms Cummings' conduct if it fell short of wilful default or neglect.

11. The judge further ruled that the pleadings failed to amount to allegations of wilful default or neglect but that, even if they had, they had no real prospect of success: Ms Cummings was not acting as an employee of DMS Governance but rather as a director and agent of Tangerine. DMS Governance could not, therefore, be vicariously liable for any of her wilful default or neglect.

12. She dismissed the claim in contract; she said there were no express terms. She similarly dismissed the claim based on assumption of responsibility.

13. There was no dispute as to the principles appropriate to striking out such a claim. By the Cayman Islands Grand Court Rules 1995 Order 14 rule 12(1), a defendant may apply for summary judgment on the ground "that the plaintiff's claim has no prospect of success". Order 14 rule 12(2) prohibits any application on the basis that part only of the claim has a prospect of success. Order 14 rule 14 (1) confers power on the court to dismiss the claim unless the plaintiff has a "prospect" of success on the whole or part of his claim. These provisions, it was agreed, impose no higher burden than that which is imposed by the English courts and, accordingly, the issue was

whether there was a real, as opposed to fanciful, prospect of success. (*Southdown Regency Dev Ltd* v *Cayman National Bank Ltd* [2007] CILR Note 4, *Re Sterling Macro Fund* Unrep 6 April 2017).

14. We were reminded of the principles re-iterated by Lord Hope and Lord Hobhouse in *Three Rivers No.3* [2001] UKHL 16, [2003] 2 AC 1 and invited to ask whether the case was "fit for trial at all" (per Lord Hope [95] p.260) or demonstrated an "absence of reality" (per Lord Hobhouse [158] p282).

Vicarious Liability absent Wilful Default or Neglect

15. Originally, the Appellant's case in this appeal was that DMS Governance could be vicariously liable for Ms Cumming's negligence despite the indemnity and/or the waiver of liability under Tangerine's Articles, contrary to the judge's decision at [77]-[79] of the judgment. We shall deal with this shortly since by the time of his reply Mr Hefin Rees QC no longer pursued this argument.

16. DMS Governance and the judge relied on the principle that vicarious liability is no more than a form of secondary liability for a wrong committed by an employee in the course of her employment. Since, by virtue of the indemnity, Ms Cummings was not liable, her employer could not be held liable (see *Majrowski* v *Guy's and St Thomas's NHS Trust* [2002] 1 AC 224 and *Staveley Iron & Chemical Co Ltd* v *Jones* [1956] AC 627.

17. The Appellant had argued before the judge and in opening the appeal that the terms of the indemnity and waiver of liability were such that they did not absolve Ms Cummings from liability but, on the contrary, indemnified her in respect of liability or waived liability once it had been established. She remained liable although Tangerine was barred "in terms of enforcement".

18. These submissions led to a dispute as to the effect of *Broom* v *Morgan* [1953] 1 QB 597 in which the Court of Appeal upheld a decision that an employer was vicariously liable to a wife for her husband/employee's negligence even though the Married Woman's Property Act 1882 barred her from suing her husband. Mangatal J focussed on the judgment of Denning LJ who had described the statutory immunity as a mere rule of procedure and not of substance (p.609), not a distinction made by Singleton LJ, and one with which Hodson LJ disagreed. The Appellant also had relied on *Various Claimants* v *Barclays Bank PLC* [2017] EWHC 1929 as another example of a procedural bar, although the proposition that the Limitation Act is merely a procedural bar finds no place in the judgment of Nicola Davies J in that case.

19. But the decision of the Privy Council in *Viscount of the Royal Court* v *Shelton* [1986] 1 WLR 985 disposed of the issue. In the instant appeal, Tangerine's Articles provided:

> "*149. Every Indemnified Person shall, in the absence of wilful neglect or default, be indemnified and held harmless out of the assets of the Company against all liabilities, loss, damage, cost or expense (including but not limited to liabilities under contract, tort...) incurred or suffered by him by or by reason of any act done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties....*
>
> *150. No indemnified Person shall be liable to the Company for acts, defaults or omissions of any other Indemnified Person.....*
>
> *153. Each Member and the Company agree to waive any claim or right of action he or it may at any time have, whether individually or by or in the right of the Company, against any Indemnified Person on account of any act or omission of such Indemnified Person in the performance of his duties for the Company; provided however, that such waiver shall not apply to any claims or rights of action arising out of the wilful neglect or default of such Indemnified Person...."*

20. Of similar clauses in *Viscount of the Royal Court*, Lord Brightman, giving the opinion of the Board said:

> "*The directors are prima facie liable to the company for the loss. But that liability was incurred "in the course of the company's business". The directors are therefore entitled to be indemnified against such liability. A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him*" (991).

21. Since Tangerine has no cause of action, Mr Hefin Rees QC rightly accepted that the Appellant could only succeed in tort if he could establish wilful default or neglect on the part of Ms Cummings and that DMS Governance was liable therefor.

The allegations of Wilful Default or Neglect

22. The judge struck out the relevant allegations because the Appellant had failed properly to particularize or plead the allegations of wilful neglect or default, and, whether in their original or amended form, they amounted to no more than a claim for negligence (Judgment [81] and [82]).

23. There was no dispute as to what had to be proved to establish the allegations of wilful neglect or default against Ms Cummings. In *Peterson and Ekstrom* v *Weavering Macro Fixed Income Fund Ltd (In Liquidation)* [2015] (1) CILR 45 Chadwick P analysed the requirements identified by Romer J in *In re City Equitable Fire Ins Co Ltd* [1925 Ch 434:

> "*An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that*

act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty"

24. Chadwick P, after analysing the authorities, concluded that:

> *"to establish the liability of a director under the second limb of the City Equitable test - recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty - it is necessary to satisfy the court that the director appreciated (at the least) that his or her conduct might be a breach of duty and made a conscious decision that, nevertheless, he or she would do (or omit to do) the act complained of without regard to the consequences; and that if the evidence does not establish that the defendant at least suspected that his neglect or default might constitute a breach of duty, it is not appropriate to characterize his breach of duty as "wilful neglect or default"* [117].

25. At paragraph 221 of the Statement of Claim under the heading Particulars of Breach it is alleged that:

> "*Ms Cummings appreciated, or should have appreciated, that her conduct might be a breach of her director and fiduciary duties, or was recklessly careless as to the same, and made a conscious decision that, nevertheless, she would:*
>
> *221.1 cause Tangerine to enter into agreements with law firms outside the agreed investment criteria (see in particular section E above);*
>
> *221.2 fail to put in place credit default insurance required by the investment objectives (see in particular section E 12 above);*
>
> *221.3 permit Panel Law Firms not to comply with the monthly reporting requirement contained in the loan documentation or fail to challenge the same (see in particular section E above);*
>
> *221.4 authorise, or fail to challenge, commercially questionable or unjustifiable payments by Tangerine (see in particular Section F above); and/or*
>
> *221.5 not make the necessary enquiries*"

26. Under Section E, the Statement of Claim sets out the procedures necessary and the documents required before loans were to be made out of the relevant fund to Panel Law Firms (those which satisfied specified investment criteria). At paragraph 121 of the Statement of Claim it is alleged that, in 2012, Ms Cummings approved and signed, on behalf of Tangerine, at least ten law firm loan agreements for aggregate commitments of £157 million. It is asserted either that no due diligence report was obtained (e.g. Signey Law para.126, February 2012, Tandem XJA Ltd April 2012, para 152, Bracewell Law, para 159 May 2012) or if one was available, it was ignored (e.g Rehab4Life Ltd, para 130, February 2012, Barnetts Solicitors, para 137, April 2012, Ingrams

Solicitors para.141 April 2012, Drake Legal Ltd, May 2012 para 168, WE Solicitors LLP, para 176, August 2012). In April 2012, a revolving loan facility was entered into with Ashton Fox Solicitors Ltd in an aggregate amount equal to £50 million. The loan was signed and approved by Ms Cummings, so it is said, despite Schools' controlling interest and it is alleged that just before Tangerine took over as investment manager 85% of the loans from the Master Fund had been made to Ashton Fox, (see paragraph 149).

27. The Appellant alleges in the Statement of Claim that none of the investment criteria relating to the Panel Law Firms was adhered to nor were documents that were required provided or considered. There was no or no adequate monitoring of the Firms' ability to comply (see para.222).

28. A list of unjustifiable transactions is identified in Section F of the Statement of Claim. It is alleged that Ms Cummings caused to pay out and failed to challenge the payment of nearly £14.5 million to entities controlled by or in which Schools had an interest. Ms Cummings' alleged failure to scrutinise Schools was despite previous disciplinary action taken against him and continuing investigation.

29. It is true, as DMS Governance contended, and as the judge accepted, that these allegations are the basis of the allegations of negligence made against Ms Cummings ("*should have appreciated that her conduct might be*" (para 221)). But they also found an allegation of being recklessly careless and an assertion that she did appreciate that her conduct might be a breach. It would have been far better if the allegations of negligence and wilful neglect or default had been distinguished. A conscious decision to act or to fail to act without regard for the consequences in spite of at least suspicion that to do so would be in breach of duty, must be alleged (see Chadwick P supra).

30. But we do not agree that the allegations do not amount to an accusation of wilful default and neglect. Para 221 specifically alleges that Ms Cummings appreciated that her conduct might be a breach of her duties but made a conscious decision to proceed. Furthermore, the alleged failures are of such magnitude and persistence; the omissions so frequent and blatant that taken together they do form the basis of the allegations of a conscious decision to disregard the duties Ms Cummings owed as director. A few failures might be regarded as no more than negligence however woeful and inadequate the omissions appear. But when, as is alleged, nothing whatever is done, despite the relevant rules of investment, over and over again, it would be open to the fact-finder to take the view that the conduct was conscious and deliberate. As suggested in argument, it becomes difficult to the point of impossibility to believe that the driver who on one journey

shoots every one of ten red lights has merely allowed his mind to wander. Such a repeated course of conduct smacks of a deliberate intention to take no notice of the warning signs.

31. For those reasons we disagree with the judge that the claim for wilful default or neglect "*falls to be struck out*" on the grounds that it was not adequately pleaded [J. [84].

32. That is not, however, an end of the matter. The question, whether the Appellant's claim that DMS Governance is vicariously liable for Ms Cummings' wilful default or neglect is bound to fail, remains to be considered.

DMS Governance's' Liability for Wilful Default or Neglect

33. The judge held that, even if Ms Cummings was an employee of DMS Governance, which was denied, or the relationship between Ms Cummings and DMS Governance was one akin to employment, the Appellant's case that DMS Governance was vicariously liable for Ms Cummings' wilful default or neglect was bound to fail on the basis that, as a matter of law, Ms Cummings' decisions, actions and omissions were made in her capacity as a director of Tangerine and not as an employee of DMS Governance Limited.

34. The judge's ruling and the Respondent's case relied on two authorities: *Kuwait Asia Bank E.C.* v *National Mutual Nominees Ltd* [1991] 1 AC 187 (PC), which was followed by this Court in *Paget-Brown & Co Ltd* v *Omni Securities Ltd* [1991] CILR 184. In *Kuwait,* a bank had appointed two of its employees to the board of a company in which it had a beneficial interest. After the company had gone into liquidation, the bank was sued on a number of grounds which included an allegation that it was vicariously liable for the acts and omissions of its two employees who were on the board of the company's directors. The Privy Council was of the opinion that any breach of duty was committed by the two directors acting in an individual capacity and as directors they were bound to ignore the interests of their employer, the bank.

35. Giving the opinion of the Board, Lord Lowry said:

> "*it does not make any difference if the directors appointed by a shareholder are employed by the shareholder and are allowed to carry out their duties as directors while in the shareholder's employment. House and August (*the two directors*) owed three separate duties. They owed in the first place to AICS (*the company of which they were directors*) the duty to perform their duties as directors without gross negligence;... They owed a duty to the plaintiff (*trustee for the depositors*) to use reasonable care to see that the certificates complied with the requirements of the trust deed. Finally, they owed a duty to their employer, the bank, to exercise reasonable diligence and skill in the performance of their duties as directors of AICS... The bank was not*

responsible for a breach of the duties owed by House and August to AICS or the plaintiff any more than AICS or the plaintiff were responsible for a breach of duty by House and August. If House and August committed a breach of the duty which was imposed on them and the other directors of AICS and was owed to the plaintiff under and by virtue of the trust deed they did so as individuals and as directors of AICS and not as employees of the bank; House and August were not parties to the trust deed, nor was the bank. House and August were allowed by the bank to perform their duties to AICS in the bank's time and at the bank's expense. It was in the interests of the bank that House and August should discharge with diligence and skill the duties which they owed to AICS, but these facts do not render the bank liable for breach by House and August of the duties imposed on them by the trust deed. In the performance of their duties as directors and in the performance of their duties imposed by the trust deed, House and August were bound to ignore the interests and wishes of their employer, the bank. They could not plead any instruction from the bank as an excuse for breach of their duties to AICS and the plaintiff. Of course, if the bank exploited its position as employers of House and August to obtain an improper advantage for the bank or to cause harm to the plaintiff then the bank would be liable for its own misconduct. But there is no suggestion that the bank behaved with impropriety.... The employment of House and August could have given the bank the opportunity to injure AICS and the plaintiff but it did not make the bank responsible for negligence of House and August in the discharge of the duties under the trust deed [221G-222F]."

36. Later, Lord Lowry added:

> "*An employer who is also a shareholder who nominates a director owes no duty to the company unless the employer interferes with the affairs of the company. A duty does not arise because the employee may be dismissed from his employment by the employer or from his directorship by the shareholder or because the employer does not provide sufficient time or facilities to enable the director to carry out his duties. It will be in the interests of the employer to see that the director discharges his duty to the company but this again stems from self-interest and not from duty on the part of the employer.*"[page 223C-D]

37. In *Paget-Brown*, the appellant was a Cayman company offering services to companies wishing to establish themselves in the Islands and provided its employee as a director to Omni, the respondent, for an annual fee of $1800. This court rejected Omni's contention that Paget-Brown was vicariously liable for its employee's breach of duty when acting as a director of Omni. Zacca P followed *Kuwait* in concluding:

> "*Mr Coleman* (the director) *was nominated by the appellant. He was appointed a director by the shareholders of the respondent and could have been removed by the shareholders. He was answerable to the respondent and its shareholders. There was no control by the appellant over Mr Coleman's performance. The respondent has not pleaded bad faith or fraud on the part of the appellant. The pleadings do not disclose that any instructions or directions were given to Mr Coleman by the appellant in the performance of his duties or that any interference with his activities occurred. The appellant would owe no duty of care to the respondent unless it had interfered with the affairs of the respondent. The acts or omissions of Mr Coleman are acts or omissions in his individual*

capacity as a director of the respondent. They are not acts or omissions by him as an employee of the appellant.
It is our view that the appellant, in the circumstances of the present case, owed no duty of care to the respondent. The appellant cannot, therefore, be held vicariously liable to the respondent. The fact that the appellant is a management company offering services does not, in our opinion, affect the legal principle as enunciated in the Kuwait case. There is no personal duty of care owed by the appellant to the respondent to monitor the conduct of Mr Coleman as director of the respondent." [p.193]

38. In addition, the Court rejected the existence of any express or implied contractual term requiring Paget-Brown to monitor the director's performance.

39. In the instant appeal, Mr Hefin Rees QC, on behalf of Mr Goodman, submitted that the scope of the services offered by DMS Governance was far wider, connoting a greater degree of control and supervision than that provided by Paget-Brown. To make good that submission the Appellant relied on a number of documents which suggested, not only a high degree of control but that Ms Cummings was, as he put it, carrying out her duties as director of Tangerine "*as a direct activity of DMS*".

40. Ms Cummings was supported, as the Appellant put it, by DMS' Tri-Level Review Process. In a marketing document called "Fund Governance. Leading the Way" DMS Management Ltd described "Our Team". It said:

> "*the operational structure of DMS is identical to that of a professional audit service firm. DMS has a full-time fund governance team of 15 Directors, 55 Associate Directors and Associates...*
> *In practice, without exception, each DMS Director appointed to a fund is supported by an Associate Director and Associate to assist him in discharging his governance duties and responsibilities to the fund.*
> *The fund governance team is further supported by robust and dedicated infrastructure teams of compliance, internal audit, technology, administrative, human resources, operations, and finance.*"

41. The document then describes the Tri-level review System which:

> "*.. provides each board action (i.e. document) careful review and consideration.*"

42. The three levels require review by the Associates and Associate Directors of a document execution file which has to be signed by the Director, who at the third level "*carefully documents*" her conclusions in that file. DMS' document also describes the supporting software, capturing all relevant documentation and the execution file.

43. Mr Valentin submitted that this material only applied to the provision of directors for hedge funds, not to the present position, which was the provision by OBS, another company within the group, of a director for an investment management company rather than for a fund. That would be a factual matter for resolution at trial if necessary, but we were content for the purposes of this appeal to assume in favour of the Appellant that the material applied to Ms Cummings' appointment as a director of Tangerine.

44. The Appellant also relied upon Ms Cummings' own employment contract, which, so it was said, showed that she had no independent mind of her own but was under DMS Governance's control. By 18.1:

> *"During the term of the employee's employment, the employee agrees that any appointments as a director of any of the Company's clients which are held by the employee in the course of the employee's employment under this employment agreement are held in that capacity as an employee of the employer and not in the employee's own right.*
> *By 18.2:*
> > *"The employee must resign from any office held by the employee or any other directorship which is a consequence or requirement of this employment agreement if asked to do so by the employer or the Company."*
> *By 18.6*:
> > *"The employee may not resign any directorships to which the employee was appointed in the course of the employment with the employer without the prior written agreement of the Company".*

45. We should observe at this stage that 'the Company' was defined in this contract as OBS and Ms Cummings was not therefore on the face of it employed by DMS Governance.

46. In the Axiom Legal Financing Fund Supplemental Offering Memorandum under the heading Investment Manager it describes the investment manager, Tangerine, as responsible for the screening of the law firms requiring loans and for the approval of models to be funded and ensuring that appropriate levels of insurance are in place for each loan , in accordance with the Investment Manager's mandate. Ms Cummings is described as serving Tangerine in a non-executive capacity, supported by a team of qualified and experienced associate directors and associates using proprietary market leading technology to assist her in discharging her duties and responsibilities to the Investment Manager (Tangerine):

> *".. responsibilities of the Investment Manager will include making and carrying out all the investment decisions on behalf of the Segregated Portfolio and the Master Segregated Portfolio. The particular skills that the Investment Manager*

brings are its general expertise and experience in the financial services sector in the UK and litigation arising therefrom."

47. The question thus arises as to whether any of this boastful description of the role of DMS Management Ltd and the scrutiny to be offered by Tangerine affects the principle identified in *Kuwait* and affords any chance of the Appellant being able to distinguish *Paget-Brown*.

48. As we have already noted Ms Cummings was not on the face of the contract employed by DMS Governance. Her employment contract was entered into with DMS Organization Ltd and OBS. As clause 18.1 indicates, she was not separately remunerated by Tangerine, but neither this factor nor the prescribed circumstances of resignation affect the principle in *Kuwait.* That decision teaches that, whatever other duties Ms Cummings might have had as employee, her duties were owed as a director to Tangerine and not to her employer or to the Respondent DMS Governance. Just as the appointing Kuwait Bank was not responsible for any breach of duty of the appointee directors to the company on whose board they served, so DMS Governance, even if it had been Ms. Cummings' employer, was not responsible to Tangerine for any breach of duty by her as director (*Kuwait* 222*)*.

49. No duty arose because her employer OBS remunerated her or could dismiss her (*Kuwait* p.223); even if it was in OBS's interests that she performed her duties to Tangerine, that did not give rise to any duty on the part of OBS (*Kuwait* p.223).

50. The support DMS Management suggested it would give to those companies to whom it offered its administrative services, including making available a director, does not alter the legal principle that such a director's duties are owed to the company on whose board she serves. OBS was paid a fixed set-up fee of $1500 and a fixed annual fee of $7500 (see email 9 February 2011) but otherwise the financial arrangements and the absence of any alleged interference in the performance of her duties on the part of either OBS, her employer or DMS differs in no material respect from that of the company Paget-Brown.

51. No distinction in principle arises, contrary to the Appellant's contention, because *Paget-Brown* was concerned with allegations of negligence, whereas the pleadings in the instant appeal allege wilful default or neglect. Such wilful breaches were breaches by Ms Cummings of her duties owed to Tangerine as a director of Tangerine; the identification of the entity to which those duties were owed and the consequential absence of any vicarious liability of her employer cannot differ because those breaches turn out not to be merely negligent but wilful.

52. The Appellant also contended that assistance could be derived from those cases in which the concept of employment was extended to the brother teachers in a Roman Catholic school (*Various Claimants* v *Catholic Child Welfare Society* [2012] UKSC 56) or to a prisoner working in a kitchen administered by the Ministry of Justice (*Cox* v *Minister of Justice* [2016] UKSC 10, both of which identified circumstances in which the workforce, for which the defendant was held vicariously liable, included those who had no contract of employment. In *Catholic Child* the relationship between the church and the brothers and the close connection between that relationship, the church's activities and sexual abuse led to the imposition of vicarious liability [86]. In *Cox*, the court focussed on the business activities carried on by the Prison Service and its attendant risks [29]. Neither of these cases assists the Appellant in undermining the principle in *Kuwait* or *Paget-Brown*. That fundamental principle is that the duties owed by Ms Cummings, whether wilfully breached or merely negligently, were owed in her capacity as a director of Tangerine, whatever the nature of her other employments.

53. The rationale for holding that the employer in *Kuwait* and in *Paget-Brown* was *not* vicariously liable remains unaffected by those cases which extended vicarious liability in order to provide a remedy to those who were not employees; that rationale is founded, substantially, on the principle that as director Ms Cummings was bound to ignore the interests and wishes of her employer (*Kuwait* 222D). OBS, if it had been the Defendant/Respondent, would not have been vicariously liable for Ms Cummings' breaches of duty as director, even though it was her employer. If an employer who makes available an employee to be a director is not vicariously liable for the reasons given in *Kuwait, a fortiori*, a company such as DMS Governance which was not the employer. Accordingly, it does not assist the Appellant to seek to extend the concept of vicarious liability to those who may be regarded as in an analogous situation to that of an employer. The questions, which arose in *Catholic Child Welfare Society* and *Cox,* of whether it was fair and just and reasonable to impose vicarious liability simply do not arise.

Public Policy

54. Public policy motivated the courts to stamp the defendants with vicarious liability in those cases. The Appellant himself invoked public policy as a reason why summary judgment should not have been entered against him. His argument merely underlines why this court should not seek to finesse the principle in *Kuwait*. The Appellant, in written argument, identifies a number of jurisdictions, which are financial centres such as Jersey and the British Virgin Islands which have legislated against directors' indemnities in respect of the performance of their duties. But while the practice of providing directors' indemnities has been criticised and has been prohibited in some jurisdictions, the examples relied on by the Appellant demonstrate a need, if any, for the

legislature and not for the courts to act. These Islands have chosen not to and it is not for this court to substitute its views as to policy for those of the legislature.

Contract

55. Although the argument arose only tangentially under Ground 1, reference was made in oral argument in the appeal to the contention advanced in the Statement of Claim that a contract was entered into between DMS Governance and Tangerine in which there were express terms that DMS Governance would, amongst other things, ensure that Tangerine met its obligations pursuant to the investment management agreement and would monitor the performance of Ms Cummings (Statement of Claim para.29).

56. No written evidence of any such contract has ever been produced, not even after the judge's judgment at [89]. This absence is despite the affidavit evidence, on 28 November 2018 (para.12), of the Chief Executive Officer of DMS Governance who expressly denied the existence of such a contract). To suggest, Micawber-like, that something might turn up on discovery betrayed a sense of despair, particularly when Tangerine was under an obligation to reveal relevant documents to the Appellant as assignee of its causes of action. There is no basis for appealing the judge's dismissal of that claim. For similar reasons, there are no grounds for holding that a duty of care akin to the alleged contract was assumed by DMS Governance.

57. Finally, the Appellant criticised the brevity of the judge's decision. But her judgment must, as she herself pointed out, be read with her earlier judgment on the preliminary issues. It is, in any event plain why she entered summary judgment in the Respondent's favour and equally plain that she was right to do so. We dismiss the appeal.