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Case Numbers: CL-2022-000321
CL-2021-000612

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 December 2024

Before :
DAME CLARE MOULDER DBE
SITTING AS A JUDGE OF THE HIGH COURT

- -

Case No: CL-2022-000321

Between :	
(1) Dynamo Recoveries Limited	**Claimants**
(2) Emerdata Limited	
- and -	
Alexander Nix	**Defendant**

- -

Case No: CL-2021-000612

And Between :	
Alexander Nix	**Claimant**
- and -	
Emerdata Limited	**Defendant**

- -

Nigel Jones KC and Stephen Hackett (instructed by **Griffin Law**) for **Dynamo Recoveries Limited & Emerdata Limited**
Jonathan Allcock (instructed by **RIAA Barker Gillette**) for **Alexander Nix**

Hearing dates: 7-10, 14-18 October

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 6th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Clare Moulder DBE :

Introduction

1. This is the judgment on two claims, one brought by Dynamo Recoveries Limited ("DRL") and Emerdata Limited ("Emerdata") against Mr Alexander Nix ("Mr Nix") and the other brought by Mr Nix against Emerdata. Both claims arise out of the collapse of Cambridge Analytica, a business which operated through a number of companies in England and in the USA. Mr Nix was Cambridge Analytica's CEO, and a director of each of the companies.

2. As explained below, at the material time the major investor behind the business of Cambridge Analytica was Mr Robert Mercer. His daughter Rebekah Mercer ("Ms Mercer") who was involved in managing and overseeing the Mercer family's political projects and charitable interests was also involved and became a director of Emerdata in March 2018. The majority shareholders in Emerdata are the Mercer family and associated trusts.

3. For convenience, reference in this judgment to the "Claimants" are to DRL and Emerdata.

Background

Formation of the Business

4. In 2005, Mr Nix established Strategic Communications Laboratories Ltd (which later changed its name to SCL Group Ltd) ("SCL Group") with Mr Nigel Oakes. In his evidence Mr Nix described the business of SCL Group at this time as undertaking "*behavioural research and strategic communications programmes and PSYOP (Psychological Operations) training for a broad range of governments and their militaries*" and in parallel "*applying a similar methodology for analysing, understanding and influencing human behaviour but in an election context (rather than a military one)*".

5. In 2012, the business was split and Mr Nix took the elections business. Mr Nix remained a shareholder of SCL Group (about 8.5%).

6. Following the agreement to split, Mr Nix incorporated SCL Elections Ltd in October 2012 ("SCL Elections"). Mr Nix explained in his oral evidence that the focus of the company was on politics and government work, not defence work but government contracts in health, development and social and thereafter he established a commercial division to look at providing similar advertising and marketing services to big brands and corporates.

7. He subsequently established SCL Social Ltd ("SCL Social") and SCL Commercial Ltd ("SCL Commercial"). SCL Social had political and social contracts, initially in the

Caribbean, and then across Africa and countries in Latin America and Asia. SCL Commercial was to deal with non-US commercial contracts.

8. In 2015, Mr Nix incorporated a new investment holding company, SCL Analytics Ltd which acquired all his shares in SCL Elections, SCL Social and SCL Commercial. Mr Nix was the CEO of the SCL companies and was a shareholder in SCL Analytics. SCL Group acquired 30% of SCL Analytics.

Investment by the Mercer family and establishment of Cambridge Analytica LLC

9. Mr Robert Mercer was a hedge fund manager and computer scientist who in the course of his career built up substantial wealth. Mr Mercer has donated to and supported conservative political causes and charitable organisations. For over 10 years, his daughter Rebekah Mercer ("Ms Mercer") has been involved in managing and overseeing the Mercer family's political projects and charitable interests. In 2013 Ms Mercer was introduced to Mr Nix and Mr Mercer subsequently had meetings with Mr Nix.

10. Ms Mercer's evidence is that she and her father had been looking for some data management and analytics service providers for use in political projects:

"We decided that an investment would be potentially profitable because we felt there was a niche in the market for a provider of data analytics services that was not hostile to Republican or conservative points of view."

11. Following those meetings the Mercers decided to establish Cambridge Analytica LLC ("CA LLC") (and the brand name "Cambridge Analytica" was invented for the purpose) to licence and deploy the SCL Group's intellectual property and methods. The SCL Group companies in the UK also started to trade under the brand name Cambridge Analytica.

12. Cambridge Analytica's business was broadly speaking the collection and analysis of data, and the deployment of the results of that analysis for the benefit of its clients (the most high-profile of whom were political campaigns and associated individuals).

13. The business was operated in England by a number of companies, SCL Group, SCL Analytics, SCL Commercial, SCL Social, SCL Elections and Cambridge Analytica (UK) Limited (together the "SCL Companies"). The business was operated in certain states of the USA by Cambridge Analytica LLC ("CA LLC") and SCL USA Inc.

14. Even though the SCL Companies in England and CA LLC were both trading under the brand name "Cambridge Analytica", they were not in common ownership at that time. CA LLC was ultimately majority owned by the Mercer family (via a company called CA Holdings LLC ("Holdings")) and the SCL Companies were majority owned by Mr Nix with other substantial shareholders also existing. References in this judgment to

"Cambridge Analytica" or "CA" is to the business of the companies trading under the brand name "Cambridge Analytica".

15. In June 2014, SCL Elections entered into a service agreement with CA LLC (the "Election Services Agreement"). The Election Services Agreement provided for CA LLC to pay a fee to SCL Elections for work sub-contracted to it at cost plus 15%. CA LLC contracted with the end clients and then sub-contracted with and paid SCL Elections to undertake the services for the end clients. Whilst CA LLC was the business which owned the brand "Cambridge Analytica " and was used for contracting sales with US clients, SCL Elections was the main beneficiary of the revenue as it was to be paid all its costs and expenses in providing the services plus a profit mark up of 15%.

GSR Data

16. Global Science Research ("GSR") was a UK company associated with Dr Alexander Kogan ("Dr Kogan"), who was a Professor in the Department of Psychology at the University of Cambridge. Dr Kogan was a director and major shareholder of GSR. Dr Kogan worked on an App called 'thisisyourdigitallife', which was an online quiz accessible via Facebook. By using the App, users of Facebook took a personality quiz which yielded psychometric data on the user and (depending on their privacy settings) the user's friends, which GSR collected.

17. In June 2014, SCL Elections contracted with GSR to undertake a large-scale research project, involving GSR undertaking surveys on c.40,000 Facebook users, who in turn gave their permission for GSR to collect data on their friends. GSR used the data they received to deliver to Cambridge Analytica a personality model for c.26 million users.

18. Mr Nix's evidence was that, initially, Dr Kogan did all the modelling in−house and gave SCL Elections this data, which it applied to a real campaign and then there was a second contract, in early 2015, where SCL licensed a little bit more data from him and this included a limited amount of Facebook likes. So in 2015, SCL did become possessed of some raw data rather than just the modelling derived from the data. [Day 3 p46]

19. Mr Nix further stated that in around November 2015, Cambridge Analytica decided not to make further use of the GSR models as the data set had proven to be not very valuable, and not as valuable as simply using Facebook's own algorithms to target audiences on their platform.

December 2015 Press Coverage

20. On 11 December 2015, The Guardian published an article: *"Ted Cruz using firm that harvested data on millions of unwitting Facebook users".*

21. The article included the following:

"Ted Cruz's presidential campaign campaign is using psychological data based on research spanning tens of millions of Facebook users, harvested largely without their permission, to boost his surging White House run and gain an edge over Donald Trump and other Republican rivals, The Guardian can reveal.

A little-known data company, now embedded within Cruz's campaign and indirectly financed by his primary billionaire benefactor, paid researchers at Cambridge University to gather detailed psychological profiles about the US electorate using a massive pool of mainly unwitting US Face book users built with an online survey.

As part of an aggressive new voter-targeting operation, Cambridge Analytica - financially supported by reclusive hedge fund magnate and leading Republican donor Robert Mercer - is now using so-called "psychographic profiles" of US citizens in order to help win Cruz votes, despite earlier concerns and red flags from potential survey-takers.

…

Mercer's connections to both the Cruz campaign and the data firm that is apparently helping to power the senator's advantages were previously reported by Politico and Bloomberg. But political strategists and privacy advocates agreed that Mercer's parallel funding channels, combined with concerns over the surreptitious, commodified Face book data - reported here for the first time - represented an intensified collision of billionaire financing and digital targeting on the campaign trail.

…".

22. Mr Nix's evidence is that Facebook contacted both SCL Elections and GSR concerning the 2015 Guardian article in early 2016. Facebook asked SCL Elections and GSR to delete all and any Facebook data.

23. In August/September 2016, SCL Elections instructed lawyers to take legal action against GSR for breach of the contractual licence agreements that they had entered into with SCL Elections. In October 2016, GSR and Dr Kogan entered into a Settlement and Release Agreement with SCL.

2016 US Election

24. Ms Mercer's evidence was that her family initially supported Senator Ted Cruz in his primary campaign for the Republican Presidential nomination in the 2016 election, that when the nomination was won by Donald Trump, her family began to support his campaign and that Cambridge Analytica provided its services to both candidates. Mr Nix in his evidence stated that Cambridge Analytica provided the "Donald J Trump for President" campaign with the expertise and intelligence that helped win the White House and that Cambridge Analytica also provided comparable services to Make

America Number 1, a right-wing super PAC (Political Action Committee), set up by the Mercers, that supported the presidential campaigns of Ted Cruz and Donald Trump.

2017 Press Articles and ICO Investigation

25. On 26 February, 21 April, 7 May and 14 May 2017 Carole Cadwalladr ("Ms Cadwalladr") of The Guardian published four Brexit related articles (a) *"Revealed: how US billionaire helped to back Brexit"*, (b) *"Leave EU under investigation over EU referendum spending",* (c) *"The Great British Brexit Robbery: How our Democracy was hijacked"*, and (d) *"Follow the data: does a legal document link Brexit campaigns to US billionaire?"*.

26. Mr Nix accepted in his evidence that SCL had initial discussions and dealings with Aaron Banks/Leave.EU but his evidence (which was not challenged and was ultimately confirmed by the Information Commissioner's Office ("ICO") in 2020) was that they subsequently did not undertake any work.

27. The Guardian newspaper's initial interest in Cambridge Analytica, according to the evidence of Mr Nix and not really disputed by the Claimants, came about because of several whistleblowers, chiefly Mr Christopher Wylie.

28. Mr Wylie was a part time contractor who worked for SCL Elections for around 7 months in 2013-2014. Mr Wylie terminated his relationship with SCL Elections on 30 June 2014. Upon leaving Mr Wylie took with him a large amount of confidential information which was to be used to set up a competing business, Eunoia Technologies Limited. As a result of this SCL Elections obtained undertakings from Mr Wylie in respect of the confidential information.

29. The Information Commissioner's Office (ICO) initiated an investigation into Cambridge Analytica's data processing practices in March 2017. It was reported in a Guardian article on 4 March 2017:

> *"The UK's privacy watchdog is launching an inquiry into how voters' personal data is being captured and exploited in political campaigns, cited as a key factor in both the Brexit and Trump victories last year.*
>
> *The intervention by the Information Commissioner's Office (ICO) follows revelations in last week's Observer that a technology company part-owned by a US billionaire played a key role in the campaign to persuade Britons to vote to leave the European Union.*
>
> *…*
>
> *The ICO spokeswoman confirmed that it had approached Cambridge Analytica over its apparent use of data following the story in the Observer. "We have concerns about*

Cambridge Analytica's reported use of personal data and we are in contact with the organisation," she said…".

30. In March 2017, SCL confirmed to Facebook that it held no data from GSR. (There was an issue raised by the Claimants in cross examination of Mr Nix and Dr Tayler as to whether an "*audit*" was carried out at this time to enable the confirmation to be given to Facebook and what form that audit took but in my view, it has no significance to the issues discussed below).

Project Dynamo

31. Following the 2016 US election, it was agreed that the business would pursue a capital raising to inject new financing into the business of Cambridge Analytica from both the existing investors (the Mercers) and from new strategic investors.

32. As part of the transaction (known as "Project Dynamo"), the SCL Companies and CA LLC were acquired by a newly incorporated English SPV (i.e. Emerdata). Project Dynamo completed on 23 January 2018. Mr Nix was one of the sellers under the share purchase agreement dated 23 January 2018 and consequently, had the right to receive a total cash consideration of USD 8,775,249.30 from Emerdata. The first payment, totalling £710,200, was transferred to Mr Nix's (GBP) account on 26 January 2018; and the second payment, which constituted the remaining balance of the cash consideration, was transferred to Mr Nix in USD on 16 March 2018 (the delay being attributable to Mr Nix opening a USD bank account).

Channel 4 Broadcasts 2018

33. It is common ground that Cambridge Analytica had been the subject of critical reports in the media since 2015 but in mid-March 2018 there was extensive and sustained critical reporting about the business published in the Observer/Guardian and New York Times newspapers and broadcast on Channel 4 in the UK.

34. On 12 March 2018, Mr Nix became aware of an impending broadcast by Channel 4: he received an email from Channel 4 notifying him about the impending broadcast. The Mercers received separate, but similar, letters from Channel 4.

35. There was a series of Channel 4 broadcasts relating to CA: the first on 17 March 2018 entitled "*Cambridge Analytica: Whistleblower reveals data grab of 50 million Facebook profiles"*. The second in the series which aired on 19 March 2018 "*Cambridge Analytica Uncovered: Secret Filming Reveals Election Tricks*" (the "Nix Broadcast") included comments made by Mr Nix at a meeting on 16 January 2018 with an individual whom he believed to be a representative of a potential future client of CA LLC (the "Meeting") and who was in fact an undercover journalist, who covertly recorded Mr Nix's comments for the ultimate use in the broadcasts on Channel 4 News.

ICO 2018 Investigations

36. On 7 March 2018, the ICO wrote to SCL Elections (the "7 March Letter") stating that it was investigating possible offences under section 55 of the Data Protection Act 1998 ("the DPA"). The letter enclosed, and referred to, a "Demand for Access" to SCL Elections' premises.

37. As discussed in detail below, there was then correspondence between SCL Elections and the ICO as well as a public statement by the Information Commissioner in an interview to Channel 4, which culminated in an application by the ICO for a warrant and a raid of the offices of SCL Elections.

Events post the Nix Broadcast on 19 March 2018

38. On 20 March 2018, Mr Nix was suspended as CEO of the Cambridge Analytica business.

39. On 23 March 2018, the ICO applied to Court for, and obtained, a search warrant in respect of SCL Elections' premises. The execution of the warrant was highly publicised.

40. On 28 March 2018, the board of Emerdata resolved that Mr Nix should be, *"removed from the Board of Emerdata with immediate effect, pending the results of an independent internal investigation*".

41. On 10 April 2018, Mr Nix transferred USD 1.45 million subscription monies to Emerdata.

42. On 24 April 2018, Mr Nix transferred USD 1.54 million to Emerdata. Mr Nix made a further payment of USD 290,000 to Emerdata on 11 May 2018. The nature of those payments is in dispute and is discussed below.

43. On 3 May 2018, the Companies were placed into administration and on 17 April 2019 the Companies were placed into liquidation.

Assignment of Claims

44. On 30 October 2020, Emerdata entered into an assignment agreement with the Companies' liquidators, whereby Emerdata was assigned the causes of action available to the Companies against Mr Nix ("the SCL Claims").

45. On 18 March 2021, Emerdata entered into two assignments with DRL, one of which assigned the Emerdata Claims (and other claims of Emerdata against parties other than Mr Nix) and the other of which assigned onwards to DRL the SCL Claims.

Witnesses for the Claimants

46. The following factual witnesses were called by the Claimants and were cross examined:

Julian Wheatland

47. Mr Wheatland was the Chief Financial Officer and Chief Operating Officer of the Cambridge Analytica group of companies at times material to this litigation.

48. The Claimants described Mr Wheatland in their written closing submissions as "*a good witness"*: "*He is an experienced finance professional. He was courteous and measured. He listened to the questions, carefully considered the documents he was taken to, and stuck to guns or made appropriate concessions when he thought he had been wrong in his written evidence*".

49. However, in my view Mr Wheatland gave evidence in his witness statement on three issues which in cross examination were in my view shown to be unsatisfactory or inaccurate:

    i) The forecasts;

    ii) his role in the ICO investigation;

    iii) the suspension by Facebook of CA's accounts.

The Forecasts

50. Although this forms part of the case on misrepresentation which was formally abandoned by the Claimants on the final day of the trial, Mr Wheatland's evidence in relation to the forecasts is still relevant to the overall assessment of his credibility.

51. At paragraphs [30]-[33] of his first witness statement he said:

> *"30. On 30 November 2017 [6 – 8] (I have reviewed the email to refresh my memory of the date) Theepa sent me a substantially revised version of the profit and loss forecast that I had not previously seen (the "30 November Forecast"). As I recall I expressed surprise to Theepa that Alexander had not involved me in this process and she agreed that it seemed a bit strange. The 30 November Forecast contained forecast profits for 2018 had increased dramatically. Having reviewed that document to refresh my memory I see that it predicted profits before tax in 2018 of £7,453,088.*
>
> *…*
>
> *33. In the course of preparing this witness evidence I have also had my attention drawn to a second profit and loss forecast with the date of 30 November 2017, contained within the same Excel file as the 30 November Forecast (the "Second 30 November Forecast"). The Second 30 November Forecast is identical in content to the 30 November Forecast. However, the Second 30 November Forecast gives a higher cost for "Research / Commission" and, in view of that higher cost, predicts lower profits of £2,545,000. Looking at these two forecasts now, I suspect it was the Second 30 November Forecast that was more plausible, as I think the 30 November Forecast*

probably was too optimistic as to the likely direct costs. To the best of my recollection I was not aware of the contents of the Second 30 November Forecast when I communicated the summary of the 30 November Forecast to the investors as described in the paragraph above, or if I was, I must have been led by Alexander or Theepa to think that the 30 November Forecast was the more plausible forecast of direct costs, and therefore profits. I do not see how I possibly can have been aware of the Second 30 November Forecast as a credible forecast, since I was uneasy enough about sending any forecasts at all, and I certainly would not have sent what I did in the terms I did if I had known that there was another credible forecast of the same date that predicted much lower profits." [emphasis added]

52. However, as was demonstrated in the course of the cross examination of Mr Wheatland, the contemporaneous correspondence in relation to the forecasts showed that the forecasts were prepared and then refined by the financial controller (Mrs Cappelli) and Mr Wheatland commented on them. Contrary to his witness statement, Mr Wheatland was clearly involved in the preparation of both forecasts of 30 November referred to in paragraphs 30 and 33 of his witness statement (above).

53. The version referred to in paragraph 30 of his witness statement showing projected net profit of £7.453m was in fact Version 8 of the forecast whilst the second forecast referred to in paragraph 33 of his witness statement which showed a projected net profit of £2.545m was in fact Version 7. Version 8 showed a higher projected net profit of £7.453m as a result of the figure for research commission which was included in Version 7 having been reduced on the instructions of Mr Wheatland.

54. Despite the clear evidence of the contemporaneous correspondence Mr Wheatland did not admit the point in cross examination but sought to obfuscate in his evidence to the Court:

"A. As I have already said, I think I was confused. It was a long time ago. There were a lot of versions. I think version 7 was the one that I hadn't seen before. Version 8 was an iteration on from it, and it had a much larger profit in there.

Q. Mr Wheatland, the point you are making in this paragraph is that you received a forecast after a period when Mr Nix was allegedly involved in it, and you were then surprised to see the profits had increased dramatically? That is the point you are making at least in the witness statement, isn't it?

A. Yes, and I think that's right, because the revenue forecast that went into the version 7, which, when corrected, became version 8, although there was still an underlying error in there, which I didn't know about at the time, did cause for a forecast that showed a dramatic increase in profit.

Q. Mr Wheatland, if you were talking about the 29 November one, you can't have been surprised about a dramatic increase in profits in version 7 because it had gone down.

The only thing you can be talking about as having surprised you by going up is version 8, isn't it?

A. Well, I reviewed version 7. I had suggested some changes where I could see that some things were wrong. I didn't do the calculation. Theepa turned it around, and this was the forecast that resulted from that.

Q. Mr Wheatland, in this paragraph, you were trying to make it look as if the 30 November forecast was Mr Nix's increase that surprised you, and the truth is it didn't surprise you, because you had brought about the change. Isn't that right?

A. No, I don't accept that. I have told you exactly what I think. Pretty clearly I think. You can ask me again and again, but the version 7 was the one, after I hadn't seen for a long time, where there had been a significant increase in profit. I didn't do the calculation. I reviewed the cost. The research commission looked incorrect. It turns out that, actually, part of the reason that the revenue had increased dramatically was because gross revenue had been taken as net revenue and the media cost hadn't been sufficiently allowed for. I can't say it any clearer than that.

Q. Let's try again, Mr Wheatland. Your answer just now was: "You can ask me again and again, but the version 7 was the one, after I hadn't seen it for a long time ..." And then it's not on the [draft] transcript, but something, something, "an increase in profit". But it wasn't an increase in version 7, Mr Wheatland. This is what I've just shown you. That one came down –

A. That was an increase in revenue. You are correct. It was an increase in revenue. That one didn't jar at me. I spotted that there was something wrong with the research commission costs. I didn't know what else was wrong. But I didn't look at the bottom line and predict what would be the result of that; I just asked Theepa to correct something which was wrong. And then I received the version 8, where, as you and I both can see, there was a big increase in profit, an erroneous increase in profit, as it happens.

Q. Mr Wheatland, you weren't surprised by the 30 November forecast, because you had brought about that change and this paragraph isn't true, is it?

A. The only thing wrong with this paragraph is that I got confused between version 7 and version 8.

Q. This also means, Mr Wheatland, does it not, that you can't possibly have expressed surprise to Theepa about version 8, can you, because you had produced it with her?

A. Well, I think I did express surprise when I saw the profit level. But actually, my surprise was at the jump in revenue that was now being projected. So I was surprised at that." [emphasis added]

55. The answers which Mr Wheatland gave on the issue of the forecasts continued in a similar vein and were indicative of a witness who was seeking to defend a position that was not supported by the contemporaneous documents, even resorting to an assertion that there was an oral conversation not previously mentioned in his written evidence:

"Q. Let's read on: "... if I was ..." If you were aware of version 7, and I will read from your witness statement: "... I must have been led by Alexander or Theepa to think that the 30 November Forecast [version 8] was the more plausible forecast of direct costs, and therefore profits." That is not true, is it?

A. No, I think it is true actually, because this is all based on the revenue projections. So I remember challenging the revenue projections, being told that they were right; and based on those revenue projections, that would have been the performance of the business. But the revenue projections, as I have said, some of them were overinflated, because they included the media costs which should have been taken out on that media costs line. So if those revenue projections had been right, then that forecast would have been right. As it turned out, they weren't.

Q. But you didn't know that at the time?

A. I did not know that at the time.

Q. So at the time it cannot possibly have been Alexander or Theepa who led you to think that version 8 was the more plausible forecast; you had proposed the change that created version 8.

A. No. What –

Q. We have literally just looked at that, Mr Wheatland.

A. Yes, shall I finish? The thing that caused that inflated profit was the high level of revenue that was at the top of the page. And that is what Alexander and/or Theepa assured me was correct. I'm going to be honest with you, I think they thought it was correct at the time, because I don't think they had spotted that gross revenue and net revenue had been confused in a couple of the lines of business. But if that revenue had been correct, as assured to me by Alexander/Theepa, then that forecast would have been correct. It turned out that was wrong.

Q. They didn't assure you about the revenue, Mr Wheatland. That's nowhere in your statement, is it?

A. Well, I think I challenged whether or not that was quite right, and I think there is an email between me and Alexander asking whether or not he really wanted to be that bullish with the forecast.

Q. When is this assurance that you have just mentioned? When was that given?

A. I think it was given verbally.

Q. But you had forgotten about that when you did your witness statement?

A. When I did this witness statement, I hadn't recalled or put together, if you like, put together -- I knew that there was a time when we had misforecast because we had forecasted gross revenue rather than net revenue, but I didn't know when that was in the timeline. The research cost was clearly wrong in version 7, so corrected that. The increased level of profitability resulting from that drove directly from the increased level of revenue being projected. And –

Q. So you are both wrong.

A. And whilst I challenged it, I was told it was right. It turned out to be wrong, through an error.

Q. Mr Wheatland, there was no challenge and there was no assurance, or you would have mentioned them in your witness statement. Is that right?

A. No, it's not." [emphasis added]

ICO Investigation

56. In relation to the ICO investigation Mr Wheatland accepted that he was involved in the earlier investigation (in 2017) but maintained that he was not coordinating the investigation in 2018. More significantly he attributed control to Mr Nix. In his first witness statement (paragraph 40) he said:

"I was not really involved with coordinating the way Cambridge Analytica responded to the ICO. Instead, Alex Tayler took the lead. That was partly because it was to do with data, which was Alex's particular area, but it was also because I was living in the USA at that time. I am sure that Alex Tayler would have coordinated the response with Alexander Nix. This was new territory for Alex Tayler and I cannot imagine he would have proceeded on his own without referring to someone more senior. Additionally, Alex Tayler and Alexander Nix were very close at that time." [emphasis added]

57. However in cross examination, Mr Wheatland sought to portray himself in a way which does not accord with the impression given by the contemporaneous correspondence. For example the exchanges in relation to the draft letter included the following which suggests that Mr Wheatland was not as he asserted, just "*stepping in*" due to the fact it was outside normal UK business hours: On the evening of 19 March 2018/early morning of 20 March 2018, Mr Wheatland had the following exchange with Squire Patton Boggs (UK) LLP ("SPB"), the lawyers engaged by SCL Elections, in relation to a draft letter sent by SPB to send to the ICO taking into account the Information Commissioner's interview with Channel 4 news.

Dr Tayler responded to SPB that it was an excellent letter and Mr Wheatland responded:

> *"I agree, this letter is good. Please note that Chris Wylie was a contractor on a 1 year fixed term contract (which he failed to turn up for at the end of the year), not an employee."*

Mr Lowles of SPB then asked Mr Wheatland for instructions as to whether he should send the letter:

> "*Julian,*
>
> *I have not heard from anyone further. Do you wish me to proceed and send the letter to the ICO or wait for confirmation from anyone else?*
>
> *I am inclined not to send anything until I hear from Philip given he would likely be resisting the warrant application if we get to that stage. Provided he is able to respond first thing in the morning I cannot see any material difference in sending the letter now and then."*

Mr Wheatland replied:

> "*Tim,*
>
> *Agreed. Please hold for Philip to comment first thing in the morning and then send the letter directly after that."*

58. Even if it is correct to say on the evidence that Dr Tayler "*took the lead*" in the response to the ICO, it seems to me to be speculation on the part of Mr Wheatland in his witness statement as to the coordination by Dr Tayler with Mr Nix and it calls into question whether Mr Wheatland is giving an independent account in his evidence to this Court or for whatever reason, trying to pass the blame onto Mr Nix.

Suspension by Facebook and impact on the business including termination by customers and suppliers

59. In his witness statement, Mr Wheatland stated:

> *"…As I have mentioned above, the Information Commissioner herself appeared on the Channel 4 broadcast and gave an interview. During that interview she said that Facebook had cooperated with the ICO's investigations. <u>That fact, and the contents of the Channel 4 broadcast, lead me to believe that Facebook also received notice of the Channel 4 broadcast in advance, and in light of that notice chose to terminate Cambridge Analytica's accounts. I cannot even begin to think of any other reason why Facebook would suspend all accounts with anything to do with Cambridge Analytica suddenly at that time</u>.*" [emphasis added]

60. In cross examination, Mr Wheatland said:

"A. The "suddenly at that time" is the – is the key part of that sentence for me, because this thing -- Facebook knew we had Facebook data. We had discussed with them. We'd certified it was deleted. There had arisen a question that the data was still in existence somewhere. We were in discussion with them in order to reconfirm that the Facebook data was deleted. So, in that sense, the Facebook data wasn't a new thing at that time. What was a new thing at that time was the Channel 4 broadcast."

61. Mr Wheatland was taken in cross examination to a passage from the public statement issued by Facebook, "Suspending Cambridge Analytica and SCL Group From Facebook-Meta" on 16 March 2018:

"Breaking the Rules Leads to Suspension

Several days ago, we received reports that, contrary to the certifications we were given, not all data was deleted. We are moving aggressively to determine the accuracy of these claims. If true, this is another unacceptable violation of trust and the commitments they made. We are suspending SCL/Cambridge Analytica, Wylie and Kogan from Facebook, pending further information." [emphasis added]

62. It was put to Mr Wheatland:

"Q. So here's the answer, Mr Wheatland. It is exactly what Mr Tayler guessed. It is the GSR data and the possibility that it might still be out there, isn't it?

A. I think that is what they said publicly. I don't think they could have said what I'd said; that they'd heard that Channel 4 had an undercover video that hadn't yet been broadcast, and so this is what they said publicly…".

63. However Mr Wheatland was also taken to an email on 16 March 2018 showing that what Facebook were saying privately to CA's lawyers at that time was focussed exclusively on the issue of data:

"I have just got off the phone to Facebook's internal and external lawyers. They were very genial and the tone was very friendly & professional. However, it is clear that they are taking the situation very seriously and want comfort on an urgent basis - they are very concerned about fending off media reports that the information is still out there. I was quite clear with them that there is nothing in the suggestion that the information hadn't been deleted. I explained that this was all just a flight of fancy of a disgruntled employee. We talked about Wylie's departure, and the circumstances that led to his disgruntlement. I think that they were initially satisfied as to the reassurances re deletion of the data by SCL/CA. However, what they want further comfort on is the position of Wylie. They asked a series of questions:

1. Did he take any FB data with him when he left?

2. *What were the discussions between lawyers when it became clear he had taken confidential information in this regard - i.e. during the pre-action correspondence?*

3. *If he did have FB data, what was done about that?*

4. *They want to know whether you have any positive reason to think that Wylie has FB data in his possession now?*

5. *They also want to know whether you have any positive reason to think that he doesn't have FB data in his possession now?*

I suggested that the Undertakings may give them a certain degree of comfort; generally, they commented that the more information we can give as to Wylie being a rogue & a trouble-maker the better. Their in-house counsel did also raise the subject of the data audit; I said that I didn't have instructions, but we all hoped that the expense and distraction of that could be avoided. I think that the more co-operative we are the easier it will be to bat off the request for a data audit…". [emphasis added]

64. It was put to Mr Wheatland that it was about the data but he insisted that it was the Channel 4 interview:

"Q. Mr Wheatland, the truth is there is no evidence at all and no reason to think that this had anything to do with Mr Nix's comments, is there?

A. Well, I think it did, so I disagree with you.

Q. The reason why – the reason why Facebook suspended the business is perfectly obvious. It was publicly announced, and it is the GSR data, isn't it?

A. I think it was triggered by the Channel 4 interview."

Conclusion on Mr Wheatland's Evidence

65. As discussed above, in certain material respects referred to above, Mr Wheatland's account of events in his written evidence was shown in cross examination to be inaccurate. Whilst I do not criticise his ability to recollect matters of detail of events which took place some 6 or 7 years ago, there were occasions, some of which are highlighted above, where it appeared that he sought to advance a narrative both in his witness statement and on occasions in his oral evidence which flew in the face of the contemporaneous documentation. Overall he gave the impression that he blamed Mr Nix for events and on occasion sought to attribute blame to him even where there was no documentary evidence to support his evidence. Whilst I do not need to attribute a motive to this, it seems to be not unfair to infer that Mr Wheatland was mindful of his own involvement in events and I note that there was some correspondence at an early stage from the Claimants to Mr Wheatland which threatened litigation in this regard. In light of the matters referred to above, I cannot regard him as an independent witness

and I approach his evidence with some considerable caution and accept it only where it is consistent with the contemporaneous record.

Rebekah Mercer

66. Ms Mercer gave evidence via video link from the United States. She is currently a director of Emerdata and DRL and is the daughter of Mr Mercer. She adopted her witness statement dated 20 March 2024 and was cross examined.

67. It was clear from the oral evidence of Ms Mercer that she strongly believes that Mr Nix's remarks were the cause of the failure of the business of CA. It is not surprising that she holds this belief given that she is a director of Emerdata and in substance represents both the Claimants and the Mercer family in bringing these proceedings against Mr Nix.

68. Her evidence in relation to causation and the weight to be given to her evidence is discussed under that section of the judgment below.

Vincent Green

69. Mr Green was initially appointed as one of the joint administrators of SCL Group Limited, SCL Analytics Limited, SCL Commercial Limited, SCL Social Limited, SCL Elections Limited and Cambridge Analytica (UK) Limited in May 2018. In April 2019 he was appointed one of the joint liquidators. Mr Green adopted his witness statement (subject to a minor correction) as his evidence in chief but was not cross examined.

Witnesses for Mr Nix

70. The following factual witnesses were called for Mr Nix and were cross examined.

Mr Nix

71. Mr Nix adopted his two witness statements (with a change to paragraphs 126 and 127 of his first statement saying that it was entirely plausible that he met with Ms Mercer). Mr Nix was cross-examined over three days.

72. It was submitted for the Claimants that Mr Nix was an advocate for his case and not a witness. It was further submitted that he paid scant attention to the truth and said what he thought would be in his best interests.

73. I do not accept this characterisation of Mr Nix's evidence as a whole. However since Mr Nix is the defendant in the action brought by the Claimants and the allegations of breach of duty relate directly to his own conduct, namely his remarks at the Meeting and his approach to the ICO, I approach the evidence of Mr Nix with some caution particularly where he is giving evidence to explain his own remarks. In determining the weight I give to his evidence, I therefore assess the credibility of his evidence by

reference to whether it is inherently plausible and in addition have looked to see to what extent his evidence is corroborated by the documentary evidence and other witnesses.

Alexander Tayler

74. Dr Tayler was the Chief Data Officer between October 2015 and April 2018 (previously the Lead Data Scientist from April 2014). Dr Tayler adopted his witness statement and was cross examined. His evidence to the extent that it is relevant is discussed in the relevant sections below.

Theepa Cappelli (nee Selvakumaran)

75. Mrs Cappelli (nee Selvakumaran) was Group Financial Controller between February 2017 and May 2018. She adopted her 2 witness statements and was cross examined.

76. Although it was submitted for the Claimants in closing that Mrs Cappelli was not impartial, in my view the Claimants have not shown that Mrs Cappelli had a motive to give, or did give, anything other than honest testimony in relation to her dealings with Mr Nix and the way in which the forecasts (upon which the Claimants' misrepresentation case was based) were prepared. However given that the Claimants have now abandoned their case on misrepresentation, Mrs Cappelli's evidence is no longer relevant to the issues which the Court has to decide and I do not need to consider her evidence further.

Expert Evidence

77. Permission had been given for expert evidence by order of Christopher Hancock KC on 9 March 2023 to address the profits that would have been made by each of the Companies had they continued to trade in the commercial circumstances as they were on 18 March 2018.

78. Mr Neil Ashton was instructed for the Claimants and Ms Susan Longworth for Mr Nix. Mr Ashton produced a report dated 4th April 2024 and Ms Longworth a report dated 30th May 2024. The joint written statement was prepared on 8th August 2024 and a supplementary report was filed by Mr Ashton on 5th September 2024.

79. Both experts were cross examined.

Disclosure

80. In their skeleton argument for trial, the Claimants stated that:

> *"A number of significant shortcomings in Mr Nix's disclosure have emerged since the beginning of 2024. These shortcomings include strong prima facie evidence of deliberate destruction of evidence by Mr Nix, and so could hardly be more serious."*

81. The Claimants included a section in their skeleton inviting the Court to draw adverse inferences against Mr Nix by reason of his destruction of evidence. The Claimants alleged that documents which had been destroyed included communications from customers and suppliers indicating that Mr Nix's comments at the Meeting meant that they could no longer do business with CA and/or further communications from Mr Nix in which he accepted responsibility for CA's demise. It was submitted that the Court should "*lean strongly towards presuming the existence of damaging evidence in the destroyed documents*".

82. It was somewhat surprising therefore that in their written Closing Note the Claimants ended their note with the following:

> *"The Court will have apprehended that the Claimants did not cross examine, as foreshadowed, on the [disclosure shortcomings]. In the end there was insufficient time to explore these issues and furthermore, as a result of the live evidence given by Mr Nix, it was not necessary to do so."*

83. It is unclear why it is now said for the Claimants that it was unnecessary to cross examine Mr Nix "*as a result of the live evidence*" which he gave.

84. However, in the light of the trial, the position is that none of the "*shortcomings*" which were alleged in the skeleton by the Claimants have been pursued at trial, let alone established, and there can be no question of the Court drawing any adverse inferences against Mr Nix or making any presumptions in the Claimants' favour by reason of any alleged disclosure shortcomings.

The SCL Claims against Mr Nix

85. The SCL Claims comprised claims against Mr Nix for breach of his statutory duties as a director and for misrepresentation. However in the course of closing submissions Mr Jones KC for the Claimants confirmed that the Claimants no longer pursued the claims against Mr Nix for misrepresentation (Re-Amended Particulars of Claim ("RAPOC") paragraphs 49-51).

Introduction

86. DRL advances the SCL Claims as assignee of the SCL Companies, to which Mr Nix owed statutory duties as a director. DRL alleges that Mr Nix breached those statutory duties by, broadly speaking, making the comments that he did at the Meeting, and/or by the obstructive way that he dealt with the ICO in the period preceding the ICO obtaining and executing a search warrant in high-profile circumstances.

Statutory Duties owed by Mr Nix to the SCL Companies as a Director

87. Paragraph 46 of the RAPOC stated:

"As a director of each of the [SCL] Companies, Mr Nix owed the statutory duties set out at sections 171 – 177 of the Companies Act 2006 (and further or alternatively fiduciary duties of the same substance as those statutory duties). These included a duty to promote the success of the [SCL] Companies and a duty to exercise reasonable skill, care and diligence."

88. However it is clear from the submissions that the Claimants advance their case in reliance on sections 172 and 174 only, which contain the duties, referred to in the second sentence of paragraph 46, to promote the success of the SCL Companies and a duty to exercise reasonable skill, care and diligence.

Relevant law on Section 172 and 174

Section 172

89. Sub-section 172(1) of the Companies Act 2006 provides that:

"A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefits of its members as a whole and in doing so have regard (amongst other matters) to–

(a) the likely consequences of any decision in the long term;

(b) the interests of the company's employees;

(c) the need to foster the company's business relationships with suppliers, customers, and others;

(d) the impact of the company's operations on the community and environment;

(e) the desirability of the company maintaining a reputation for high standards of business conduct;

(f) …". [emphasis added]

90. It did not appear to be in dispute that the test is a subjective one although the Claimants submitted that:

"When the assertion of a director is so disreputable and so beyond the pale, the Court is not bound to accept that the director held that belief, all the more so when the assertion of that belief is justified by the reliance only on the alleged but obviously inadequate belief that winning the business was the only prize."

91. The subjective nature of the duty to act in the interests of the company was set out in *Regentcrest Plc v Cohen* [2001] BCC 337:

"*120. The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law (Sweet & Maxwell), para. 8.508). The question is not whether, viewed objectively by the Court, the particular act or omission*

which is challenged was in fact in the interests of the company; still less is the question whether the Court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the Court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test." [emphasis added]

92. I also note the following passages from *Clientearth v Shell plc* [2023] EHWC 1897:

"28. Although it is now said that these specific duties flow from what is said to be the logical consequence of the Board's acceptance that climate risk is a serious risk to Shell's business, rather than being a duty to which all directors of companies such as Shell are subject, I still think that their formulation is inconsistent with the well-established principle that it is for directors themselves to determine (acting in good faith) how best to promote the success of a company for the benefit of its members as a whole. This duty continues on an ongoing basis throughout the period of time for which directors hold office and has always been the law (e g Re Smith & Fawcett Ltd [1942] 1 All ER 542 at 543, [1942] Ch 304 at 306 per Lord Greene MR). It is unaffected by the codification of the duty in s 172. It is an important principle because, as Lewison J observed in Lesini at [85]: 'The weighing of all these considerations [as set out in s.172] is essentially a commercial decision, which the Court is ill-equipped to take, except in a clear case.'

[29.] It is well established that the test for breach of s 172 is a subjective one (e g Regentcrest plc (in liq) v Cohen [2001] 2 BCLC 80 at [120] per Jonathan Parker J) and requires proof of conduct other than in good faith. As Jonathan Parker J explained, there will be cases in which an absence of good faith can be inferred from the irrational nature of the conduct in issue, but it remains the case that the state of mind of the director concerned is what matters. For these purposes, good faith, not irrationality, is the cornerstone and an honest but unreasonable and mistaken belief that a particular course of action is in the company's best interests is not sufficient to amount to a breach of s 172." [emphasis added]

93. Mr Nix also relied on *Extrasure Travel Insurances Limited v Scattergood* [2003] 1 BCLC 598 at [87-90]:

"[87.] It is trite law that a director owes to his company a fiduciary duty to exercise his powers (i) in what he (not the Court) honestly believes to be the company's best interests, and (ii) for the proper purposes for which those powers have been conferred on him. Mere incompetence is not a breach of fiduciary duty: it might give rise to a claim for breach of a tortious or contractual duty of care, but the claim in this case was based entirely on alleged breaches of fiduciary duty.

[88.] The claimants sought to argue that a director is also in breach of his fiduciary duty if he honestly, but unreasonably and mistakenly, believes that he is pursuing the company's best interests. This argument was founded on a single remark of Richard Field QC (sitting as a deputy High Court judge) in Re Pantone 485 Ltd [2002] 1 BCLC 266 at para [46]. In that passage, the judge observed that it was not a breach of fiduciary duty for a director of company A to advance monies for the benefit of a related company B, if the director 'honestly and reasonably' believed that company B would repay the monies so advanced. On the basis of this formulation, Mr Nicholls submitted that it would be a breach of fiduciary duty if the director's belief, albeit honestly held, had no reasonable basis in fact. He submitted that, if the law were otherwise, a director would be immune to suit for crass incompetence: in other words, his fiduciary duties would be less demanding that any common law duty of care.

[89.] I reject that proposition. Fiduciary duties are not less onerous than the common law duty of care: they are of a different quality. Fiduciary duties are concerned with concepts of honesty and loyalty, not with competence. In my view, the law draws a clear distinction between fiduciary duties and other duties that may be owed by a person in a fiduciary position. A fiduciary may also owe tortious and contractual duties to the cestui que trust: but that does not mean that those duties are fiduciary duties. Bearing all that in mind, I find nothing surprising in the proposition that crass incompetence might give rise to a claim for breach of a duty of care, or for breach of contract, but not for a breach of fiduciary duty."

[90.] Furthermore, I do not consider that the judge's remarks in Pantone 485 can support the proposition for which Mr Nicholls relies on them. What the judge was dealing with was a question of onus — namely, whether a claimant in such a situation has to prove that the money has not been repaid by company B, or whether the director has to prove that the money has been repaid. In my view, the judge was not seeking to address any fundamental question of substance as to the scope of a director's fiduciary duty — namely, whether he is in breach of that duty if he acts on an honest, but unreasonable and mistaken, view. In any event, if (contrary to my understanding) that is what the Judge was saying, then he was flying in the face of a clear line of binding authority running from Smith v. Fawcett [1942] 1 Ch 304 at 306, through Bristol & West Building Society v. Mothew [1998] Ch 1 at 18, to Regentcrest plc [2001] 2 BCLC 81 at l05a–h. Those cases make it perfectly clear that a director's duty is to do what he honestly believes to be in the company's best interests. The fact that his alleged belief was unreasonable may provide evidence that it was not in fact honestly held at the time: but if, having considered all the evidence, it appears that the director did honestly believe that he was acting in the best interests of the company, then he is not in breach of his fiduciary duty merely because that belief appears to the trial judge to be unreasonable, or because his actions happen, in the event, to cause injury to the company." [emphasis added]

Section 174

94. Section 174 provides that:

"(1) A director of a company must exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with –

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and;

(b) the general knowledge, skill and experience that the director has."

This is the codification of the common law duty of care; the duty is not fiduciary in nature (s.178(2) of the Act, *Keymed v Hillman* [2019] EWHC 485 at [101-104]).

95. The question is whether the decision taken by the director fell outside the range of decisions reasonably available to the director at the time (*Clientearth v Shell plc* at [32]).

"31. Furthermore, in complying with their duty to Shell under s.174 CA 2006, each of the Directors is required to display the care, skill and diligence that would be exercised by a reasonably diligent person with both (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the Director in relation to that company and (b) the general knowledge, skill and experience that the Director has. Not only does the law not superimpose on that duty more specific obligations as to what is and is not reasonable in every circumstance, it also requires the Directors to continue to manage Shell's business with an open mind and to continue to have regard to a range of competing considerations.

32. This is one of the principal reasons why the Court is ill-equipped to intervene with its own assessment of how best to proceed save in a clear case. As Shell submitted, the question is whether the decision falls outside the range of decisions reasonably available to the Directors at the time (see e.g. Sharp v Blank [2019] EWHC 3096 (Ch) per Sir Alastair Norris at [631], applying this principle in a case to which the duties codified in CA 2006 apply) …". [emphasis added]

96. Mr Nix referred the Court to *Palmer's Company Law* at 8.2810: "*Liability is for negligence, not mere errors of judgment, or imprudence*."

The Alleged Breaches of Duty

97. The pleaded breaches of duty are set out at paragraph 47 of the RAPOC:

"Mr Nix breached one or both of the duties particularised in the paragraph above in the following ways:

47.1. By making the comments he made at the Meeting. Insofar as those comments reflected the way in which Cambridge Analytica had genuinely conducted its business,

it was a breach of Mr Nix's duties to have conducted the business in that way, and further or alternatively to refer to that fact at the Meeting. Insofar as Mr Nix's comments did not genuinely reflect the way in which Cambridge Analytica conducted its business, but rather were remarks made in the hope of winning business for Cambridge Analytica, Mr Nix breached his duties by stating (even if untruthfully) that Cambridge Analytica had in the past engaged, and was prepared in the future to engage, in disreputable and unethical practices, which would lower Cambridge Analytica in the estimation of any right-thinking person.

47.2. Further or in the alternative, by causing or permitting Elections to conduct itself in its dealings with the ICO in March 2018 in a way that was unreasonable and/or uncooperative, even though the Information Commissioner warned Mr Nix of the adverse publicity implications of doing so."

Alleged Breach of Duty arising out of Mr Nix's comments at the Meeting

Pleaded Case

98. The particulars relied on in respect of the alleged breach of duty arising out of Mr Nix's comments at the Meeting are set out in paragraph 19 of the RAPOC:

"In the course of the Meeting, Mr Nix made comments to the effect that Cambridge Analytica had in the past, and/or would in the future be prepared to:

19.1. entrap a political opponent into accepting a corrupt business deal, with a view to filming that exchange and broadcasting it on the internet;

19.2. send prostitutes to a political opponent's home with a view to generating incriminating photographs or footage; and

19.3. take steps to generate false allegations that would be accepted as true by the electorate, saying at one stage:

"I mean, it sounds a dreadful thing to say, but these are things that don't necessarily need to be true as long as they're believed."

99. In the Re-Amended Reply in response to an objection that DRL had failed properly to particularise with reference to specific words the comments Mr Nix made, the following response was pleaded in paragraph 5:

"… the following is relevant (with dotted lines inserted where it is not clear from the broadcast whether the passages followed directly):

"Reporter: What we want to know is what is the expertise of the deep digging that you can do to make sure that the people know the true identity and secrets of these people?

Mr Nix: Oh, we do a lot more than that. I mean, deep digging is interesting, but, you know, equally effective can be just to go and speak to the incumbents and to offer them a deal that's too good to be true and make sure that's video recorded, you know, <u>these sorts of tactics are very effective</u>; instantly having video evidence of corruption, putting it on the internet, these sorts of things.

Reporter: And the operative you will use for this is who?

Mr Nix: Well, someone known to us.

Reporter: Okay, so it is somebody – you won't use a Sri Lankan person, no because-

Mr Nix: No, no we'll have a wealthy developer come in, somebody posing as a wealthy developer.

Mr Turnbull: I am a master of disguise. [laughter]

Mr Nix: Yes, they will offer a large amount of money to the candidate, to finance his campaign in exchange for land, for instance, we'll have the whole thing recorded on cameras, we'll blank out the face of our guy and then post it on the internet."

…

"Mr Nix: Send some girls around to the candidate's house. We have lots of history of things."

…

"Reporter: For example you are saying, when you are using the girls to introduce to the local fellow, and you're using the girls for this, like the seduction, they're not local girls? Not Sri Lankan girls?

Mr Nix: I wouldn't have thought so, no, we'll bring some – I mean, that was just an idea, just saying we could bring some Ukrainians in on holiday with us, you know, you know what I'm saying.

Reporter: They are very beautiful Ukrainian girls.

Mr Nix: They are very beautiful, I find that works very well."

…

"Mr Nix: Please don't pay too much attention to what I'm saying because I'm just giving you examples of what can be done, and what, what has been done."

…

"Mr Nix: I mean, it sounds a dreadful thing to say, but these are things that don't necessarily need to be true as long as they're believed." [emphasis added]

100. The pleaded defence of Mr Nix in this regard was as follows:

"At the Meeting the proposed project was discussed and it remained, consistently with earlier communications, unremarkable and uncontroversial. After that business had been discussed, however, and in what was (with hindsight) a deliberate attempt by the reporter to entrap the Defendant and/or Mark Turnbull, the reporter directed the conversation away from the proposed project and initiated an informal conversation about exposing corrupt politicians and using unethical tactics.

The Defendant went along with this new line of conversation and, partly to spare the Supposed Client Representative from embarrassment and partly to try to understand what this new line of conversation was about, humoured his questions about the use of unethical tactics (i.e. "honey-traps") and discussed certain hypothetical scenarios in a light hearted manner. The Defendant's comments were then taken out of context and were edited heavily in an unfair manner for maximum negative effect within a programme broadcast on Channel 4.

In the premises, it is denied that the Defendant "made comments to the effect that" any entity under the "Cambridge Analytica" brand had undertaken any of the acts pleaded in paragraphs 19.1 to 19.3 or would be prepared to do so in the future. The Defendant's remarks were hypothetical and light-hearted and made during a conversation in which he was humouring the Supposed Client Representative for the reasons explained above. Therefore, although the Defendant recognises that, taken out of that context, the statements made by him that Channel 4 chose to broadcast appeared to indicate that Cambridge Analytica might be willing to arrange undercover reporting to expose the corruption of a political opponent, or send "girls" to an opponent's house, that is not how his comments were intended to be understood or could reasonably have been understood at the time, when considered in their proper context.

In addition as regards paragraph 19.3, although it is admitted that the Defendant said the words in the quotation marks, it is denied that he made any comments to the effect that Cambridge Analytica would "generate false allegations that would be accepted as true by the electorate". [emphasis added]

Evidence

101. I note that the Court does not have the benefit of the full transcript of the Meeting. Mr Nix sought to obtain it from Channel 4 and subsequently sought the assistance of the ICO but was unable to obtain it. Further Mr Nix pointed to differences between the version of the remarks attributed to him in the Channel 4 press release and the transcript of the Channel 4 broadcast in the bundle notably in the words "*Send some girls around*". The press release indicates where edits have been made but the scope of the edits are unknown. The remarks as set out in the press release are reflected in the pleaded case and to determine the issue of breach of duty, the Court therefore relies on the version in the press release rather than the transcript of the Nix Broadcast.

102. I note from the press release that there were a series of meetings culminating in the Meeting in January 2018 which Mr Nix attended. The press release set out the background as follows (although I note that the final date should be December 2017, not December 2018):

"… The admissions were filmed at a series of meetings at London hotels over four months, between November 2017 and January 2018, where an undercover reporter for Channel 4 News posed as a fixer for a wealthy client hoping to get candidates elected

in Sri Lanka. Along with Mr Nix, the meetings also included Mark Turnbull, the managing director of CA Political Global, and the company's chief data officer, Dr Alex Tayler…The meetings with an undercover reporter for Channel 4 News were held on:

November 2017, Hari Hotel - Mark Turnbull and Alex Tayler

November 2017, Dorchester Hotel - Mark Turnbull and Alex Tayler

December 2017, Berkeley Hotel - Mark Turnbull

January 2018, Berkeley Hotel - Alexander Nix and Mark Turnbull

December 2018, phone call with Alexander Nix and Mark Turnbull…".

103. I also note the following extract from the press release which relates to comments made by Mr Turnbull at one of the earlier meetings on the 19 December 2017:

"So we're not in the business of fake news, we're not in the business of lying, making stuff up, and we're not in the business of entrapment, so we wouldn't, we wouldn't send a pretty girl out to seduce a politician and then film them in their bedroom and then release the film. There are companies that do this but to me that crosses a line ...".

104. In his witness statement Mr Nix's evidence as to the Meeting and his remarks was as follows:

"146. The meeting commenced with pleasantries and a recap of the prior discussions between Mr Turnbull and Dr Tayler about the project. Champagne glasses were repeatedly refilled during this exchange, which was less about business and more about a bonding and small talk and 'socialising the deal' that had been discussed and agreed at the previous meetings. However, the conversation took an unexpected turn when Mr Ratwatte unexpectedly disclosed his interest to entrap rival politicians using controversial methods such as honeytraps. This revelation introduced a surreal and somewhat comical element to the discussion.

147. Neither Mr Turnbull nor I were prepared for this change of tack, and I remember exchanging bemused glances with Mr Turnbull during this turn of events. I did not take the conversation seriously, and I believe Mr Turnbull shared this sentiment. Mr Ratwatte continued to inquire about methods to entrap politicians, and we responded by providing hypothetical responses to his questions and 'playing along' with his inquiries. My comments to Mr Ratwatte were improvised and somewhat tongue-in-cheek to address hypothetical queries posed by the undercover reporter.

148. At no point in the conversation did I offer (genuinely or in jest) to carry out any of these services for Mr Ratwatte. Moreover, the discussion between Mr Turnbull and me and the reporter did not constitute a formal sales meeting. The parameters of the work to be undertaken by Cambridge Analytica had already been discussed and agreed upon in three previous meetings, as I had been told by Mr Turnbull. I knew that certain proposals had been shared with the clients, but at the time, I had been given a high-

level summary of these objectives verbally by Mr Turnbull. It is also very possible that I was shown the historic presentation that was shared with the client in the previous meeting that set out our proposed service offering, however, I cannot remember.

149. When Mr Ratwatte unexpectedly redirected the conversation towards exposing corrupt politicians instead of concluding the discussion, Mr Turnbull and I indulged the supposed client by addressing his inquiries about potential actions to reveal such politicians. However, both Mr Turnbull and I explicitly emphasised that our responses were hypothetical. We made it clear in a very awkward conversation that the business was not involved in fake news, lying or entrapment, and that we disapproved of such practices. Specifically, in a previous meeting with Mr Ratwatte that was also aired on C4, Mr Turnbull had made it expressly clear that we were not in the business of fake news or making stuff up. In the meeting, when addressing some of the awkward questions that Mr Ratwatte posed in respect of how it might be possible to entrap a politician, I made it clear that the answers were hypothetical.

150. At no time in any of the meetings between C4 and me or any other Cambridge Analytica staff did any of us offer to undertake any of the "services" that Mr Ratwatte was inquiring about. He was asking a series of very probing and difficult questions about illegal and/or unethical practices and we were answering them as best we could without offending or alienating a prospective client." [emphasis added]

105. I note from this evidence that Mr Nix says that he was providing "*hypothetical responses*" and "*playing along*" with his enquiries; that he was trying not to offend or alienate the prospective client.

106. In cross examination Mr Nix was asked about the section of his remarks which related to entrapment:

"Reporter: "It has to be the deep digging and what we want to know is what is the expertise of the deep digging that you can do to make sure that the people know the true identity and secrets of the people?

Nix: "Oh, we do a lot more than that. I mean deep digging is interesting but you know equally effective can be just to go and speak to the incumbents and to offer them a deal that's too good to be true, and make sure that that's video recorded, you know, these sorts of tactics are very effective instantly having video evidence of corruption, putting it on the internet, these sorts of things." [emphasis added]

107. In cross examination on this section of the remarks it was put to Mr Nix:

"Q. You weren't being asked how to find the skeletons in their cupboard, you were being asked, were you, how to create the skeletons?

The evidence of Mr Nix was:

A. No. No, not create the skeletons. That is misleading. I'm saying where there is knowledge or evidence of corruption, it is in the public interest to expose that, especially if it is with a government official or a politician seeking office or in office." [Day 4 p11:24-12:6]

108. Mr Nix's evidence was that in 2010 SCL had used entrapment as a method although he insisted that he was merely evidencing a corrupt politician:

"But what I was suggesting, and I was thinking on my feet here, I cast my mind back to the exposure of a corrupt politician that we assisted with in 2010, where the scenario that I set out was really just a reflection or a recollection of that, where we evidenced very serious corruption from the leader of a political party who was subsequently arrested by the police and charged." [Day 4, p 12:18-12:25]

"A. [we had] pretty substantial evidence that the politician was corrupt and we had even been told what his modus operandi was. We just had to evidence it and then let the police do the rest. Q. Right, and did you evidence it by entrapment, Mr Nix?

A. We sent a colleague or a third party to speak with the politician and to discuss with him the acquisition of land in the country, and the politician asked for a -- I think it was a $1.7 million payment into his personal bank account.

Q. So it was entrapment?

A. It was an exposure in the public interest of corruption." [Day 4, 13:20-14:6] [emphasis added]

109. In relation to the comment about "*sending girls*" Mr Nix's evidence in cross examination was:

"This was a hypothetical discussion about entrapment more generally. There was no request for services. The reporter was asking -- was telling that there are lots of corrupt politicians in Sri Lanka and did we know how to entrap politicians, or words to those effects. And I said, "Hypothetically speaking, I guess you could send some girls around", but I then went on to say, "I'm just giving you examples, these are just hypothetical, I'm making them up", and that bit was then edited out of the video, the bit that says, "And the answers are hypothetical, that's really important, please don't put too much attention on what I'm saying". [Day 4, p17:14-17:25]

Submissions for Claimants

110. It was submitted for the Claimants (skeleton for trial paragraph 49) that:

"It is hard to see how fabricated claims to offer services that any right-thinking person would consider ethically unacceptable (if not illegal) could comprise a good faith attempt to promote the success of the Companies, or could be consistent with the conduct of a reasonably diligent and competent director."

111. It was further submitted for the Claimants that:

111.1. The context is critical: Mr Nix was the CEO of the most influential data company in the world; it was already experiencing headwinds and thus his remarks required

probity and care; the client could have been testing CA and could have told other people.

111.2. Mr Nix should not be offering to create skeletons; the fact that the bribery was true was irrelevant; Mr Nix should not have been offering the service or that CA could or might offer it;

111.3. in response to Channel 4 CA did not deny that the remarks had been made or say that they had been taken out of context;

111.4. Mr Nix said the remarks were "*hypothetical*" but he had used entrapment and bribes in 2010; the remark "*I find pretty girls work well*" suggested experience; "*we can do a lot more than that*" "*equally effective can be*" "*these tactics are very effective*" "*examples of what can be done*" all suggested that these were services CA had done or was prepared to do;

111.5. Although Mr Nix said it was to win business, it was to win business without regard to anything else: Mr Nix did not address the sub section of s172 to maintain high standards of business conduct.

Submissions for Mr Nix

112. Mr Nix did not dispute that he spoke the words. However it was submitted for Mr Nix that he did not consider it a serious conversation and his answers were hypothetical. It was submitted that the difference is between on the one hand, Mr Ranwatte (the putative client) asking CA to provide services and Mr Nix pitching services; and on the other hand, a discussion in general terms about what can be done if you want to expose corrupt politicians. [Day 8, p88]

113. It was submitted that the "context" was missing from the transcript not in the sense of any extra words, but in terms of the context of the tenor and mood of the discussion; essentially was it serious or not. [Day 8, p86]

114. It was further submitted that the remarks had been edited, we do not know how it has been edited and we cannot assume the edits are fair. [Day 8, p90] For example between the following statements a dotted line indicating an edit appears in the press release:

"Nix: "*They are very beautiful, I find that works very well."*

…

Nix: "And the answers are hypothetical and that's really important is, is please don't pay too much attention to what I'm saying because I'm just giving you examples of what can be done and what, what has been done. The right solution will be made for the right, for your problem"."

115. However in the transcript of the broadcast there is no such indication and further the words that the answers were "hypothetical" were omitted so it read as follows:

"They are very beautiful, I find that works very well. Please don't pay too much attention to what I'm saying because I'm just give you examples of what can be done, and what has been done."

116. It was submitted for Mr Nix that although the disqualification undertaking given by Mr Nix to the Insolvency Service made reference to Mr Nix offering "*potentially unethical services*", the undertaking is limited to the insolvency proceedings and does not amount to an admission for the purpose of these proceedings.

117. It was submitted that it was not a breach of section 172 as his purpose was to secure the contract and promote the success of the company and the good faith requirement attaches to his consideration not his actions. He was playing along trying not to offend or alienate the client.

118. As to section 174 it was submitted that this was not a transaction decision but a drink in a bar where Mr Nix had to react in the moment. In the highly unusual circumstances this was not an unreasonable way to deal with this highly unusual situation and it does not reach the high bar for negligence.

Discussion on Breach of Duty arising out of the Meeting

119. In relation to the remarks that he made at the Meeting, Mr Nix's evidence was that the remarks were taken out of context and he has been unable to demonstrate this as Channel 4 have refused to make available the full transcript of the Meeting and even though he sought to obtain it through the ICO, he has been unable to do so.

120. Mr Nix accepts that he said the remarks which are reported but it was submitted on his behalf that without the full transcript the Court does not have the benefit of seeing the context which it is submitted would show that it was a hypothetical discussion and not an offer of services.

121. In cross examination Mr Nix said:

"… We certainly weren't offering him any of these things. <u>You know, he opened with a question, "If I wanted to entrap a politician, what sorts of things could be done?" A very open leading question. I hypothetically gave him some examples of the sorts of things that could be done. I never offered to do any of them for him</u>. We have never done any of those things before. I'm talking about honey traps. We don't operate like that. We have never operated like that. So, you know, it never crossed my mind that this was something that was remotely serious. Neither did it cross Mark Turnbull's mind. Both of us thought it was ludicrous. As I said before, it was a bizarre conversation that he initiated and we just played along." [Day 4, p 24:4-24:18] [emphasis added]

122. It was submitted for the Claimants that it was absurd to believe that Mr Nix was only talking about what other companies had done or what other companies might do or be

prepared to do. He was talking squarely about what CA had done or might be prepared to do.

123. In relation to entrapment by offering bribes Mr Nix had been told that the client wanted to know*: "what is the expertise of the deep digging that you can do".* [emphasis added]

124. In my view this clearly suggests that the client was asking about CA and not other companies in general and in my view this was how Mr Nix understood the question when he responded: "*we do a lot more than that*". When pressed for detail as to the operative "*you will use for this*", Mr Nix replied:

"Well, someone known to us."

125. In relation to "*sending girls*" Mr Nix in cross examination suggested that his remark was to the effect: "*Hypothetically speaking, I guess you could send some girls around".* However the actual words of Mr Nix in the transcript (taking the version in the press release which reflects the pleaded case) were:

"Send some girls around to the candidate's house, we have lots of history of things." [emphasis added]

126. In cross examination Mr Nix struggled to provide an explanation for the reference to "*lots of history of things":*

"Q. What did you mean by those words?

A. I don't know. I honestly don't know. This is what I mean by hyperbole. I was absolutely taken aback by the direction of the conversation. The reporter initiated it. He had given his thoughts on what sorts of things might be appropriate. I was just playing along. Mark Turnbull was playing along. It was a very [surreal] and strange conversation. I was just trying to say something to be in the conversation and not make him feel awkward. It was no more than that." [Day 4, p18:5-18:14]

127. In my view the obvious inference from the words "*we have lots of history of things"* is that it was intended to bolster their credentials of CA and provide support for the proposition that CA had done this in the past and could do it for this client.

128. I accept that in the Meeting according to the transcript Mr Nix went on to say: "*I mean it was just an idea*" but he also made the observation that:

"[Ukrainian girls] are very beautiful, I find that works very well." [emphasis added]

129. Again, Mr Nix struggled to explain this remark when it was put to him in cross examination:

"A. Yes, I have thought about that actually. I think what I meant by that is I don't think entrapping a politician with a non-beautiful girl is going to be as effective. I think that

was the point I was making, not an intention to say, "I find that works very well because I have done that many times before". That was not the intention. It was a reference to beautiful girls versus maybe girls with other qualities." [Day 4, p21:8-21:15]

130. This purported explanation of this remark was not in my view credible. In my view the natural inference from the remark is that Mr Nix was saying that CA had experience in this regard and (I infer) thereby seeking to bolster CA's credentials.

131. For Mr Nix it was submitted that the distinction is between discussing and negotiating services to be provided and having a hypothetical conversation about things that can be done in theory: he was not actually selling services. [Day 8, p92]

132. In my view the distinction which Mr Allcock for Mr Nix sought to draw between a hypothetical conversation of ways to entrap politicians and the offer (or negotiation) of services to be provided by CA is not necessarily the appropriate distinction in terms of the analysis of breach of duty. Even if I accept that Mr Nix was putting forward different possibilities of ways in which politicians could be exposed and thus in that sense was speaking "*hypothetically*" in my view the text and in particular the additional phrases referred to above, make it clear that Mr Nix was describing what CA could do and not merely what any company in that line of work could do. I do not accept the explanations put forward by Mr Nix for these additional remarks: "*lots of history*" cannot be satisfactorily explained as "*hyperbole*"; "*works very well*" was again clearly a reference to what could be done in their experience.

133. Mr Nix's evidence in his witness statement was that:

"When Mr Ratwatte unexpectedly redirected the conversation towards exposing corrupt politicians instead of concluding the discussion, Mr Turnbull and I indulged the supposed client by addressing his inquiries about potential actions to reveal such politicians. However, both Mr Turnbull and I explicitly emphasised that our responses were hypothetical."

134. In cross examination Mr Nix was asked about the following section of the transcript:

Nix: "And the answers are hypothetical and that's really important is, is please don't pay too much attention to what I'm saying because I'm just giving you examples of what can be done and what, what has been done. The right solution will be made for the right, for your problem."

135. Mr Nix's evidence in cross examination was:

"A. ... I think that was quite a tactful way of disagreeing with what he was exploring but without saying "No" to him. So what I was saying is, "Yes, these are some solutions that you are interested in, but we will find you the right solution", which was basically saying, "No, we are not going to do that for you but we will find something else for you"." [Day 4, 23:10-23:22] [emphasis added]

136. I cannot accept this interpretation advanced by Mr Nix. There is nothing in the language to support an inference that he was in fact saying that CA would not provide the sort of services that had been discussed earlier in the conversation.

137. The Court is having to form a view on the remarks of Mr Nix without the benefit of the context of the full transcript and by reference to an edited version. Mr Nix's evidence was that his remarks were in response to an opening hypothetical question along the lines of "*If I wanted to entrap a politician, what sorts of things could be done*." But even if Mr Nix was responding to such a hypothetical question, the subsequent remarks, as discussed above, lead to the obvious inference that these were statements as to the sorts of things that CA could do or provide for the client. To the extent that Mr Nix sought to explain away the remarks in cross examination (e.g. *hyperbole, a reference to beautiful girls versus maybe girls with other qualities, basically saying, "No, we are not going to do that for you but we will find something else for you*") as discussed above, that evidence in my view was not credible and damaged his overall credibility.

Section 172

138. Against these findings as to how Mr Nix's remarks should be interpreted I turn to the alleged breach of section 172.

139. Mr Allcock for Mr Nix pointed out that there were 2 alternative cases within the pleaded case on breach of duty in paragraph 47 of the RAPOC and it appears that the Claimants are pursuing the second alternative set out in the pleading:

> *"… Insofar as those comments reflected the way in which Cambridge Analytica had genuinely conducted its business, it was a breach of Mr Nix's duties to have conducted the business in that way, and further or alternatively to refer to that fact at the Meeting.* [emphasis added] [Alternative 1]
>
> *Insofar as Mr Nix's comments did not genuinely reflect the way in which Cambridge Analytica conducted its business, but rather were remarks made in the hope of winning business for Cambridge Analytica, Mr Nix breached his duties by stating (even if untruthfully) that Cambridge Analytica had in the past engaged, and was prepared in the future to engage, in disreputable and unethical practices, which would lower Cambridge Analytica in the estimation of any right-thinking person."* [Alternative 2]

140. It seems to me unnecessary for the purposes of determining whether there has been a breach of duty under section 172 (and/or section 174) to draw a distinction between services which had actually been provided in the past and were referred to at the Meeting (within the first alternative) and services which had not been provided in the past but that CA were prepared to offer in the future (the second alternative). Both alternatives are pleaded and would in my view involve the provision of services which would be regarded as disreputable and unethical practices, and I reject Mr Nix's evidence in cross examination (referred to above) in relation to bribes that CA were

merely evidencing corruption such that the entrapment could be defended as a method of exposing corruption which was in the public interest.

141. It is clear on the authorities referred to above, that section 172 is a subjective test and the issue is whether Mr Nix was acting in a way which "*he consider*[ed], *in good faith, would be most likely to promote the success of the company".*

142. Counsel for Mr Nix submitted that if Mr Nix honestly considered that what he was doing was to promote the success of the company there can be no breach of section 172:

"It is his considerations which must be in good faith and that means – for most purposes, that means honest. So he must honestly consider taking into account all of the relevant factors."

143. However, as this submission acknowledged, the duty in section 172 is a duty to act in the way which the director considers, in good faith, would be most likely to promote the success of the company but there is also an obligation in so doing to **"***have regard (amongst other matters) to … the desirability of the company maintaining a reputation for high standards of business conduct".*

144. It is therefore not enough to discharge the duty in section 172 for Mr Nix to believe that he was acting in the way which he considered would be most likely to promote the success of the company unless he took into account (amongst other things) in reaching that decision *"the desirability of the company maintaining a reputation for high standards of business conduct".*

145. In cross examination Mr Nix appeared to say that at the Meeting he had in mind the reputation of the company:

"A. Was I aware of my obligations as a director?

Q. You can express it that way if you wish.

A. Not front of mind, but in back of mind.

Q. I would imagine, with the greatest respect, Mr Nix, that as the CEO of the most influential data company in the world, you would be aware of your obligations as a director every day you went to work?

A. Indeed. But I think the point that I'm making is that I was focused on the purpose of the meeting, which was to represent the best interests of the company through delivering on the objective, which was to close the business that we were asked to -- I was asked to help close by Mr Turnbull.

Q. So the most important objective that you had in your mind, was it, was not the reputation of the company or anything of that kind, or any risk that you might put the company to, but just to close that deal?

A. No, that is twisting my words. I'm simply suggesting that it was also a factor, alongside the reputation and the other things that you have pointed out.

Q. Yes. And I'm suggesting to you, and I hope you would agree with me, that you had all of those objectives in your mind when you went to that meeting, because that is what you would have in your mind whenever you went to a meeting?

…

Q. I'm suggesting to you, and I hope you will agree with me, that you had all of those objectives in mind when you went to that meeting; do you agree?

A. I think that is fair." [emphasis added]

146. In light of my assessment of other parts of the evidence of Mr Nix in cross examination which as referred to above, damaged his credibility I have to doubt this evidence. However since the point appeared to be accepted by counsel for the Claimants, I proceed on the basis that Mr Nix did have in mind his obligation to take into account the reputation of the company when considering whether he was acting to promote the success of the company. The issue is then whether having in mind his obligations, he considered that his remarks were in the best interests of the company.

147. It was said in *Clientearth* that *"good faith, not irrationality, is the cornerstone and an honest but unreasonable and mistaken belief that a particular course of action is in the company's best interests is not sufficient to amount to a breach of s 172".*

148. In *Regentcrest* (above) it was said that:

"The question is not whether, viewed objectively by the Court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the Court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the Court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test." [emphasis added]

149. The issue under section 172 is as to the director's state of mind. In my view this is a case where the nature of the services which Mr Nix appears to offer to the potential client namely entrapment and honey traps, and the likely impact on the reputation of the company of offering to provide, or appearing to be willing to provide, such services if such remarks became known, lead me to conclude that Mr Nix could not honestly have considered that his remarks "*would be most likely to promote the success of the company*" having regard (amongst other matters) to the factors in section 172 and in

particular to *"the desirability of the company maintaining a reputation for high standards of business conduct".*

150. Even though Mr Nix did not know that it was an undercover journalist and irrespective of whether the "client" was acting as a principal or agent for others (his evidence was that he believed he was talking to *"a fixer for a wealthy client hoping to get candidates elected in Sri Lanka"*), it seems highly likely that others would be involved and/or interested in the services being used to promote a political campaign and thus highly likely that the offer of these services, even hypothetically, would be repeated and be made public. Further if the remarks became public it was at a time when CA had already been the subject of adverse comment in the press and investigation by the ICO.

Section 174

151. In relation to the alleged breach of section 174, section 174 requires a director to exercise "*reasonable care, skill and diligence*". As referred to above, liability is for negligence, not mere errors of judgment, or imprudence.

152. It was submitted for the Claimants that the context required probity and care. Mr Nix was talking to a prospective client: the fact that the client may have been trying to elicit from him whether the company would carry out something deeply unethical may have been a test; it may have been genuine but it was always possible that the client did not want to engage a company that did such things and always possible that he would tell others what he had been told.

153. I agree with counsel for Mr Nix that this was not a decision to enter into a transaction but a conversation in an informal setting where Mr Nix had to react in the moment. It is not an obvious situation where section 174 would come into play. However it seems to me that although the circumstances may have been unusual, Mr Nix was still acting as a director when meeting what he thought was a potential client and as such subject to the duty to exercise reasonable care in his dealings on behalf of the company with that potential client.

154. In my view Mr Nix's remarks went beyond an error of judgment. In the context of a meeting with someone who Mr Nix thought was a potential client, he failed to take reasonable care: even if he thought he risked losing or alienating the client by refusing to go along with the discussion of these services, stating that CA could provide services such as entrapment and honeytraps (even if not a firm offer to provide a particular service but merely to suggest that services such as these could be provided by CA) falls outside the range of decisions reasonably available to Mr Nix as a director at the time. The suggestion that CA would or could provide such disreputable and unethical services went beyond an error of judgment. These services were services which as Mr Turnbull had told the client at an earlier meeting "*crosse*[d] *a line":*

"So we're not in the business of fake news, we're not in the business of lying, making stuff up, and we're not in the business of entrapment, so we wouldn't, we wouldn't send a pretty girl out to seduce a politician and then film them in their bedroom and then release the film. There are companies that do this but to me that crosses a line ...".

155. I accept that it was said in *Clientearth* that "*the Court is ill-equipped to intervene with its own assessment of how best to proceed save in a clear case".* However in my view this is such a case.

Conclusion on Breach of Duty arising out of Mr Nix's comments at the Meeting

156. For the reasons set out above I find that by making the comments he made at the Meeting in relation to entrapment and honey traps, Mr Nix breached his duty under section 172.

157. In addition, for the reasons set out above, by making the comments he made at the Meeting in relation to entrapment and honey traps, I find that Mr Nix breached his duty under section 174.

Alleged Breach of Duty arising out of Dealings with ICO

Alleged Breach

158. It is alleged in the RAPOC (paragraph 47) that Mr Nix breached one or both of section 172 and 174 by "*causing or permitting Elections to conduct itself in its dealings with the ICO in March 2018 in a way that was unreasonable and/or uncooperative, even though the Information Commissioner warned Mr Nix of the adverse publicity implications of doing so."*

159. Earlier in the RAPOC the Claimants referred to the following:

"25. Mr Nix regarded this communication [7 March Letter]*, not as part of a reasonable and good faith investigation by the ICO, but as suggestive of a pre-determined course on which the ICO was determined because of bias against him and Cambridge Analytica. This irrational and incorrect belief informed a subsequent needlessly uncooperative approach to dealings with the ICO.*

26. On 14 March 2018 Elections responded to the ICO's letter (in the person of Stephen Wilkinson, described as Elections's "Data Compliance Officer"). Elections's strategy, as ultimately determined and approved by Mr Nix, was to offer to cooperate in respect of the documents, but not to engage at all with the request for access (presumably in the hope that the ICO would not pursue the request for access so long as there was sufficient cooperation in respect of the documents) ...

27. This cooperative approach appeared initially to find favour with the ICO ...

28. Subsequently Elections, at Mr Nix's behest or with his approval, altered its position on disclosure, taking the decision that it would not provide disclosure to the ICO as quickly as had been suggested after all, but rather would be less cooperative, and would only provide documents within 14 days …

…

30. It was therefore Elections's change in position about when the documents would be disclosed that led the ICO renewing its demand for access, which otherwise it had apparently been willing not to pursue.

31. On 18 March 2020 the Information Commissioner wrote to Mr Nix (at Elections and "via" Mr Wilkinson). The Information Commissioner expressly warned Mr Nix about the adverse publicity that was likely to arise for Cambridge Analytica if it did not cooperate with the ICO …

Notwithstanding the Information Commissioner's warning, Elections did not cooperate with the ICO. To the contrary, Elections consistently refused to grant access, which was a strategy conceived of and/or approved by Mr Nix. The ICO was compelled to apply to Court for a search warrant, which it did successfully on 23 March 2018. As had been foreshadowed by the Information Commissioner's letter to Mr Nix, the execution of that search warrant was carried out in well-publicised circumstances." [emphasis added]

Evidence relating to the ICO Dealings

The Internal and External Teams acting for CA

160. In his witness statement Mr Nix explained who was dealing with the ICO for CA both internally and externally:

"67. Internally, the team dealing with the ICO consisted of Dr Tayler, Mr Wheatland and Mr Stephen Wilkinson (Mr Wilkinson)... Mr Wheatland was the COO and CFO; Dr Tayler was the Chief Data Officer for both CA LLC and the SCL Companies …and Mr Wilkinson was the Chief Data Protection Officer …There was also Mr Sean Richardson (Mr S Richardson), who was an internal legal advisor for CA LLC and reported directly to Mr Wheatland. Mr S Richardson headed Cambridge Analytica' s in-house legal team and was a specialist Technology & Privacy lawyer.

68. Externally, the business engaged Mr Matthew Richardson (Mr M Richardson) (a barrister with at Henderson Chambers - 2006 call) as well as Mr Philip Coppel KC (Mr Coppel KC) (at Cornerstone Barristers - 1994 call). The business also had the benefit of additional legal advice and support from solicitors Squire Patton Boggs... I understood that Mr Coppel KC was a leading expert in data protection and personal privacy and was invited by the Leveson Inquiry to give expert evidence on data

protection and the protection of personal privacy. I also believe that election law has always been a central part of Mr Coppel KC's practice …".

161. Mr Nix's evidence in his witness statement was that he:

"… was not involved in making any strategy decisions, for the simple reason that the expert team were simply much more competent than me in this regard and as such I was copied in on some correspondence with the ICO but not all …".

Correspondence prior to the 7 March Letter

162. It is worth noting by way of background Mr Nix's evidence that the ICO's letters over the course of their investigation were variously addressed to SCL Group, SCL Elections and to Cambridge Analytica and that internally they did not draw a distinction as to which company was engaging with the ICO, as post-January 2018, all companies were owned by Emerdata regardless of brand. The precise corporate entity within CA to which a particular letter was addressed does not affect the analysis in relation to Mr Nix's alleged breach of duty as he was CEO of the SCL Companies including SCL Elections.

163. The 7 March Letter referred to in the RAPOC was addressed to SCL Elections. It was not the first contact by CA with the ICO over data protection. In March 2017 there had been a meeting with the ICO and CA and the Court was taken to correspondence in May 2017 pursuant to which the ICO was seeking general information about the processing of data by CA. Mr Nix's evidence in cross examination was that what the ICO was interested in at least in part if not principally, was whether CA was still holding Kogan data. [Day 4 p38]

164. In September 2017 there was a letter from the ICO which related to a subject access request from a Professor Carroll and which required CA to provide information to show that they had complied with data protection laws.

165. There then appears to have been a further enquiry from the ICO in November 2017 which was not pursued by the ICO until 5 February 2018 when the following letter was sent by the ICO to Cambridge Analytica:

"Thank you for your letter of 24 November 2017 in response to the Information Notice served on Cambridge Analytica. <u>The information you have provided to date has been helpful however we now require further clarification and it is hoped that you will cooperate with our request without the need for a further Information Notice.</u>

1. You have previously referred to working on three UK election campaigns over the past 15 years. Please confirm which UK election campaigns were worked on.

2. *We understand that in relation to the three UK election campaigns SCL worked on, none of them involved the processing of personal data. Please describe SCL's role in each of the campaigns and what data SCL had access to.*

3. *You explain that the goal of the personality quiz is to profile personality profiles over time. Does this mean that anyone who fills out the survey is either added to your data base or is linked to an existing profile in your data base? Further, do you provide fair processing information to those who use the 'Login with Facebook' widget or sign-in without the Facebook widget? If so, explain.*

4. *We understand that in the past you have pulled data such as the content of tweets from the main Twitter APL Although this data is publicly available, the ICO could still regard it as personal data.*

    a. *Please explain how this data is pulled from Twitter.*

    b. *Was any fair processing information provided?*

5. *In February 2016, Cambridge Analytica's CEO, Alexander Nix, told Campaign magazine: "Recently, Cambridge Analytica has teamed up with Leave.EU - the UK's largest group advocating for a British exit (or 'Brexit') from the European Union - to help them better understand and communicate with UK voters. We have already helped supercharge Leave.EU's social media campaign by ensuring the right messages are getting to the right voters online and the campaign's Facebook page is growing in support to the tune of about 3,000 people per day ." Please explain this comment and, in particular, how did Cambridge Analytica help supercharge Leave.EU's campaign by ensuring the right messages are getting to the right voters online?*

6. *Can you please confirm whether Julian Wheatland, (who we understand is, or was, Analytica's Chief Financial Officer), or any other Cambridge Analytica employee or employees, whether or not still employed by Cambridge Analytica met with members of the UKIP data team between 2 November 2015 and 19 November 2015? If so, was data shared at any meeting or meetings or subsequently, and if so what kind of data and for what purpose was it shared?*

7. *We understand that Cambridge Analytica created models in the United States which are evaluative assessments created to guess individuals political preference relying on data held in relation to a particular individual. As this data is processed in the UK, please advise us of the following;*

    a. *Please provide specific details in relation to how the rankings are determined within the model.*

    b. *What personal data is used to determine the rankings?*

c. What data is used in the creation of such models? Please confirm the sources of any data

Please provide the requested information as soon as possible and in any event by 19 February 2018." [emphasis added]

166. This was self-evidently a very wide ranging letter and the 4 page detailed response from CA on 16 February 2018 commenced as follows:

"Thank you for your letter dated 5th February 2018 in response to our ongoing discussions relating to the activities of Cambridge Analytica (CA). Whilst I note your acknowledgement of our communication dated 24th November 2017, may I reiterate that what was said in that letter. Your letter dated 25th October 2017 does not constitute an Information Notice within the meaning of the Data Protection Act 1998 ("DPA) S43 and we provided information to the Information Commissioner's Office ("ICO") on a voluntary basis.

While we remain committed to assisting the Commissioner with information as requested within its latest letter, any request for assistance must be proportionate and balance the matters of legitimate concern to the ICO against effort required by us in answering those requests. The requests so far have proved very time-consuming and your ultimate goal is no longer clear to us…". [emphasis added]

7 March Letter and the ICO demand for access

167. The 7 March Letter from the ICO to SCL Elections stated:

"It appears to me, Stephen Eckersley, Head of Enforcement, appointed pursuant to paragraph 4 of Schedule 5 to the Data Protection Act 1998 as amended, that there are reasonable grounds for suspecting that an offence or breach of the data protection principles under the Data Protection Act 1998 has been or is being committed.

Namely:

1. The offence of knowingly or recklessly, without the consent of the Data Controller obtaining personal data contrary to Section 55 (1) (a) & (b) of the Data Protection Act 1998.

2. Failure to comply with Schedule 1, Part 1 of the DPA/

And that there is evidence to be found on the premises of SCL Elections Ltd. 55 New Oxford Street, London WC1A lBS

THEREFORE TAKE NOTICE that on Thursday 15th March 2018 at 12pm I will, by Sally Anne Poole and my officers, staff or agents, demand access to the above premises for the purposes of inspecting, examining, operating and testing equipment and

inspecting documents and seizing any documents or other material found which may be such evidence namely;

1. All correspondence, emails, records of communications and meetings (and any other associated material) between SCL Elections Ltd, their employees, officers or agents and Global Science Research (Company no. 09060785), their employees, officers or agents.

2. Documents, or other materials held electronically or hard copy, obtained from Global Science Research on or after 4 June 2014.

3. Any derivative data created by SCL Elections as a result of the data obtained from Global Science Research...". [emphasis added]

168. The evidence of Mr Nix is that following receipt of this letter he flew back from America and met with Mr Coppel KC:

"The next day Julian and I met with and engaged Philip Coppel KC to help us to navigate this , together with Matthew Richardson and all the internal staff. So I think it was a concern. We were slightly blindsided by this. It is a very serious letter and it required a serious response which is what we gave it…" [Day 4 p44]

169. It was put to Mr Nix in cross examination that the 7 March Letter was limited to the GSR data and CA could have easily proved that they no longer held this data:

"Q. So you could have responded to this letter and said, "We have given you all the proof, if you want to come and look for the proof yourself, you are very welcome to do so. We carried out an audit. There is no GSR data at all. If you want to come and look, and prove it for yourself, please do."

…

A. That is not what they are asking for, is it? Even in this simple letter, what they are asking for is: "All correspondence, emails, records of 16 communications and meetings (and any other associated material) between SCL Elections ... and [GSR] ... "Documents, or other materials ..." So what they are asking for is a digital footprint of everything that has happened between GSR and the company from the day we met them through to the day of this letter."

Email 9 March from Mr Nix to Mr Coppel

170. Following the meeting Mr Coppel apparently drafted a proposed response to the ICO to which Mr Nix responded by email on 9 March 2018:

"…I also think your letter is excellent, but having discussed the matter with Alex Tayler, we think that it might be better not to volunteer quite so much information at this initial stage and at least until we understand more about the exact nature of their enquiry.

He has offered to amend your letter, and we should have an updated draft tomorrow COB."

171. It was put to Mr Nix in cross examination that he together with Dr Tayler, decided to amend the proposed draft to offer less cooperation to the ICO. Mr Nix rejected this:

"A. No, I wouldn't accept that. Dr Tayler decided that, together with the internal team. They came up with that strategy. They simply asked me to send it because Philip had written to me.

Q. Did you agree with the strategy?

A. Well, the reason I have experts around me is to seek their advice and listen to it. It would not be much good employing people with multiple PhDs and law degrees, of which I have neither and no real knowledge of data and data compliance, to make a decision and overrule them. It was not so much did I agree, was it my decision, I deferred to their expertise. I think that is a really sensible thing to do in my position." [Day 4 p48-49]

Email 13 March 2018 Dr Tayler to Mr Coppel

172. In an email on 13 March to Mr Coppel Dr Tayler wrote:

"My concern about your letter is that we're too quick to volunteer our emails to them. I have slightly changed your letter below to instead suggest we send them only relevant material with a cover letter. This at least allows us to control the narrative about our interaction with GSR..."

Email 13 March 2018 from Mr Coppel

173. Mr Coppel responded at 22.51 on 13 March with a few corrections and the comment:

"Though less forthcoming, it should be sufficient to stave off an application for a warrant."

Dr Tayler then instructed Mr Wilkinson the following morning to send the letter to the ICO.

Email 14 March 2018 SCL Elections to ICO

174. The response that was sent by SCL Elections to the ICO on 14 March 2018 included the following passage:

"SCL Elections Ltd is committed to helping the ICO with its investigations. Point (3) is the easiest to answer: I can confirm that SCL Elections Ltd does not hold any data obtained from Global Science Research or any derivatives thereof. Points (1) and (2) are likely more time-consuming since these demands are not time- limited, do not limit

themselves to individuals within either SCL Elections Limited or Global Science Research Limited, do not limit themselves to any particular subject, and do not limit themselves to a particular medium of recording. Thus, the demands have cast the net very widely indeed. I will have a better idea of how great the burden is on the company once we get into retrieving the material, and I may want to come back to you on this." [emphasis added]

175. The penultimate paragraph of SCL Elections' letter was as follows:

"In order to make you a faster (and likely more useful reply), I will in the next few days set out in a letter to you the interactions between SCL Elections Ltd and Global Science Research. If you wish, I can supply you with the most relevant emails between the parties together with copies of the signed agreements… In this way you may find that you can cast any request for data with more specificity than the dragnet terms currently proposed, and that this will not impair the requirements of your investigation. Please let me know if you would like to follow this route (which is mutually advantageous) and I will prepare these materials for you." [emphasis added]

Email 14 March from ICO to Stephen Wilkinson

176. The email response from the ICO requested the documents which CA had offered to provide:

"…I would also be pleased to receive the documents referred to in the penultimate paragraph of your letter in the next few days…". [emphasis added]

177. The reaction of Stephen Wilkinson can be seen in an email to Dr Tayler and others early on the morning of 15 March 2018 at 08:37:

"The ICO have responded to our letter regarding the 'Demand for Access' notice. I'm pleased to say the ICO should not be in attendance today although there is a request for clarification as well as information relating to the penultimate paragraph, the timeline for submission of this information is vague as it indicates 'a few days'. We should respond to Ms Poole's email clarifying her request and proposing a definitive date for the submission of information." [emphasis added]

Email 15 March from Dr Tayler to Stephen Wilkinson (08:45) about timing of document provision

178. In an email of 15 March Dr Tayler suggested to Mr Wilkinson a period of 2 weeks to provide the documentation:

"You can write back to her and say that no parent, subsidiary or affiliate companies of SCL Elections Ltd hold data obtained from Global Science Research. I think the end of next week is probably a reasonable amount of time to get the material together, but we will need to have it reviewed by Matt. Perhaps we should say two weeks? There's no

reason we should be rushed by them, they take months to come back to us following each communication."

179. Mr Wilkinson responded by email agreeing with Dr Tayler.

Email 15 March 2018 from SCL to ICO

180. An email was then sent by Mr Wilkinson to the ICO reflecting the exchange between Mr Wilkinson and Dr Tayler:

"…We can confirm that no parent, subsidiary or affiliate companies of SCL Elections Ltd hold data obtained from Global Science Research… SCL will send on documentation referred to in the penultimate paragraph of our letter within two weeks of this email."

Letter 16 March 2018 from the ICO

181. On 16 March 2018 the ICO responded:

"We write further to… your most recent response by email dated 15 March 2018. In that email you proposed sending documentation, which in your previous letter of 14 March you suggested could be made available within the next few days, within the following 2 weeks (by 29 March).

Having reviewed this matter further, we are not satisfied with this response and approach and in particular the timescales proposed. In order to investigate this matter fully and effectively, we reiterate our demand to access the premises of SCL Elections Limited, of which the company was initially given notice on 7 March 2018.

We intend to attend the premises of SCL Elections Ltd at 55 New Oxford Street on Wednesday 21 March 2018 at 12 noon in order to enter and search the premises for evidence…

We request that written confirmation is given by 4pm on Monday 19 March 2018 as to whether access to the premises on Wednesday 21 March is to be permitted or refused. Please note that in the event that such access is refused our next steps will be to consider making a Court application for a warrant, of which we will give you notice so that the company has the opportunity to be heard on the granting of the same." [emphasis added]

Letter 18 March 2018 from the Information Commissioner addressed to Mr Nix and sent 'via' Mr Wilkinson

182. The letter from the Information Commissioner to Mr Nix (referred to expressly in the pleadings) was sent on Sunday 18 March after the publicity over the weekend of 17 March. It read:

"I write in light of the considerable concerns being expressed publicly about the conduct of Strategic Communications Ltd (SCL) and Cambridge Analytica (CA) in news coverage over the past 48hrs and your statements in responses to those concerns.

As you will be aware we are still waiting your provision of Information requested by way of a Demand for Access notice of 7 March. Initially, your staff Indicated that Information could be provided within a timescale of 'the next few days', and we held our initial attendance at your premises. We were then told it would be provided in a timescale of weeks. We have explained this is unacceptable and therefore we intend to attend your premises on Wednesday 21st March to conduct a search under the Demand for Access unless you indicate you will refuse such access or fail to respond to our latest letter, in which case it is our intention to move to list for a hearing for a search warrant under Schedule 9 of the Data Protection Act 1998.

My observation, given your comments reported in the media, your press release and in evidence to the Select Committee is that an inspection by the regulator to verify the facts of the situation would be in everyone's interest at this time… As such I would be happy to expedite our inspection of SCL/CA and would be happy to make arrangements for attendance by a team of auditors and investigations from my office starting as early as Tuesday March 21…

Investigations by my office would usually be conducted in private.

However, given the scale of interest in this case, my view is that it is likely to be in the public interest that I provide a detailed public update on our investigation. I anticipate that at the very least Parliament's DCMS Select Committee will seek such an update shortly. The degree of your co-operation (or lack of it) is likely to feature in such an update, and, as provided for in S59(2) of the Data Protection Act 1998, I invite your comments on this to inform my consideration of the public interest test in this case." [emphasis added]

183. It is relevant to note as context for the letter of 18 March 2020 sent by the Information Commissioner to Mr Nix that on 16 March 2018 CA was suspended by Facebook and on 17 March 2018 the first of the Channel 4 broadcasts ("*Cambridge Analytica: Whistleblower reveals data grab of 50 million Facebook profiles*") went out.

184. The press statement issued by Facebook included the following statement:

"…By passing information on to a third party, including SCL/Cambridge Analytica and Christopher Wylie of Eunoia Technologies, [Kogan] violated our platform policies. When we learned of this violation in 2015, we removed his app from Facebook and demanded certifications from Kogan and all parties he had given data to that the information had been destroyed. Cambridge Analytica, Kogan and Wylie all certified to us that they destroyed the data.

…

Several days ago, we received reports that, contrary to the certifications we were given, not all data was deleted. We are moving aggressively to determine the accuracy of these claims. If true, this is another unacceptable violation of trust and the commitments they made. We are suspending SCL/Cambridge Analytica, Wylie and Kogan from Facebook, pending further information." [emphasis added]

185. The internal discussions that followed the letter of 18 March 2018 in the form of the email correspondence are before the Court. I note that Mr Coppel in an email to Dr Tayler on the afternoon of 18 March 2018 (16:43) expressed the view that:

"The tone and content of the ICO 16/3/16 letter is very different from that of the ICO 14/3/18 letter and, for that matter, the ICO 7/3/18 letter. The 16/3/18 letter states an intention to visit SCL's premises on 21/3/18. It does not invite discussion or negotiation. The only request made in the letter is for an indication whether SCL will permit that access or not. The sub- text is that if SCL won't permit the ICO in, the ICO will apply for a warrant. I see nothing in the 16/3/18 letter suggesting that the ICO will honour the two-week deadline. That new posture has been reiterated in the 18/3/18 letter (which has suggested an even earlier date – "Tuesday March 21" should, I think, read "Tuesday March 20"." [emphasis added]

186. Later that evening CA engaged SPB to advise and a conference call was held. SPB then circulated a draft letter "*drafted in order to try and de-escalate the current threat*" and made a proposal to provide the documents by 5pm on the Wednesday. Mr Coppel expressed the view that the letter struck the "*right tone*" and Mr Wheatland in an email said he agreed and the letter "*looks good to me".*

187. On Monday 19 March (8.38) Mr Nix emailed that he was happy with the draft letter and at 10am SPB indicated that they would send the letter.

Letter 19 March 2018 Squire Patton Boggs to ICO

188. As discussed internally, the letter sent by SPB on 19 March 2018 offered to provide the documentation by 5pm on Wednesday 21 March 2018:

"…It is clear from this correspondence that our client has always been willing to assist the ICO in respect of this matter and that this is consistent with all of the numerous interactions our client has had with the ICO over the last 12 months.

…Retrieving requested information will require a substantial diversion of resources for our client and Is for that reason that a delivery date of 29 March was proposed. In light of the apparent urgency of the matter from the ICO's perspective, our client Is prepared to redeploy its resources in order to retrieve the requested documents as quickly as possible.

Should the timescales proposed genuinely be the cause for concern then our client will provide the information requested by no later than 5pm on Wednesday 21 March 2018.

As this was acceptable to Ms. Poole previously we trust this will assuage any concerns you may have about our client's willingness to assist the ICO's investigations and that there will be no need for the ICO to attend our client's premises.

…

Should you still feel it necessary to make a public statement, in respect of which all of our client's rights are reserved, then we ask that you make clear that our client has always cooperated with the ICO and assisted with its investigations, including inquiries made prior to its latest demand for access, and has offered to provide the requested information voluntarily." [emphasis added]

Letter 19 March 2018 ICO to SPB and internal correspondence

189. The ICO responded to that letter the same afternoon. The letter from the ICO read in material part:

"…We note your client's offer to provide the information requested ln paragraphs 1 and 2 of the Demand for Access voluntarily by 5pm on Wednesday 21 March 2018, which we now expect to receive by that deadline.

However our concerns do not relate solely to the timescales previously suggested for the provision of this information. In relation to paragraph 3 of the Demand for Access, we note that your letter sets out your client's position as that it did not hold any data obtained from Global Science Research (GSR) or any derivatives thereof.

We have reason to suspect that is not correct, The evidence relating to this issue is crucial to our investigation into suspected offences contrary to section 55 Data Protection Act 1998 (DPA) and contraventions of the data protection principles set out in Schedule 1 DPA, which have come to light during our investigation into data analytics and their use for political purposes. This particular strand of our enquiry relates to suspected s55 DPA offences and principle contraventions relating to the obtaining and subsequent use of Facebook data by Doctor Kogan/GSR and your client.

Our reasonable grounds for suspecting that Facebook data and/or derivative data obtained from GSR is held or on behalf of by your client, includes evidence from a whistle blower, previous responses from your client and apparent contradictions on this issue. We are not satisfied that this aspect of our investigation has been in any way resolved by your client's response.

We therefore repeat our intention to attend your client's premises at 55 New Oxford Street on Wednesday 21 March 2018 at 12 noon to exercise our inspection powers under schedule 9 of the DPA.

From your response earlier today, we assume that your client intends to refuse access, Please confirm whether or not this is the case by 6pm today (an extension of 2 hours

from our letter of 16 March), If we do not hear by that time, our next step will be to seek a listing for an on notice warrant application to be made to a circuit judge…". [emphasis added]

190. The evidence of the contemporaneous emails shows that the reaction of Mathew Richardson to this letter was to suggest the following way forward to avoid the need for a site visit:

"I think that we will get somewhere if we tell them all about Chris Wylie and his history with the company and that we are currently undergoing a third-party audit from a respected independent provider to show that we do not have the GSR data, and we will be happy to share that audit with the ICO. In those circumstances there will be no reasonable need for a site visit."

191. Dr Tayler responded by email that he agreed with this. SPB then circulated a draft letter in advance of the 6pm deadline. Dr Tayler then approved the letter at 18.02. However at 19.31 Matthew Richardson wrote:

"The information commissioner just said that CA are being "uncooperative". What possible basis does she have for saying that?"

It would appear from the evidence that the letter had not been sent to the ICO at that time and whilst CA were discussing with their advisors how to respond to the ICO's demand for access, the Information Commissioner gave an interview on Channel 4 news.

Transcript of Interview of Elizabeth Denham, Information Commissioner on Channel 4 News, 19/03/2018

192. In the interview Ms Denham said:

"…

JS - Now by their own admission Cambridge Analytica say that they hide what they are doing, so that's not making your job any easier, do you have the resources?

ED - It isn't making our job any easier, on March 7th I issued a demand for access to Cambridge Analytica. They were given until 6pm tonight to respond to it. I'm not accepting their response so therefore I will be applying to the Court for a warrant, I've instructed my office, tomorrow. So we need to get in there, we need to look at the databases and we need to look at the servers and understand how data was processed or deleted by CA, there are a lot of conflicting stories about the data.

…

JS - When you say you're going in, are you going in tomorrow?

ED - We are applying for a warrant tomorrow, we're hoping to be able to go in by Wednesday.

...

JS - In the position that you hold, are you concerned about the implications for democracy?

ED - I am. I think it's a very important moment. Right now we have parliamentarians, we have the media, we have companies, we have the public's attention on voter surveillance. And I think it's critically important that there's trust and confidence of the public in our democratic institutions, and it's a very important time for us to focus on this.

JS - And just to clarify, the warrant is for Cambridge Analytica not for Facebook?

ED - It's for Cambridge Analytica. Facebook has been cooperative with us and has provided a great deal of information about the profiles, about the 50 million profiles. We're waiting for more information but it's Cambridge Analytica that has been uncooperative with our investigation." [emphasis added]

Emails 19 March and 20 March between CA and its advisers following the interview by the Information Commissioner

193. Mr Coppell emailed his reaction to the interview at 22.30 to Matthew Richardson, SPB and Dr Tayler:

"May I suggest SPB get a transcript of that interview prepared and get the time of it.

Incidentally, the ICO does not have any general "investigative" power, as the ICO might from that interview have one believe. SCL/CA aren't s 41A data controllers. Presumably there has been as 42(1) request for assessment, but the way that such a request for assessment is supposed to be "investigated" is through a s43 information notice (which is given coercive force by s 47 and against which there is a right of appeal under s 48). In short, the "investigation" is a statutorily defined procedure: there is no roving right of investigation. The placement of s 50, which gives effect to Sch 9, rather suggests that the powers of entry+ inspection in Sch 9 are to be exercised consistently with and in support of the procedure in Pt V.

I appreciate that it's a TV interview, but it looks a bit like the ICO is dancing to the clamour from certain quarters rather than a sober performance of her statutory functions." [emphasis added]

194. At 23.33 SPB wrote:

"I attach an updated draft letter to send to the ICO taking into account the IC's interview with Channel 4 news.

In accordance with my discussions with Alexander and Alex, it would seem clear the ICO is determined to seek a warrant and attend CA's premises, as such the letter has been drafted primarily to highlight the unsatisfactory nature of the comments made in the interview and to try and ensure the ICO provides us with sufficient notice prior to any application being heard. We have however also suggested that CA would in principle agree to the ICO conducting an inspection subject to the scope being agreed in advance.

Please let me know if you have any comments on the draft - in particular Philip given he is most likely to be referring to the correspondence at the hearing of any warrant application." [emphasis added]

195. Mr Wheatland was asked by SPB whether they should send the letter or wait for confirmation from Mr Coppell.

196. On 20 March 2018 12:33am, Julian Wheatland asked SPB to wait for Mr Coppell to comment and then to send the letter.

197. In an email at 0559 on 20 March Mr Coppel wrote:

"...

1. SCL have not now refused access, which is one of the requirements that a judge has to be satisfied of before issuing a warrant: see para2(1)(b)(i) of Sch 9.

2. A TV interview with the IC does not constitute notification of the application for the warrant, another requirement that a judge has to be satisfied of before issuing a warrant: see para 2(1)(c) of Sch 9.

3. If it goes before the Court today, SCL have not been given "an opportunity to be heard" since that means a reasonable opportunity to be heard, and that means more than just a couple of hours: see para 2(1)(c).

4. There is nothing to suggest that this is a case of urgency or that compliance with the requirements of para 2(2) would defeat the object of the entry: see para 2(2) …".

198. This advice was reflected in the letters which SPB then sent to the ICO on the morning of 20 March. The second letter included the following:

"Last night on Channel 4, the Information Commissioner stated that she intended to apply for a warrant today. This comment has been reported widely in this morning's media without clarification or contradiction from the ICO.

As per our earlier letter of today, and in accordance with your previous assurances, we wish to make you aware of the following:

1. Our client has instructed Philip Coppel QC in respect of this issue and your demand for access;

…

3. SCLE are, subject to agreeing the scope of any searches, not unreasonably refusing access to their premises, such being one of the requirements for issuing a warrant pursuant to para2(i)(b)(i) of Sch 9 of the DPA;

4. No notice of your intended application has been provided to our client. A TV interview with the ICO does not constitute notification of the application for the warrant, another requirement of which a judge has to be satisfied before issuing a warrant and our client is entitled to have an opportunity to be heard at the hearing: see para 2(1)(c) of Sch 9…". [emphasis added]

Letter 20 March 2018 from ICO to SPB

199. In that letter the ICO wrote:

"…By your first letter of this morning, received by us at 07.21, you made two proposals:

a. That commission of an audit by Stroz Friedberg, the results of which will be shared with the ICO with the further provision of an affidavit; alternatively

b. That your client will allow the ICO access to your client's premises "subject to agreeing the scope of the inspection". You raise "potential" privilege and confidentiality concerns.

7. Your first proposal is not acceptable to us. The Commissioner is carrying out her own investigation and requires access to your client's premises in the course of that investigation.

8. As to your second proposal, the Commissioner does not intend to agree restrictions on the scope of her investigation. The Commissioner's powers are set out in Schedule 9 paragraph 1(3) DPA, and the Commissioner reserves the right to exercise those powers fully in the course of her investigation. Your client is not entitled to limit the Commissioner's investigation in the manner you suggest.

…

10. Next steps: Please confirm by 3pm today that you will allow us access to the premises at 55 New Oxford Street at 12 noon Wednesday 21 March 2018…".

Email 20 March from SPB to ICO

200. SPB then responded to the ICO by email in the afternoon of 20 March seeking to avoid the warrant application but the proposal was rejected by the ICO:

"We write further to our recent correspondence on this issue and note your intention to have the warrant application listed for tomorrow morning. As previously stated, this deprives our client of the reasonable opportunity envisaged by the Act to make informed submissions on why the application should be granted. You have given no explanation as to why it is necessary to proceed with such undue expedition and the only conclusion which can be drawn is that the ICO is responding to public pressure in light of the recent media coverage. That is no basis for trampling over our client's statutory rights. In a final attempt to avoid a hearing tomorrow, our client hereby undertakes not to delete, remove or otherwise interfere with the material requested pending a negotiated settlement of the DPA issues. Please confirm by return that the threat of a Court hearing tomorrow will now be removed whilst these discussions continue."

Discussion on ICO

201. It was submitted for Mr Nix that: "*Reasonable reliance on experts, such as lawyers, can be significant: Palmer's Company Law at 8.2813."*

202. However this passage is of limited assistance to Mr Nix which makes it clear that on receipt of the advice directors must themselves exercise independent judgment on the matter at hand consistent with section 173 of the Companies Act:

"The general duty of care and skill, by its very nature, means that on occasions the directors will need to seek expert advice, and indeed will be considered negligent if they do not first obtain such advice before proceeding. Advisors need to be selected with appropriate care, and on receipt of the advice the directors must themselves exercise independent judgement on the matter at hand (Companies Act 2006 s.173). Where directors reasonably rely on experts, such as lawyers, they may escape claims of breach of duty of care, and in any event may have grounds for being excused under Companies Act 2006 s.1157." [emphasis added]

203. It is clear on the evidence that CA was receiving detailed legal advice on its strategy towards the ICO from experts in the field of data protection both internal and external. Mr Nix however had to exercise independent judgment and in particular as the CEO had ultimate control of the strategy adopted towards the ICO.

204. The pleaded case is that Mr Nix *"caus*[ed] *or permit*[ed] *Elections to conduct itself in its dealings with the ICO in March 2018 in a way that was unreasonable and/or uncooperative."* There appear to be three time periods in March 2018 identifiable from the pleadings and the context:

204.1. The period up to and including 14 March;

204.2. The period from 15 March to the letter of 18 March from the Information Commissioner;

204.3. The period from 18 March to 20 March when Mr Nix was suspended.

The period up to and including 14 March

205. This encompasses the 7 March Letter from the ICO and the initial demand for access, the internal discussions (including with external lawyers) and the response of 14 March from SCL Elections offering to provide relevant emails and signed agreements.

206. It was submitted for the Claimants that SCL Elections could easily have provided information to the ICO. The Claimants in oral closing submitted that Dr Tayler accepted that the companies had nothing to hide from the ICO. [Day 7p41]

207. The evidence of Dr Tayler in this regard was in relation to the time when SCL were resisting the ICO's application for a warrant. Dr Tayler was asked in cross examination about the contents of his witness statement dated 23 March 2018 which he provided in support of SCL's opposition to the warrant:

"Q. So, you were of the view that it should be quite easy therefore to prove to the ICO that you did not hold any of the Kogan Facebook data and you could explain to them that mistake?

A. It's not easy to prove the absence of something, but I felt that we explained what that line on the data inventory was and I think we showed them an invoice where it had come from.

Q. And would it be fair, again using my language, Dr Tayler, would it be fair to say that at this stage in March 2018, as far as you were concerned, Elections had nothing to hide?

A. Elections had nothing to hide?

Q. From the ICO?

A. Yes." [Day 5, p40:2-40:16]

208. That witness statement was after Mr Nix had been suspended and further it is clear that in cross examination Dr Tayler was responding to a question concerning the position at that time so this evidence has no relevance to the issue of Mr Nix's approach to the ICO.

209. Looking at the contemporaneous documentary evidence which is relevant to this period, as set out above, the 7 March Letter on its face was not limited to whether CA held the GSR data but was a broad ranging demand which extended to what Mr Nix correctly in my view described as "*a digital footprint of everything that has happened between GSR and the company from the day we met them through to the day of this letter"*.

210. Further I note that in the letter of 14 March SCL Elections confirmed that it did not hold any data obtained from GSR. This was merely met with a request by the ICO for confirmation that no parent, subsidiary or affiliate held data from GSR and when this

was confirmed in an email of 15 March the ICO nevertheless sought to access the premises of SCL Elections.

211. It was submitted for the Claimants that Mr Nix *"could and should have sought a more conciliatory resolution to the ICO's investigation".* In particular the Claimants pointed to the "*firmer line*" adopted by CA in that "*rather than accepting letters as drafted by Mr Coppel, Mr Nix took steps himself or approved steps designed to take a firmer line that than Mr Coppel had drafted".* The Claimants pointed to the email of 9 March from Mr Nix and the email of 13 March from Dr Tayler.

212. As set out above, Mr Nix did state in the email of 9 March that *"it might be better not to volunteer so much information"* and in an email of 13 March Dr Tayler proposed that only *"relevant material"* should be provided. However I note that the advice from leading counsel experienced in this field (email of 13 March) was that the approach proposed to be adopted in response to the 7 March Letter "*Though less forthcoming …should be sufficient to stave off an application for a warrant*." This does not support an inference that Mr Nix should have sought a "*more conciliatory resolution*" at this stage.

213. In any event the Claimants appear to accept in their pleaded case that up until 14 March SCL Elections had acted in a cooperative manner, so this purported reliance on correspondence which predated the 14 March is at odds with their pleaded case on breach of duty. The relevant passage in the RAPOC read:

> *"26. On 14 March 2018 Elections responded to the ICO's letter (in the person of Stephen Wilkinson, described as Elections's "Data Compliance Officer"). Elections's strategy, as ultimately determined and approved by Mr Nix, was to offer to cooperate in respect of the documents, but not to engage at all with the request for access (presumably in the hope that the ICO would not pursue the request for access so long as there was sufficient cooperation in respect of the documents) …*
>
> *27. This cooperative approach appeared initially to find favour with the ICO…".*
> [emphasis added]

214. On the Claimants' pleaded case the complaint was a failure to engage with the request for access but even that seems, on the pleadings, to be part of the "*cooperative approach*" which is said to have initially found favour with the ICO.

The period from 15 March to the letter of 18 March from the Information Commissioner

215. In its pleadings the Claimants asserted that: "*it was … Elections's change in position about when the documents would be disclosed that led the ICO renewing its demand for access, which otherwise it had apparently been willing not to pursue."*

216. As set out above, on 15 March SCL Elections told the ICO that it would send on documentation within 2 weeks of the email.

217. In my view the evidence of the earlier letter of 14 March to the ICO indicates that no firm timeframe had been set by SCL Elections (and thus there was no "*change in position*" by SCL Elections). As set out above, the letter of 14 March merely offered to set out in the next few days "*the interactions*" between SCL Elections and GSR; no timescale is specified in that letter for the provision of emails and signed agreements.

218. I accept that the ICO did not read the letter in that way and responded on 16 March stating that they were not happy with the timescales proposed. However on an objective reading of the contemporaneous correspondence, in my view SCL Elections did not change its position.

219. Even if I were wrong on that, to establish a breach of s172 the Claimants would have to show not that with hindsight Elections took the wrong decision but that applying the subjective test, Mr Nix did not consider he was acting in a way which would be likely to promote the success of the company.

220. Insofar as it is relevant to the issue of Mr Nix's subjective state of mind, I do not accept that Mr Nix was motivated in his approach to the ICO at this time by an "*irrational and incorrect belief*" of bias which it is alleged "*informed a subsequent needlessly uncooperative approach to dealings with the ICO*" (paragraph 25 of the RAPOC).

221. As set out above, the two week timeframe appears on the evidence of the internal email of 15 March to have been considered by Dr Tayler to be a reasonable amount of time to get the material together and reviewed. It was not prompted by any evident desire to be uncooperative. I take into account in this regard the protracted and lengthy correspondence between SCL Elections and the ICO prior to March 2018 which is referred to above.

222. In relation to section 174 it was submitted for the Claimants that it cannot have been the act of a reasonably competent director to proceed of the basis of a conspiracy. This submission appears to put the case higher than the pleaded case of bias but is equally unfounded in my view having regard to the evidence of the correspondence.

223. I accept that both Mr Nix and Dr Tayler appear to have felt they were being unfairly targeted. In an email from Mr Nix to Mr Coppel KC on 9 March 2018 he wrote:

> *"In regards to the hearing that I attended last week ... It would appear that the ICO persuaded the DCMS to ask the question they needed answering, such that they could launch an investigation.*
>
> *It feels like the committee hearing was part of a much larger plan .... (that clearly had nothing to do with fake news)."*

224. In cross examination Counsel for the Claimants referred Dr Tayler to the email of 9 March and he was asked whether Mr Nix, at this stage, was driven by a feeling that the

company was being persecuted. Dr Tayler rightly declined to speculate but when pressed did say:

"A. I don't have the exact timeline in my head, but certainly by the time the media attention ramped up it felt like we were being unfairly persecuted. Yes."

225. However I do not accept that any sense that SCL Elections was being "*unfairly persecuted*" dictated or defined the response to the ICO which on the evidence was clearly formulated having regard to the detailed and ongoing legal advice.

226. It was submitted for the Claimants that it was for Mr Nix (and not the lawyers) to take the "*broad strategic view*" about the merits or otherwise of resisting the ICO's demand for access and he had to take that view in the particular circumstances the companies were then facing including, in his case, his knowledge by no later than 12 March 2018 of the flurry of adverse media coverage that was shortly to arise. It was submitted that it ought to have been obvious to him, taking a strategic view, that Cambridge Analytica's best interests were served by a cooperative rather than an adversarial approach.

227. Although this submission appears to link to Mr Nix's knowledge from 12 March of the impending media coverage and thus to be relevant to this period, it also seems to focus on the merits of resisting the ICO's demand for access rather than the timescale for providing documents which as pleaded is what led to the renewed demand for access on 16 March. In any event the evidence does not support a conclusion that CA was taking an "*adversarial approach*". The evidence shows that SCL Elections were trying to gauge how best to respond to the wide ranging requests having regard to the legal position.

The period from 18 March to 20 March when Mr Nix was suspended

228. The pleaded case appears to focus on the period after the letter from the Information Commissioner on 18 March in that it pleads that Mr Nix caused or permitted SCL Elections to act in a way that was unreasonable and/or uncooperative "*even though the Information Commissioner warned Mr Nix of the adverse publicity implications of doing so".*

229. It was submitted for the Claimants that Mr Nix failed to permit access even following the personal letter from the Information Commissioner offering an "*olive branch*" if Mr Nix cooperated.

230. It is difficult to interpret the letter of 18 March from the Information Commissioner as offering an "*olive branch*" given the terms in which it is expressed:

"…We intend to attend your premises on Wednesday 21st March to conduct a search under the Demand for Access unless you indicate you will refuse such access or fail to

respond to our latest letter, in which case it is our intention to move to list for a hearing for a search warrant …

Investigations by my office would usually be conducted in private.

However, given the scale of interest in this case, my view is that it is likely to be in the public interest that I provide a detailed public update on our investigation. I anticipate that at the very least Parliament's DCMS Select Committee will seek such an update shortly. The degree of your co-operation (or lack of it) is likely to feature in such an update…".

231. However the decision not to grant access is only a breach of the director's duty in section 172 if Mr Nix was not acting in the way which he considered, in good faith, would be most likely to promote the success of the company for the benefits of its members as a whole. It is clear from the correspondence set out above, that the approach taken was to try and "*de-escalate*": the letter of 19 March from SPB to the ICO offered to provide the information much more quickly (by 5pm on 21 March) instead of granting access. This was a letter which leading counsel said struck the "*right tone".*

232. It was submitted for the Claimants that it ought to have been obvious to Mr Nix, taking a strategic view, that Cambridge Analytica's best interests were served by a cooperative rather than an adversarial approach. It was submitted that a director acting properly would have apprehended that the appearance of trying to avoid the scrutiny of the regulator would be disadvantageous.

233. However as set out in their response of 19 March, by this stage the ICO were of the view they did not accept SCL Elections' statement that it did not hold any data obtained from GSR. I infer from this that the ICO would have insisted on a site visit whether or not SCL Elections granted access without the need for a warrant. Further it would seem clear on the face of the letter from the Information Commissioner that even if access had been granted at this juncture, the matter would have been made public. The letter stated that:

"…Investigations by my office would usually be conducted in private.

However, given the scale of interest in this case, my view is that it is likely to be in the public interest that I provide a detailed public update on our investigation…".

234. Perhaps implicitly acknowledging this, it was submitted for the Claimants that, even if made public the "*tenor of reporting*" would have been different if Mr Nix had granted access to the ICO.

235. I accept that the Information Commissioner in her letter stated that "*The degree of your co-operation (or lack of it) is likely to feature in such an update* [to the Parliamentary DCMS Select Committee]". However as the correspondence above shows, whilst SCL Elections were preparing a response to the letter of 19 March and before it could send

the response stating whether it was prepared now to grant access, the Information Commissioner gave an interview on Channel 4 in which she stated that she would be applying for a warrant and that CA had been "*uncooperative*" with their investigation.

236. In my view the approach of the ICO appears to have been informed by the press coverage rather than any lack of cooperation from Mr Nix or CA. The letter of 18 March to Mr Nix referred to the media reports as the context for the letter to Mr Nix:

"I write in light of the considerable concerns being expressed publicly about the conduct of Strategic Communications Ltd (SCL) and Cambridge Analytica (CA) in news coverage over the past 48hrs and your statements in responses to those concerns…".

237. In the interview the Information Commissioner said:

"…we need to get in there, we need to look at the databases and we need to look at the servers and understand how data was processed or deleted by CA, there are a lot of conflicting stories about the data…". [emphasis added]

238. Although CA was discussing whether an alternative to a site visit could be offered to the ICO, its response was overtaken by the interview given by the Information Commissioner on the evening of 19 March. It appeared to CA and its advisers that the ICO were intent on obtaining a warrant, however the draft response from CA "*suggested that CA would in principle agree to the ICO conducting an inspection subject to the scope being agreed in advance".* Such a response does not suggest that CA was being uncooperative or unreasonable. Further it is clear from the email exchanges on the evening of 19 March and the early morning of 20 March (set out above) that Mr Coppel's advice was sought throughout. His advice at this time was that "*SCL have not now refused access"* and "*A TV interview with the IC does not constitute notification of the application for the warrant".*

239. In light of the Information Commissioner's comments to Channel 4, I do not accept that allowing access at that juncture rather than allowing the ICO to seek a warrant would have impacted significantly the amount of negative publicity.

Conclusion on Alleged Breach of Duty arising out of Dealings with the ICO

240. I note from *Shell* at [29]:

"It is well established that the test for breach of s 172 is a subjective one (e g Regentcrest plc (in liq) v Cohen [2001] 2 BCLC 80 at [120] per Jonathan Parker J) and requires proof of conduct other than in good faith. As Jonathan Parker J explained, there will be cases in which an absence of good faith can be inferred from the irrational nature of the conduct in issue, but it remains the case that the state of mind of the director concerned is what matters. For these purposes, good faith, not irrationality, is the cornerstone and an honest but unreasonable and mistaken belief that a particular

course of action is in the company's best interests is not sufficient to amount to a breach of s 172."

241. Having regard to the fact that s172 is a subjective test, for the reasons discussed above, the evidence does not support a finding that Mr Nix in his dealings with the ICO was not acting in what he considered in good faith to be in the best interests of the company.

242. As to the alleged breach of s174, applying the authorities referred to above, the question is whether the decision falls outside the range of decisions reasonably available to the directors at the time. In my view the evidence does not lead to a conclusion that Mr Nix acted in a way which fell outside the range of decisions reasonably available to him at the time.

243. Further the degree of cooperation to be afforded was a question for the directors to determine and Mr Nix did so based on ongoing legal advice from experts in the field of data protection and their assessment of what was in the interests of the company bearing in mind the time and inconvenience of responding to the wide ranging requests and allowing access. I accept the submission for Mr Nix that "*these were difficult judgment calls taken in good faith, in difficult circumstances, with the benefit of detailed advice from multiple lawyers (Philip Coppel KC, Matthew Richardson, Squire Patton Boggs) over many emails, calls and meetings."*

244. SCL Elections offered to provide the documentation but with the publicity over the weekend of 17/18 March the ICO decided that it wanted to access the premises in any event. The response of the ICO and its insistence on accessing the premises were not the result of any unreasonable or uncooperative approach on the part of Mr Nix.

245. I also reject the submission for the Claimants that the existence of other serious allegations against the companies made it important to give consent to the search and not to try to resist it. There was good reason to resist a wide ranging search with no clear limits and in my view it was unlikely given the history of the dealings with the ICO and the wide ranging nature of the enquiry that there would have been a prompt resolution that could have avoided the adverse publicity.

246. However even if I were wrong on that Mr Nix did not act in a way which fell outside the range of decisions reasonably available to him at that time.

247. For all these reasons, I find that Mr Nix was not in breach of section 172 or 174 in his dealings with the ICO.

Causation

Relevant Law

248. It was common ground that a breach of the section 172 duty is enforceable as a breach of fiduciary duty whereas a breach of section 174 is enforceable as a breach of a common law duty.

249. The Claimants submitted (paragraph 55 of its skeleton for trial) that it was likely to be relevant that in the case of a breach of an equitable duty, considerations of remoteness and new intervening acts are not relevant and thus Mr Nix could not avoid liability for breach of section 172 by proving that the Companies would have collapsed in any event. However, the Claimants accepted (paragraphs 55.1 and 55.2) that the "but for" test has to be satisfied both at common law and in equity: *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at p434:

"Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred: see Underbill and Hayton, Law of Trusts & Trustees 14th ed. (1987), pp. 734-736; In re Dawson, deed.; Union Fidelity Trustee Co. Ltd. v. Perpetual Trustee Co. Ltd. [1966] 2 N.S.W.R. 211; Bartlett v. Barclays Bank Trust Co. Ltd. (Nos. I and 2) [1980] Ch. 515. Thus the common law rules of remoteness of damage and causation do not apply. However there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred but for the breach: see also In re Miller's Deed Trusts (1978) 75 L.S.G. 454…". [emphasis added]

250. I also note *Palmer's Company Law* at 8.3312:

"If equitable compensation is available, the loss is measured at the time of the trial and must of course be causally related to the breach, on a "but for" test: i.e. compensation will not be awarded if the loss would have been suffered even if the director had not committed any breach."

251. To similar effect is *Clerk & Lindsell on Torts 24th Ed.* at 2-09:

"The first step in establishing causation is to eliminate irrelevant factors, and this is the purpose of the "but for" test. This test asks: would the damage of which the claimant complains have occurred "but for" the negligence (or other wrongdoing) of the defendant? If the damage would have occurred in any event the defendant's conduct is not a "but for" cause."

252. It was submitted for the Claimants that:

"The common law application of the "but for" test, however, is flexible so as to take account of the merits of the case in circumstances of multiple causative factors. DRL and Emerdata will rely on the broad and merits-based approach to causation set out by Lord Nicholls in Kuwait Airways Corp v Iraq Airways Co [2002] UKHL 19; [2002] 2 A.C. 883 at [73] - [74]".

253. In my view that authority does not provide for a general "*merits-based approach to causation*". I note that the authority of *Kuwait Airways* is discussed in *Clerk & Lindsell on Torts 24th Ed.* at 2.10 which supports my view that it is not authority for a general proposition that the "but for" test can be regarded as "flexible":

> *"There are some circumstances, and some torts, where the "but for" test is not satisfied, but nonetheless the Court considers it appropriate to attribute responsibility to the defendant's conduct. In Kuwait Airways Corp v Iraq Airways Co, the claimants sought damages in respect of the loss of 10 aircraft purloined by the Iraqi government following the invasion of Kuwait and subsequently handed over to the defendants for their use.The defendants argued that there was a general rule of liability in tort that the tortious act must have been at least a necessary condition of the damage, and that a claimant would fail if he could not prove that the damage would not have happened but for the tort. On the facts, the defendants said, the claimants could not show that but for the defendants' tortious acts of conversion they would not have been kept out of possession of their aircraft, because the Iraqi government would have retained them or given them to some other state institution. The House of Lords held that the claimants did not have to satisfy the "but for" causation test in these circumstances…*
>
> *In the case of conversion, a tort of strict liability, the causal requirements followed from the nature of the tort, which existed to protect proprietary or possessory rights in property and was committed by an act inconsistent with those rights…".* [emphasis added]

Pleaded Case

254. The Claimants pleaded case on causation is that:

> *48.1. But for Mr Nix's comments at the Meeting, Channel 4 would have been unable to broadcast a damaging programme detailing Cambridge Analytica's ostensible wrongdoing (or any such programme would have been very much less damaging).*
>
> *48.2. But for Mr Nix's behaviour towards the ICO, the ICO would not have had to apply for a search warrant, which was then executed in highly publicised circumstances.*
>
> *48.3. DRL's primary case is that either one of the matters referred to above would have resulted in the failure of the Cambridge Analytica business by reason of the adverse publicity generated. In the alternative, DRL contends that one of the matters referred to above, or alternatively both of them cumulatively, led to the failure of Cambridge Analytica."* [emphasis added]

255. Accordingly the Claimants have to show that for either claim, the cause of the demise of the SCL Companies was the breach of duty i.e. the pleaded comments of Mr Nix at the Meeting which amounted to a breach of duty and/or his behaviour (as pleaded) towards the ICO.

256. In light of my findings above, the second issue does not arise. However I will consider it for completeness.

257. Mr Nix's pleaded defence (paragraph 53 Re-Amended Defence) is:

> *"Neither the absence of the (alleged) comments by Mr Nix from the series of Channel 4 reports, nor a search of Elections' premises by consent rather than by warrant, nor both of these things together, would have avoided or prevented the failure of the Cambridge Analytica business. The sub-paragraphs to paragraph 37 above, which set out Mr Nix's position as to the cause of the demise of the business, are repeated."*

258. Paragraph 37 reads:

> *"37.1. It is denied that "the Channel 4 broadcast" (which is understood to refer to the second part of the Channel 4 series, containing the comments made by Mr Nix at the Meeting) and the publicity surrounding the execution of the search warrant by the ICO were "disastrous" for "Cambridge Analytica" (as to which paragraph 4.1 above is repeated). The demise of the business cannot be attributed to those two matters, save that Mr Nix admits that the latter (the search and seizure of documents and equipment at Elections' premises) was damaging and contributed significantly to what occurred.*
>
> *37.2. On the contrary, the causes of the demise of "Cambridge Analytica" were complex and multi- faceted, but were in summary: (i) Cambridge Analytica's association (through GSR) with the Facebook privacy and data collection controversies; (ii) media reports (at least initially in The Guardian and the Observer and The New York Times) of allegations made by Christopher Wylie and alleged links between Cambridge Analytica and 'Brexit' and Russian involvement in western democratic processes; (iii) the ICO's investigation and the search and seizure of Elections' premises and equipment, and the practical impact this had on the ability to operate the business thereafter; (iv) wider controversies about President Trump and 'Brexit'; and (v) wider public controversy and debate about the use of data in political campaigns more generally."*

Case on Funding

259. In their written submissions for trial dealing with quantum, the Claimants relied on Ms Mercer's evidence in her witness statement that her family would have continued to fund CA to keep it afloat:

> *"62. The position would have been very different if Alexander had not so disastrously undermined Cambridge Analytica with the comments he had made that were broadcast. Had the brand not been destroyed in that way, we would have been willing to keep funding Cambridge Analytica so that it could survive even if it had been unable to survive on its own trading profits. We would have continued to fund it at least until the US government revenue work stream was up and running. We had not committed US$22m in cash, plus the benefit of CA LLC's promissory note, to the business, only to*

let it fail at least before the strategy had played out and the US government business had been up and running for quite some time (and the work had not even started in March 2018). Even leaving aside our hopes for Cambridge Analytica's future profitability, as I have said above, it was appealing to us to have access to a political data consultancy firm that was not hostile to the Republican party. Given Cambridge Analytica's successes in the 2016 presidential election, I do not think it is remotely possible that we would have allowed Cambridge Analytica to fail financially before at least the presidential election in November 2020, and not even then so long as it continued to provide its political services well. In any event, by the time of the 2020 election I feel confident it would not have failed anyway, but would have been very profitable, had it not been for the events of March 2018." [emphasis added]

260. In their closing note the Claimants submitted in relation to causation that:

"…It appears to be common ground that the Companies would have required an injection of external funding to survive 2018 (and it is certainly Mr Nix's case that they would have done so in light of the allegations of data misuse in the media). Ms Mercer has given the clearest evidence that her family was ready to provide that funding, even in an environment of adverse media coverage (as it had in the past). The Mercers were not prepared, however, to provide funding in circumstances where Mr Nix had committed what they considered to be actual wrongdoing (as they considered the comments at the Meeting to be), thereby toxifying the brand to an extent that was impossible as a result of false media allegations. Accordingly, Mr Nix's comments at the Meeting would have prevented the Mercers from putting in further funding in 2018 and would have therefore prevented the Companies from surviving 2018." [emphasis added]

261. Counsel for Mr Nix objected that the Claimants were seeking to introduce a different case from that which has been pleaded. It was submitted for Mr Nix that if DRL wanted to say that the breaches of duty also caused the funder to withdraw his support that was a fact that required pleading: it would have required disclosure from different individuals including Mr Mercer and on different topics (their decisions in March and April 2018 about the future of the business and whether to fund it). The expert evidence would have to have addressed the cashflow position and to identify the timing requirements of any further funding. It was submitted that it was too late for DRL to introduce a case of that kind.

262. No application was made by the Claimants to amend their pleaded case. Rather the Claimants submitted that this was not a new case. Counsel for the Claimants submitted that:

"What you have here is evidence which supports that because the consequences of the revelations, the publicity of those, was such that they would not have continued to fund. That is what Ms Mercer has said…"

"…Taking account of the evidence you have heard and the evidence you have heard discloses quite clearly that the suggestion that the company only went down because of the Facebook scandal and did not go down because of the meeting scandal is wrong as a matter of fact."

263. It was submitted for the Claimants [Day 8 p4] that paragraph 48.3 of the RAPOC was wide enough wording to encompass the evidence that Ms Mercer gave:

"DRL's primary case is that either one of the matters referred to above would have resulted in the failure of the Cambridge Analytica business by reason of the adverse publicity generated. In the alternative, DRL contends that one of the matters referred to above, or alternatively both of them cumulatively, led to the failure of Cambridge Analytica."

264. It was submitted that Ms Mercer's written and oral evidence was to the effect that they would or might have put in funding if the only issue they had to face was to survive until the Facebook issues were proved to be false but because of the toxic effect on the brand of the media reports of Mr Nix's comments they would were not prepared to do so.

265. It was submitted for Mr Nix that it was pleaded that the comments caused adverse publicity and that caused customers and suppliers to leave (paragraph 36 of the RAPOC) and that caused the failure of the business:

"The Channel 4 broadcast and the ICO's well-publicised execution of its search warrant were disastrous for Cambridge Analytica. Customers and suppliers almost immediately began to abandon Cambridge Analytica."

266. CPR 16.4 states that particulars of claim must include a concise statement of the facts on which the claimant relies. I note that in the "causation" section of the Claimants' skeleton for trial there is no mention in that section of the funding point which is now advanced, only of the impact of the comments on clients and suppliers:

"DRL and Emerdata submit as follows as to the competing causative factors for Cambridge Analytica's collapse:

58.1. Allegations around Cambridge Analytica's use of the GSR data dated back to late 2015 and were therefore nothing new. Whilst there may have been a number of articles on the subject published in The Guardian in March 2018, the fact was that all GSR data had been deleted in 2016 and litigation against GSR had been threatened and settled. Cambridge Analytica's suppliers and customers were well-aware of Cambridge Analytica's alleged association with the GSR data from previous media reports, and there is no reason to think that they would suddenly abandon Cambridge Analytica because of a flurry of activity from The Guardian, especially once the truth about the GSR data had been explained to them. The involvement of Christopher Wylie added nothing, since he was a very junior and disgruntled ex-employee, whose credibility would not have withstood scrutiny (Mercer 1 ¶49 – 50 {C/1.1/14}).

58.2. By contrast, Mr Nix's comments at the Meeting represented a genuine, new and up to date act of impropriety for which there was no justification or explanation (the best Mr Nix could ever have said by way of explanation being either (i) that he had provided such services or (ii) that he offered to provide such services). Mr Nix has sought to suggest that there was comparatively little media interest in the story arising from the Meeting, but the relevant factor is not media interest, but the significance it was felt to have among Cambridge Analytica's clients and suppliers. Moreover, Mr Nix has cited exclusively from articles in The Guardian at Nix 1 ¶161, whereas if the Court takes judicial notice of, for example, a BBC article dated 21 March 2018 (https://www.bbc.co.uk/news/technology-43465968) it will note that the article leads by discussing Mr Nix's comments at the Meeting.

58.3. Mr Nix had never expressed any contrition to the board or to the Mercers in respect of the GSR data, yet as early as 26 March 2018 Mr Nix wrote to Emerdata's board expressing personal regret and culpability for Cambridge Analytica's adverse circumstances. Nothing had changed by 26 March 2018 to make the story about the GSR data any more accurate; the only developments in events that would explain Mr Nix's sudden contrition and acceptance of responsibility were the Channel 4 broadcast and the ICO's raid, and that is plainly what he accepted responsibility for.

58.4. Mr Wheatland has given evidence in the strongest terms (Wheatland 1 ¶44) that his instant reaction to knowledge of the content of the Channel 4 broadcast was that it would be catastrophic for Cambridge Analytica, and so he considers it proved. His evidence is supported by contemporaneous documents on which DRL and Emerdata will rely at trial." [emphasis added]

267. I note that the passage of Mr Wheatland's evidence in his witness statement referred to at paragraph 58.4 (above) of the Claimants' submissions also refers to the impact on customers and suppliers:

"I remember reading the transcript and thinking that we would not have a customer by the end of the month. I was right about that, but it turned out we didn't have any suppliers either. We were cut off by Twitter and Facebook. He destroyed the company."

Further the "*contemporaneous documents*" referred to in paragraph 58.4 are correspondence concerning suppliers and clients namely Lotame (CA's Data Management Platform) and Datorama.

268. The Claimants' skeleton for trial reflects in my view how their pleaded case was intended to be understood, namely that it was the impact of Mr Nix's comments (and the adverse publicity which resulted) on customers and suppliers which led to CA's collapse. The subsequent oral submissions in closing for the Claimants were an attempt to construct an argument on causation which was not open to them on the pleadings.

269. I therefore find that this funding argument is not pleaded and it is not open to the Claimants to rely on it.

Evidence

Press Coverage

Notifications in advance of broadcast 12 March 2018

270. Prior to the series of broadcasts by Channel 4 letters were sent to CA and to the Mercers by ITN setting out the allegations which were to be broadcast and inviting them to comment.

12 March 2018 letter from ITN to Nick Fievet (at CA)

271. The focus of this letter was *"the allegations of unlawful and unethical conduct…concerning the acquisition and use of more than 50 million Facebook profiles"* with reference to the 2016 US Presidential election and links to Russia:

> *"…Channel 4 News is preparing a report on Cambridge Analytica (hereafter referred to as 'CA') and its parent company SCl Group and other linked entities such as SCL Elections (hereafter collectively referred to as 'SCL').*
>
> *We intend to broadcast this report on Sunday the 18th of March 2018. As part of this report we have interviewed Mr Christopher Wylie who was contracted full time by SCL and CA between June 2013 and September 2014, latterly with the title Director of Research at CA.*
>
> *Mr Wylie has made a number of allegations about his involvement with SCL/CA in 2013 and 2014, and subsequent events.*
>
> *Channel 4 News intends to report these claims which contain allegations of unlawful and unethical conduct by your company concerning the acquisition and use of more than 50 million Facebook profiles. We understand that this was part of a joint enterprise by Global Science Research also known as the Global Science Research Institute ("GSR") and SCL/CA which enabled the psychological profiling of tens of millions of Facebook users. Mr Wylie claims that the data was commercialised and used for 'microtargeting' operations in a number of congressional races in the United States, the Republican primaries and the 2016 US Presidential elections, in an effort to more effectively influence voters.*
>
> *Mr Wylie also alleges that inadequate security was put in place by SCL/CA to protect the data acquired from Facebook and that this data may have inadvertently been accessible by the Russian authorities.*
>
> *Furthermore, Mr Wylie has told Channel 4 News that SCL/CA had extensive dealings with the Russian state-owned oil company Lukoil in 2014, which contradicts statements made by Alexander Nix to Parliament in February 2018.*
>
> *In the circumstances it is clear that there is an overwhelming public interest in disclosing these allegations…".* [emphasis added]

Second letter dated 12 March 2018

272. A second letter was sent which over some 19 pages set out further allegations. These included the comments of Mr Nix at the Meeting under subheadings "*Entrapment through the payment of bribes to anonymously discredit political opponents*" and *"Entrapment through the use of honeytraps to discredit political opponents"* but also covered a wide range of additional allegations under the following headings:

"2.3 Use of intelligence gathering organisations to obtain information to discredit political opponents

2.4 Manipulation of social media platforms, and use of the Internet, to anonymously distribute negative material to discredit political opponents

2.5 Use of untrue negative material to discredit political opponents

2.6 Operating secretly through the use of fake ID's, fake websites, and different company names, and obscuring activity through alternative entities or corporate vehicles

2.7 Using subcontractors to shield links between CA and its activities abroad

2.8 Role and activities in the Kenya elections, in 2013 and 2017

2.9 Role in the Donald Trump presidential campaign 2016

2.10 Use of data in the Donald Trump presidential campaign 2016

2.11 Use of Data Analytics - Profiling and Use of fear

2.12 Acting as an apparent intermediary for coordinated communications between the Donald Trump presidential campaign 2016 and the Make America Number 1 super-PAC

2.13 "Defeat Crooked Hillary" and voter disenfranchisement

2.14 Comments about the House Intelligence Committee Hearing, the inquiry by Special Counsel Robert Mueller, and President Trump

2.15 Use of jurisdiction to prevent cooperation with ongoing inquiries

2.16 Use of secret encrypted email accounts with self-destruct timers to avoid scrutiny and prevent disclosure

2.17 Reasonable grounds to investigate CA's involvement with an alleged attempt by Russia to interfere with the US 2016 presidential election"

Letter to Mercers from ITN dated 12 March 2018

273. A separate letter was sent to the Mercers by ITN inviting comment. This letter focussed on the role of CA in the US Presidential election:

> *"…We intend to broadcast the reports in the week commencing the 18 th of March 2018. The reports contain serious allegations about the activities of Cambridge Analytica which are detailed below. We have written to the company inviting them to respond to the allegations and we will fairly and accurately reflect their responses in the programme. In particular, the reports will focus on Cambridge Analytica's role in the Trump campaign between June 2016 and the US Presidential Election in November 2016…".* [emphasis added]

274. The letter made reference to the meetings which had been secretly recorded including the allegations of entrapment and honeytraps but also extending to other matters including fake identities and methods of intelligence gathering:

> *"On 16 January 2018 Mr Nix and Mr Turnbull attended a meeting with our undercover reporter at the Berkeley Hotel (hereafter referred to as the 'Second Berkeley Meeting'). Mr Nix made a series of admissions including the offer of entrapment of political opponents, the use of sex workers as honeytraps to obtain compromising material, fake identities and the use of British and Israeli contractors to carry out "intelligence gathering." Mr Nix made it clear that CA could contract with our reporter using unknown companies, including ones registered in the state of Delaware.*
>
> *Mr Nix provided further details of his relationship with President Donald Trump and CA's role in his presidential campaign. He also spoke about his long-standing relationship with Mr Steve Bannon. Mr Nix made a series of comments about the investigations being carried out by the FBI Special Prosecutor and a number of Congressional committees in the United States into the Trump campaign, outlined how CA intends to deal with these inquiries and how the company carries out its communications using encrypted email and messaging services which leave no evidence."*

Guardian email 12 March 2018

275. Also on 12 March 2018 The Guardian sent an email to Nick Fievet at CA raising a number of questions which it said it wished to put to the directors:

> *"The Guardian & Observer news team are considering publishing articles that will report how Cambridge Analytica was founded, acquired private Facebook data without users' consent, and allied this to the company's expertise in information operations to psychologically profile them and target them online. We are also considering a further report on contacts with a Russian company and individuals…".* [emphasis added]

Guardian email 12 March 2018 to Mercers

276. A related email was sent by The Guardian to the Mercers which had a US focus:

"The Guardian & Observer news team is considering publishing articles that will report that Cambridge Analytica was the beneficiary of the harvesting of up to 58 million Facebook profiles which were then used to psychologically profile and target US voters…".

New York Times email 13 March 2018 to CA and (indirectly via Ms Preate a friend of Rebekah Mercer) to the Mercers]

277. On 13 March 2018 an email by The New York Times was sent to Nick Fievet and indirectly to the Mercers stating that "*we are preparing a major story on Cambridge Analytica in partnership with The Guardian*" and seeking answers about the GSR data but also compliance with US election legislation and whether this had been violated by non-US staff being involved in the US 2014 and 2016 elections.

Guardian article 15 March 2018

278. On 15 March 2018 The Guardian published an article concerning the alleged work done by CA for the Leave.EU campaign which was headlined:

"Data firm pitched 'illegal offer targeting overseas donors' to Leave.EU. Arron Banks gave MPs document with information about rejected offer from Cambridge Analytica".

The article said:

"A controversial data marketing firm appeared to propose raising money from Brexit-supporting foreign donors on behalf of the Leave.EU campaign, in breach of UK election law. Cambridge Analytica told the group fronted by Nigel Farage and Arron Banks they could target wealthy people from the US, …".

Channel 4 broadcasts

279. In Mr Nix's witness statement he set out the broadcasts by Channel 4 between 17 March 2018 and 11 July 2018. I did not understand the Claimants to challenge this factual evidence which provides a convenient and helpful outline:

"139 On 17 March 2018, Channel 4 aired a 'Series' over 5 days called "Data, Democracy and Dirty Tricks" in 7 parts and each had a different title (a) the whistleblower (16 minutes), (b) the sales pitch exposure (19 minutes), (c) Trump campaign (17 minutes), (d) Nix suspended (4 minutes), (e) the Brexit Whistleblower (16 minutes), (f) The Mexico allegations (7 minutes) and (g) The Cambridge Analytica data still circulating (10 minutes). The focus of these broadcasts was on the use of data, although among each part references are made to various undercover meetings. I principally featured in part two ('The Sales Pitch exposure'), which had extracts of the meeting on 16 January 2018 at the Berkeley Hotel London.

140. This 'Series' was interspersed and followed up with extensive related reporting on Channel 4 News, which expanded on the main themes of the 'Series' and also introduced new reporting on the companies as news became available.

141. In total I believe some 25 separate programmes were broadcast between 17 March 2018 and 11 July 2018 at a total of 4 hours, 6 minutes and 7 seconds. The reporting that included the sting operation (detailed below) accounted for 10 minutes and 42 seconds of programming, spread across three episodes of the 'Series': Data, Democracy & Dirty Tricks - Episode 2 (5 mins 50 secs), Data, Democracy & Dirty Tricks - Episode 3 (35 Secs) and Data, Democracy & Dirty Tricks - Episode 4 (4 mins 17 secs)."

280. The Nix Broadcast was reported in the Channel 4 press release:

"REVEALED: Senior executives at Cambridge Analytica, the data company that credits itself with Donald Trump's presidential victory, secretly filmed saying they could entrap politicians in compromising situations with bribes and Ukrainian sex workers and using ex-spies to dig dirt on political opponents…".

Guardian articles 17 March-23 March 2018

281. In Mr Nix's witness statement, he also sets out a list of The Guardian articles that were published from 17 March 2018 onwards. Again, I did not understand this to be disputed by the Claimants whose submissions, as set out below, focus on what they submit should be a "*qualitative"* rather than a "*quantitative*" analysis of the reporting.

282. The relevant section of his witness statements details the following articles published from 17 March 2018. I have set out below the titles of the various articles for the period to 23 March 2018 although the reporting continues beyond that date with numerous further articles through April and May 2018. I have grouped the articles under the relevant date and omitted the journalist and time as the relevant point in my view is that they show the range of allegations that were being reported at that time:

"<u>17 March 2018 (5 articles)</u>

-How Cambridge Analytica turned Facebook 'likes' into a lucrative political tool

-Cambridge Analytica whistleblower: We spent $1m harvesting millions of FaceBook profiles

-Cambridge Analytica: links to Moscow oil film and St Petersburg university

-Staff claim Cambridge Analytica ignored US ban on foreigners working on elections

-Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach"

18 March 2018 (6 articles)

-I made Steve Bannon's psychological warfare tool: meet the data war whistleblower

-Data scandal is huge blow for Facebook - and efforts to study its impact on Society

-Democrats call on Cambridge Analytica head to testify again before Congress - Adam Schiff says Trump campaign may have used 'illegitimately acquired data' to help sway election

-What is Cambridge Analytica? The firm at the centre of Facebook's data breach

-Breach leaves Facebook users wondering: how safe is my data?

-Facebook employs psychologist whose firm sold data to Cambridge Analytica

19 March 2018 (4 articles)

-Facebook and Cambridge Analytica face mounting pressure over data scandal

-No 10 'very concerned ' over Facebook data breach by Cambridge Analytica

-Cambridge Analytica boasts of dirty tricks to swing elections

-Where's Zuck? Facebook CEO silent as data harvesting GMT scandal unfolds

20 March 2018 (3 articles)

- 'Utterly horrifying': ex-Facebook insider says covert data harvesting was routine

-Cambridge Analytica caught in undercover sting boasting about entrapping politicians

-Cambridge University asks Facebook for evidence about role of academic

21 March 2018 (8 articles)

-Guardian Readers Guardian Are you leaving Facebook? Share your concerns on

-MPs summon Mark Zuckerberg, saying Facebook misled them

-Cambridge Analytica execs boast of role in getting Donald Trump elected

-Tory donors among investors in Cambridge Analytica parent firm

-The evil genius of Cambridge Analytica was to exploit those we trust most

-MoD granted 'List X' status to Cambridge Analytica parent company

-Cambridge Analytica was offered politicians' hacked emails, say witnesses

-Cambridge Analytica 's ruthless bid to sway the vote in Nigeria

22 March 2018 (4 articles)

-Mark Zuckerberg apologises for Facebook's 'mistakes' over Cambridge Analytica

-'They were given an inch and took 100 miles': readers on Cambridge Analytica, Facebook and privacy

-Facebook gave data about 57bn friendships to GMT academic

-Cambridge Analytica scandal: the biggest revelations so far

23 March 2018 (3 articles and a video)

-Facebook says warning to Guardian group 'not our wisest move'

-Leaked: Cambridge Analytica's blueprint for Trump victory

-Cambridge Analytica misled MPs over work for Leave.EU, says ex-director

-Former Cambridge exec says she wants lies to stop."

283. It is difficult to summarise the extensive press reporting which I have reviewed for the purpose of this judgment but in my view the following points emerge from the detailed reports in The Guardian:

283.1. The inquiry by the ICO was general in nature: "*Cambridge Analytica and Facebook are one focus of an inquiry into data and politics by the British Information Commissioner's Office. Separately, the Electoral Commission is also investigating what role Cambridge Analytica played in the EU referendum. "We are investigating the circumstances in which Facebook data may have been illegally acquired and used," said the information commissioner Elizabeth Denham. "It's part of our ongoing investigation into the use of data analytics for political purposes which was launched to consider how political parties and campaigns, data analytics companies and social media platforms in the UK are using and analysing people's personal information to micro-target voters."*

283.2. There was concern expressed in the US congress about the use of Facebook data by CA: *"US congressional investigators want the head of data firm Cambridge Analytica to testify again before their committee, under subpoena if necessary, after a whistleblower claimed the company exploited Facebook and received millions of people's profiles that were taken without authorisation."*

283.3. The allegations about "harvesting" GSR data were revived in March 2018 by comments by Mr Wylie: *"Why is it in the news? Over the weekend, the Observer revealed that in 2014, so million Facebook profiles were harvested by a UK-based academic, Aleksandre Kogan, and his company Global Science Research…Wylie, a Canadian who previously worked for Cambridge Analytica, has lifted the lid on this and other practices at the firm, which he describes as a "full-service propaganda machine". He contradicts claims made in the past by Nix, who in February told British MPs that the company did not use Facebook data in its work…".*

283.4. There was political interest in the UK in the alleged Facebook data breach by CA: *"Face book and Cambridge Analytica face mounting pressure over data scandal. Growing calls in US and UK for investigations to explain data breach affecting tens of millions…No 10 'very concerned' over Facebook data breach by Cambridge Analytica" … Conservative party donors are among the investors in the company that spawned the election consultancy at the centre of a storm about use of data from Facebook."*

283.5. The undercover investigation was reported in relation to Mr Nix' remarks about entrapment and honey traps but the focus was on the relationship with Trump and the role in the US election: "*In Tuesday's second instalment of an undercover investigation by Channel 4 News in association with the Observer, Nix said he had a close working relationship with Trump and claimed Cambridge Analytica was pivotal to his successful campaign. Thanks to the reporting of the Observer, The Guardian and Channel 4, we now know that Cambridge Analytica could happily arrange for a candidate to fall into a compromising scandal with a Ukraine prostitute or a bribery sting. …Election laws will surely change as a result of Nix's bragging and Facebook's arrogant and inept response to this snowballing scandal. Nobody could get away with such brazenly political manipulation in TV ads. Why should they do so on Facebook or any other part of the web? …The Trump campaign - aided and abetted by Russian hackers and trolls, conservative billionaires, and the brainiacs of firms like Cambridge Analytica - drove its disinformation through the people we like to trust: our friends."* [emphasis added]

"Ripple Effect"

284. The original reporting by The Guardian, Channel 4 News and The New York Times was widely reported in a variety of media. Bearing in mind the Claimants' submissions (below) concerning the need for a qualitative approach, from the numerous Google alerts put in evidence, I highlight below some of the evidence concerning the major media outlets.

285. In an email from Issac Collins (CA Mexico) to Mr Nix with multiple news articles on 17 March 2018:

"… The news keep (sic) spreading, and going to mainstream media. I don't know what will be the reaction of our current deals. This is a long weekend (Monday is holiday) and many people is on vacation, not following the news. I'll see reactions on Tuesday.

Any clue about how you're dealing with customers?, will be highly appreciated. When fixed, the clarification with Facebook must have the same coverage. One portal is highlighting, the video from Channel 4 News, with Christopher Wylie, talking about 50 million of Facebook's profiles used in US elections."

286. In a Google alert dated 17 March 2018 reporting the Financial Times:

"Facebook has banned Cambridge Analytica, the political data company that worked with the Trump presidential campaign, claiming it violated rules by failing to delete user data collected by an app for research purposes. The social network said on Friday that it would suspend Strategic Communications ...". [emphasis added]

287. An email to SCL Group dated 17 March 2018 from Chris Sanders of Reuters:

"Reuters is seeking comment in light of NY Times/Observer stories Saturday saying Trump campaign allegedly used data leaked from 50 million Facebook users involving Cambridge Analytica. The data was allegedly used by Cambridge to help the campaign to elect Donald Trump.

We are also seeking comment on the announcement on Friday by Facebook that it is suspending Cambridge Analytica because it did not erase data it obtained from Facebook users inappropriately." [emphasis added]

288. An email to CA dated 18 March 2018 from Mark Bridge of The Times:

"I've been asked to write a piece for tomorrow's paper following up the Observer and NYT stories on Cambridge Analytica and Facebook and covering the statement today from Damian Collins

…

Does Cambridge Analytica have any response to Collins' accusations that Mr Nix deliberately misled the committee by giving false statements?

Also, CA's statement denies that the company used data obtained from GSR in its work for the Trump campaign? Was the data used in any other contexts for the targeting of campaigns, or the building of tools? …".

289. An email from Issac Collins to Mr Nix with Mexican news article dated 19 March 2018:

"In this mexican newspaper it says that we are trying to avoid the airing of a video from Channel 4 with where you talk about inappropriate practices…".

290. The BBC published an article on 21 March 2018 entitled *"Cambridge Analytica: The story so far".* The article read (in material part):

"It's a sensational story containing allegations of sleaze, psychological manipulation and data misuse that has provoked an internationally furious response.

Tech giant Facebook and data analytics firm Cambridge Analytica are at the centre of a dispute over the harvesting and use of personal data - and whether it was used to influence the outcome of the US 2016 presidential election or the UK Brexit referendum.

Both firms deny any wrongdoing.

The boss of Cambridge Analytica, Alexander Nix, has since been suspended, while Facebook founder Mark Zuckerberg has been called on by a Commons parliamentary committee to give evidence.

How has Cambridge Analytica been accused of sleazy tactics?

Channel 4 News, external sent an undercover reporter to meet executives from data analytics firm Cambridge Analytica, following reports by the journalist Carole Cadwalladr in the Observer newspaper, external.

The firm had been credited with helping Donald Trump to presidential victory.

The reporter posed as a Sri Lankan businessman wanting to influence a local election.

Cambridge Analytica boss Alexander Nix was apparently filmed giving examples of how his firm could discredit political rivals by arranging various smear campaigns, including setting up encounters with prostitutes and staging situations in which apparent bribery could be caught on camera.

…

What has the official response been?

US senators have called on Mark Zuckerberg to testify before Congress about how Facebook will protect users.

In the UK, the chairman of a parliamentary committee, Damian Collins, has summoned Mr Zuckerberg to explain the "catastrophic failure" to MPs.

The head of the European Parliament said it would investigate to see if the data was misused.

A spokesman for Prime Minister Theresa May said she was "very concerned" about the revelations.

Meanwhile, Cambridge Analytica has suspended its chief executive, Alexander Nix, saying his comments "do not represent the values or operations of the firm".

And the academic who created the app at the centre of the storm, Dr Aleksandr Kogan, said he has been made "a scapegoat"…". [emphasis added]

Claimants' Submissions

291. It was submitted for the Claimants (paragraph 56 of their skeleton for trial) that either one of Mr Nix's breaches of duty in respect of the Meeting or his breaches of duty in

respect of dealing with the ICO would have caused Cambridge Analytica's collapse. Alternatively, they contend that both together made Cambridge Analytica's collapse inevitable.

292. It was submitted that Mr Nix's comments represented a "*genuine new and up to date act of impropriety"* unlike the allegations around CA's use of the GSR data which dated back to 2015. It was submitted that the relevant factor is not media interest but the significance it was felt to have among CA's clients and suppliers; the clients and suppliers were well aware of CA's alleged association with the GSR data and "*there is no reason to think that they would suddenly abandon CA because of a flurry of activity from The Guardian especially once the truth about the GSR data had been explained to them*." (skeleton for trial paragraph 58)

293. It was further submitted for the Claimants that Mr Nix wrote to Emerdata's board as early as 26 March 2018 expressing personal regret and culpability and the only development in events that would explain Mr Nix's sudden contrition and acceptance of responsibility were the Nix Broadcast and the ICO's raid.

294. It was submitted for the Claimants that although Mr Nix says the majority of the articles were about the "data scandal" as opposed to a comparatively small amount of coverage about the covert recording, that misses the point and fails to recognise the difference between a quantitative approach and a qualitative approach. [Day 7, p 45:4-45:12] It was submitted that Mr Wheatland thought it was the reason for the collapse and Ms Mercer's evidence was that all the other allegations were untrue. In cross examination Ms Mercer said:

"Cambridge is operating a brand and Alexander completely destroyed that brand" [Day 3 p12]

"We had full trust in Alexander and if he hadn't destroyed that trust and shown himself to be the person he ultimately is, then we would have believed the company could weather pretty much anything because we didn't believe the company was doing anything wrong. It was just the nature of the media in the US to try to destroy us with baseless accusations that weren't true. We didn't have a problem with standing up to that. We have a problem when the president of the company says horrific, horrible things that there is no defence for." [Day 3 p10]

295. It was also submitted by the Claimants in oral closings that clients may not have given the real reason in the correspondence:

"…it is not unsurprising… that if people don't want to be associated with you anymore, what they would actually do is read the contract they do have and see if there is something you are in breach of and then rely on it."

Nix Submissions

296. It was submitted for Mr Nix that the Claimants assert that the acts of Mr Nix caused the adverse publicity which caused the collapse of CA; the "but for" test means that all other matters are assumed to have occurred.

297. It was submitted that the adverse publicity caused by the Nix Broadcast was limited to a couple of days. The publicity covered a wider range of matters: data harvesting, it had been suggested that CA still had GSR data, allegations of breach of US electoral laws, involvement in controversial subject matter, the impact on elections in particular US 2016 election of Trump and Brexit; the Mueller investigation into Russian involvement in the 2016 election and the role in the Kenyan elections.

298. It was submitted that it was better for the Court to look at the documentary evidence rather than the opinions of Mr Wheatland and Ms Mercer which were inferences based on the timing of the Nix Broadcast and content of the Nix Broadcast, which added nothing to the relevant evidence. [Day 8 p179] Ms Mercer said the only allegation that was true was the comments of Mr Nix and that CA could have shown that other matters were untrue. It was submitted for Mr Nix that Ms Mercer on her evidence was not close to what was happening. She did not see the Nix Broadcast until very recently. She relied on an account from a barrister. She could not remember when or how that conversation took place.

Discussion

299. The Claimants relied on the evidence from Mr Wheatland and Ms Mercer that it was Mr Nix's comments at the Meeting that led to the collapse of the business.

Mr Wheatland

300. Mr Wheatland's evidence in his witness statement (paragraphs 46 and 47) was that:

> *"Channel 4 ultimately broadcast its feature including the secretly recorded footage of Alexander on 19 March 2018. I watched the videos in the USA, in the New York office with all of the other staff gathered around the TV, and everyone was shocked…My immediate thought was: you've just killed the company. I felt really let down.*
>
> *Following Alexander's interview, things moved very quickly. Rebekah Mercer began to involve herself more closely…There had been media attention since late 2015, but the Channel 4 broadcast was on a totally different scale. Previously the adverse media interest might have caused us to miss out on some customers, but we were trading through it. We lost everything because of that recording."*

301. However for the reasons discussed above, I do not regard Mr Wheatland as an independent witness and I approach his evidence with some considerable caution and accept it only where it is consistent with the contemporaneous record.

Ms Mercer

302. Turning to the evidence of Ms Mercer, her evidence in cross examination was that all the allegations (other than those about Mr Nix's comments) were false and could have been dealt with but that Mr Nix's remarks lent "*credence*" to the allegations that were false.

303. Her evidence in cross examination was that Mr Nix caused the damage:

"Q. But, Ms Mercer, how can you know that if you don't know what the coverage was, you don't know what the pushback was and you don't know whether the pushback was having any effect? How could you know what comments were really causing the damage in those circumstances?

A. Because his comments were what triggered everything.

Q. But how could you know that if you didn't even know what the media reporting was?

A. … the timing of everything. Christopher Wylie was not a significant issue or person. All of his allegations were false. He was sued already and he lost. Alexander made unbelievably serious, damaging comments that lent credibility to false things and set fire to everything and destroyed everything.

Q. So your evidence is that the basis for saying that you think that Mr Nix's comments caused the damage is the timing of everything; that is the basis for your belief?

A. Not just timing, the fact that what he said, he actually said. He made (inaudible) believe that Cambridge was engaged in exactly what they were pretending it was engaged in, when it wasn't. But here is the president of the company claiming it was; that's unbelievably damaging. As opposed to a disgruntled employee who meant nothing and is already sued, Alexander's comments were unbelievably fatal." [emphasis added]

304. In her witness statement Ms Mercer said:

"In the period from 12 March 2018 when we were first notified of the broadcast until 23 March 2018 when the ICO executed its search warrant, we devoted very little time to dealing with the public relations consequences of Christopher Wylie's comments."

305. However, Ms Mercer accepted in cross examination that she did not know what the PR team were dealing with in London:

"Q. Would you agree that in fact from just before 17 March when the stories were published, in London everyone was extremely busy dealing with the public relations consequences of Christopher Wylie's comments. Would you agree with that?

A. I have no idea."

306. Further in cross examination Ms Mercer was referred to a passage in an earlier witness statement made by the Claimants' lawyers and she accepted that she was not involved in the management of the business:

"Q. …this is January 2022: "Emerdata is hampered in evaluating the above defences because its present board have virtually no knowledge of many of the relevant matters, having either not been in office or, in the case of Rebekah and Jenifer Mercer, having been in office for the final few weeks of the material period, but having had very little personal involvement in the management of the business." Do you agree with that statement?

A. I do agree with that.

Q. To wrap this section up, Ms Mercer, the position is therefore that you just weren't able at the time or now to see or understand the problems and pressures the company was facing at the time. Isn't that fair, based on what we've seen?

A. Probably, but I did see a lot, those times I took over at the board but, yes, that's probably true.

…

Q. But even when you were on the board, we've seen from Mr Blaney you had little involvement in the management of the business. Is that right?

A. That's correct." [emphasis added]

307. Paragraph 45 of her witness statement was as follows:

"Channel 4 broadcast its feature including Alexander's covertly recorded comments on 19 March 2018. I did not actually watch the broadcast because, having learnt its contents from the letter I received from ITN, I found the idea of watching it too upsetting. However, I did discuss the contents of the broadcast in detail with various individuals, particularly Matthew Richardson. It was obvious from what Matthew told me, and from the immediate media reaction, that what Alexander had been recorded saying was going to prove hugely damaging. My immediate reaction on hearing from Matthew the detail of what was in broadcast was that Alexander had lied to me when he had denied making the remarks in the way that the notice of the broadcast had suggested. As opposed to brief comments shown with no context, Matthew explained that the broadcast consisted of long uncut speeches from Alexander in which he expressed, in a serious tone, a history of and a willingness to engage in entrapment, disseminating falsified allegations, manufacturing incriminating video footage and so on." [emphasis added]

308. In cross examination her evidence in her witness statement (paragraph 37) in relation to the pre broadcast letter from ITN on 12 March 2018 was shown not to be a fair

summary of its contents but focussed only on Mr Nix's remarks. Ms Mercer's explanation was that:

"…it is a fair summary of the important part of the letter when everything else was a lie."

309. When it was put to Ms Mercer that the other matters nevertheless could do serious damage to the business Ms Mercer's evidence was that this was only if they were true:

"Q. Do you accept then that they were important?

A. They were lies and would not stand up to scrutiny, so we would not worry about them if they were lies.

Q. But nevertheless, because they were serious, they had the potential to do serious damage to the business, didn't they?

A. Only if they were true, which they were not.

Q. But is that really right, Ms Mercer? The allegations were going to be printed even though you maintain that they were untrue, weren't they? They were going to be printed anyway. Do you agree with that?

A. I don't know. I don't know what was ultimately printed. Were they printed?

Q. Well, are you aware that allegations about all of these matters were printed in The New York Times and The Guardian, or you don't recall?

A. I don't recall." [emphasis added]

310. It was in my view surprising that this claim, based on the remarks of Mr Nix in the Nix Broadcast, has been brought by the Claimants and yet Ms Mercer, a director of Emerdata and the only member of the Mercer family to give evidence, did not watch the Nix Broadcast until a month or so before this trial [Day2 p140]) and her evidence was that she relied on an account of the comments provided by a friend and English qualified barrister, Matthew Richardson. Further and perhaps more significantly in terms of weighing the impact of Mr Nix's remarks on the collapse of the business, her evidence was that she had not watched any of the other Channel 4 broadcasts. [Day 2 p123]

311. As to the ICO raid her evidence was that the ICO raid was due to Mr Nix's comments and that this was evident from the timing of the raid:

"…The reason that gave fuel to these allegations of Christopher Wylie were Alexander's remarks. That is why the ICO raided the offices later, at the end of March. Christopher Wylie -- SCL, I believe, had already successfully sued him because he had stolen data. He had done all these things. He was not a credible person. But

Alexander's comments lent credence to things he had said and therefore gave more (inaudible) there to something that wasn't there for Christopher Wylie, but was there for Alexander.

Q. The ICO's decision to raid the premises had nothing to do with Mr Nix's comments, did it?

A. I believe it actually did.

Q. And what is that belief based on, Ms Mercer?

A. The timing." [emphasis added] [Day 2 p147-148]

312. In my view the overall picture that emerged from the evidence of Ms Mercer was that she has formed a view as to the impact of Mr Nix's comments on the business without having considered the Nix Broadcast in context, without being aware of what was happening "*on the ground*" in London and without regard to the evidence of the media reports and the impact of the media reports.

313. For these reasons, insofar as causation is concerned, whilst I accept the genuine belief held by Ms Mercer, her evidence as to the reasons for the collapse of CA cannot be of any real assistance. I therefore reach my conclusions on causation based on my analysis of the extensive documentary record and such of the witness testimony as I assess to be credible and reliable.

Mr Green

314. In terms of a qualitative analysis it is relevant to consider the evidence of Mr Green, the administrator/liquidator who prepared a report at the time. In paragraph 10 of his witness statement Mr Green referred to the reasons for the loss of existing and potential clients linking it directly to the "*significant adverse publicity*" created by the reporting of accusations regarding the use of Facebook data by CA:

"In the [Administrators'] Proposals we mention that as widely reported in the media, there were accusations in certain UK and US newspapers and other media outlets regarding the use of Facebook data by the Companies. The significant adverse publicity created by this reporting led to the purported loss of several existing and pending contracts and projects that the Companies were engaged in and damage to the Cambridge Analytica brand. In addition to the loss of clients and potential clients, many resolved to withhold or contest payment of their accounts. In some instances, clients demanded the return of funds paid on account of work being done." [emphasis added]

315. Mr Green also noted the impact of the ICO raid (paragraph 11). Although this was based on reports from staff it nevertheless is evidence as to the impact of the raid. His evidence refers to the impact on the financial viability of the trading entities of the computer

equipment being seized; it does not refer to any link between adverse publicity generated by the ICO raid and the financial viability of the CA business:

"I had been informed by staff that the financial viability of the trading entities was further compromised by the ICO in exercise of their statutory powers, seizing all of the Companies' computer equipment holding financial and other records and data located at the Companies' leasehold premises at 55 New Oxford Street, London WClA lBS on 23 March 2018. The seizure of the computer and other electronic equipment of the Companies was said to have meant that the existing customer projects could not be completed and resulted in the Companies encountering difficulty in accessing and using data management tools and other data technology. For that reason we included in the Proposals a reference to the ICO's seizure of computer equipment having a negative impact on the business. That said, as I have explained at paragraph 10 above, I had only incomplete information available when preparing the Proposals. The comment about the ICO's seizure of equipment having a negative impact on the business therefore did not reflect a conclusion I had drawn following a detailed review; as I say it reflected what I was told by staff, which was the best I had to go on at the time." [emphasis added]

Documentary Record

316. There is an extensive contemporaneous documentary record before the Court relating to the period in March 2018 and the immediately following months which comprises:

316.1. The letters sent by the media before publication to CA and the Mercers (referred to above);

316.2. The articles that were published in the main media which initiated the coverage- The Guardian/Observer and The New York Times (referred to above);

316.3. The Channel 4 broadcasts (referred to above);

316.4. The references to the allegations that were published by other media organisations on the back of the original articles (referred to above);

316.5. The response of customers and suppliers;

316.6. The letters from Mr Nix to the Board and shareholders of Emerdata;

316.7. The public statement by Facebook concerning the suspension of CA and the correspondence with CA in this regard.

The response of customers and suppliers

317. As referred to above, the Claimants placed particular reliance on the significance that Mr Nix's remarks had on CA's clients and suppliers. It was submitted that the clients and suppliers were already aware of the association with GSR data and "*there is no*

reason to think that they would suddenly abandon CA because of a flurry of activity from The Guardian especially once the truth about the GSR data had been explained to them".

318. There are a number of pieces of documentary evidence before the Court relating to the termination of the arrangements with CA by customers and suppliers. They include the following:

318.1. Letter of termination from Mead Johnson Nutrition dated 20 March 2018:

"In light of recent very concerning developments and pending government and/or other agency inquiries into allegations of, among other things, CA's misuse of personal data, this letter shall serve as official notification of MJN's termination of the Agreement…". [emphasis added]

318.2. Letter from LiveRamp Inc dated 20 March 2018:

"…Given recent reports of SCL Group's improper use of Facebook user data and the related suspension of SCL Group from Facebook, we have good reason to believe SCL Group has materially breached Section 6 of the Agreement, wherein "Client warrants that it fully owns or has the authority to use the Client Data as set forth herein, and that in obtaining or collecting Client Data, it did not violate the law or the rights of any third party." By this letter, LiveRamp hereby provides notice to SCL Group of its intent to terminate the Agreement, and upon ten (10) days of your receipt of this letter, will deem the Agreement to be terminated." [emphasis added]

318.3. Email of 21 March 2018 from Lotame, a business data management platform terminating the Agreement. An internal email to Mr Wheatland on 27 March stated:

"…Update on Lotame - while the CEO is personally extremely supportive, he came back to me today to say that a majority owner on their board has expressed significant concerns about backlash on their side if an investigation proves that we uploaded illegal data into their DMP…".

318.4. Letter from SCL Posedion 23 March 2018:

"…Based on the information available to us, Facebook, Inc. has suspended SCL and its political data analytics company, Cambridge Analytica, from Facebook with effect on March 16 due to a violation of its Terms of Service. Moreover, compromising video footage obtained by Channel 4 News gives reason to believe that executives of Cambridge Analytica have been actively involved in unethical practices such as bribery and entrapment of political targets on behalf of clients. While these allegations against SCL may prove to be inaccurate or incorrect, the media coverage and pending investigations of the business practices of SCL and Cambridge Analytica make it unreasonable for LG to maintain contractual relationships with SCL. Moreover, it is inarguable that the suspension from Facebook renders it impossible for SCL to fulfil its

contractual obligations in due course. As a result, we hereby inform you of our decision to exercise our right of immediate termination of the Agreement…". [emphasis added]

318.5. Letter from Linn Freedman of Robinson Cole representing Direct Care dated 4 April 2018:

"…On March 16, 2018, Direct Care was notified of CA's suspension from its use of the Facebook social media platform to conduct its digital marketing analytics. The suspension rendered the ability for CA to provide the digital marketing services that is the subject matter of the Agreement to Direct Care impossible. Therefore, CA has been in breach of the Agreement since March 16, 2018 and continues to be in breach to date…

Direct Care engaged CA to carry out certain Services which have not been performed and cannot be cured due to the Facebook suspension. The campaign never materialized, and it is impossible for CA to provide Direct Care the Services and Work Product as promised in the Agreement due to CA's suspension from the Facebook social media platform. Therefore, Direct Care requires reimbursement of the fees it has paid to CA to date in the amount of $200,000." [emphasis added]

319. As can be seen from these letters and emails, three refer to the allegations of unauthorised use of data and the Facebook suspension, one refers to the suspension from Facebook rendering it impossible for SCL to fulfil its contractual obligations and one (Poseidon) referred to both the suspension and *"unethical practices such as bribery and entrapment".* I do not regard the letters which are before me as conclusive as they do not purport to be complete. I do not however accept the submission for the Claimants (paragraph 34.2.4 of their Closing Note) that the Court "*ought to have regard to the fact that it would prima facie be much easier legally to terminate a contract for the provision of data services …rather than …unethical conduct on the part of the CEO*". There is no evidence to support the submission that the customers or suppliers were not advancing in the correspondence the "real" reason for terminating the relationship.

320. I also do not accept the submission for the Claimants that where no reason was given by the customers the Court should infer that the Nix Broadcast was the reason because of the timing of the terminations. There were seven broadcasts in the series from 17 March to 29 March 2018 which covered a range of topics (as well as the additional reporting referred to above). Mr Nix's remarks featured primarily in the second of the series. The timing therefore of the letters casts no light on the reason for the terminations.

321. In addition to the specific examples before the Court, I take into account the evidence of Mr Green in this regard which, as referred to above, linked the adverse publicity regarding the use of Facebook data directly to the loss of customers. Mr Green was not cross examined on his evidence so this evidence was unchallenged.

322. The evidence does not therefore support the Claimants' submission that suppliers and customers were aware of the GSR data and the allegations in The Guardian were "*nothing new*" whereas the comments of Mr Nix were of more significance among clients and suppliers.

The letters from Mr Nix to the Board

323. There were a series of letters from Mr Nix to the Board and shareholders of Emerdata Ltd. On 26 March 2018 Mr Nix wrote:

> *"Dear Board and Shareholders of Emerdata Ltd.,*
>
> *There are simply no words that can adequately convey to you how very, terribly sorry I am for the current scandal. I feel personally and entirely responsible for a catalogue of misjudgements that have all been uncovered and magnified, in one coordinated attack, in an attempt to destroy the business of Cambridge Analytica.*
>
> *Clearly at the centre of the storm are the accusations regarding the misappropriation of Facebook data. But these have been augmented with a string of allegation regarding the ethics and integrity of the company and its management; which have been brought starkly to the attention of the world through the recordings of an undercover reporter, and a string of testimonies from disgruntled former employees and consultants.*
>
> *The impact on the Company will be significant, if not terminal. The impact on management and staff will be damaging, if not career ruining. Yet it is in regard to the impact on the Board and Shareholders that I am writing to you - as it is now in your hands how we move forward.*
>
> *Ahead of sending you (later this week) a document setting out the strategic options available to CA, I wanted to take this opportunity to share with you a very candid summary of the facts surrounding the various assertions that have been made by the press. I have tried to address as many of the allegations as possible, and certainly the most important ones.*
>
> *The purpose of this information is to better help you understand the acts Vs the Myths, such that you can evaluate whether you want to continue your association with the company, let alone to support it through this testing period.*
>
> *Whilst I recognise that my credibility is shot in the Court of public opinion, for those of you that know me better, I hope that you will trust me one more time and accept this document as, to the very best of my knowledge and enquiry, entirely honest. Where possible I have tried to support the facts presented with proof in the form of information and documentation.*
>
> *If there is one silver lining to the current situation it is that, however, unethical the company may appear, however, perverted management decisions may look, and*

however, tarnished the CA and SCL brands now are, there was never any intent to break the law. And indeed we are already being advised by a team of lawyers, on both sides of the Atlantic, that no laws have been broken.

With sincere apologies" [emphasis added]

324. It was put to Mr Nix in cross examination:

"At that stage, you were accepting responsibility for the effect of that broadcast which had in your words augmented the effect of the Facebook issue. Do you stand by those words, Mr Nix?"

325. Mr Nix's evidence was:

"I was, as you can perhaps imagine, absolutely knocked sideways when this happened. One day I'm the CEO of a very rapidly growing, very exciting tech start-up business, that is enjoying enormous unparalleled success in a very short space of time, and two or three days later, there is a coordinated attack across some of the largest media organisations in the world, intent on destroying the business, and I was all over the shop, to be honest. Obviously because the Channel 4 reporting was personal to me, I felt it very personally. I think at the stage that this letter was written, I don't think any of us knew how much impact that reporting would have. It was not until later, as we saw what really caused the demise of the business, that we were able to analyse that. But I think when I wrote this letter, I was pretty traumatised by that reporting from Channel 4." [Day 4 100:8-101:4, Oct. 10, 2024)

326. Mr Nix further stated:

"...what this letter makes absolutely crystal clear is the line: "Clearly at the centre of the storm are the accusations regarding the misappropriation of Facebook data." That is unequivocal and always remains mine and most of my colleagues -- all of my colleagues, it would seem, apart from Julian Wheatland's, belief that that was what destroyed the company. Obviously the Channel 4 misrepresentation didn't help. Of course it didn't. And I have never denied that. But I reiterate what I said before. This was a data scandal." [Day 4 p101:14-101:25]

327. The Claimants also rely on the letter of 4 April 2018 to the Mercers in which Mr Nix wrote:

"...I have already shared with you the 'Facts Vs Myth' document – I stand by the contents of this in regard to the work of both SCL Group and CA. We have received an initial opinion from Counsel, also shared with you, in regard to the data acquired from GRS – and it indicates that we acted in good faith. We will shortly receive the findings from the independent investigation into the Company's practices and ethics – and I am similarly hopeful that this will prove that, whilst we might be guilty of recklessness and definitely of hyperbole, there is no evidence of actual wrongdoing. Finally, we are

about to commence the independent data audit of our servers - and I am equally hopeful that this will prove that we did, indeed, delete the Facebook data as instructed to by Facebook in Q1 2017.

…

Today, I am deeply ashamed and deeply contrite…". [emphasis added]

328. It was put to Mr Nix that:

"…what you were ashamed about was not that Mr Wylie had got the better of you in bringing down the Facebook investigation on you, what you were ashamed of and deeply contrite about was the Channel 4 broadcast, which was your personal contribution to the storm that hit the company."

329. Mr Nix responded:

"…your entire claim relies on the Channel 4 video, it is the centre of your universe, but you are kind of assuming that at this time in March '18 it was the centre of my universe. It wasn't. My universe had much, much bigger problems than this. Let me give you an example. Contravention of FEC Regulations in the United States is punishable by jail. Contravention of the 1961 Wire Act in the United States is punishable by jail. We were also being investigated by the Mueller Inquiry that sent people to jail, including one of our former employees -- nothing to do with us, I hasten to add -- oh no, threatened with jail. We had the NCA in England, the National Crime Agency, investigating us. Of course the ICO. I don't think there is a jail term there, but there were severe monetary penalties. There were some much, much bigger, really existential, terrifying things going on. To turn and around and say what was going through my head was some misrepresentation by Channel 4 is not fair. I was worried about spending the next 25 years in a US jail for something I did not even understand, like the Wire Act…." [Day 4, p107:7-108:4]

330. It was submitted for Mr Nix that in these letters, he was expressing contrition but his sense of responsibility was "*managerial responsibility*" and his contrition was about the whole failure of the business.

331. In my view the issue of causation has to be determined objectively and dispassionately by reference to the evidence. It is clear from the timing of the letters and the evidence of Mr Nix, as set out above, that he was under an enormous amount of personal pressure at that time from a variety of sources with the business that he had led being the subject of investigation both in the US and the UK. In my view the evidence of this pressure and as a result his likely frame of mind at the time he wrote the letters to the Board of Emerdata and the Mercers was made clear in the following passage of his evidence in cross examination which was unchallenged and compelling:

"…I don't think that you are comprehending the magnitude of what was going on at this period. I mean, I have sort of alluded to it before. This was a tsunami of events. I will try and give you a flavour because it is important. To answer this properly, you have to understand the context. We, and me particularly, was on the front page of every single newspaper in the world for weeks. Every single day, the newspaper was printing stories about us and they were all horrible. We had the press camped outside my home for days, weeks. Every time the door opened, my kids went out, they just ran up the stairs and caused mayhem. Every time I went to the office, there were 100 press camped outside there and afterwards. Everywhere I went I was being booed, jeered, spat at. People were photographing me. It was an intense period in my life, okay? So, contrite? Ashamed? I didn't know if I was coming or going. I mean, I couldn't work out some days what the meaning of life was, let's put it like that. It was awful. And in the midst of this I was trying to say to the investors, "We didn't commit any crimes. Whatever the reporting is, we didn't commit any crimes. We have never done anything illegal. Whether you believe me or not, this will come out". And in due course, years and years later, wow, at last it did come out, we didn't commit any crimes anywhere, and no one cares because the scandal is over. But I cared…". [Day 4 p105:17-106:19]

332. I do not therefore regard the comments of Mr Nix in these letters, relied upon by the Claimants, as objective or reliable evidence as to the cause of the demise of the business and look therefore to determine the cause of the demise by reference to the objective evidence. In my view this comprises the following:

332.1. the media reporting;

332.2. the public statement by Facebook when it suspended CA from its platform and the correspondence between Facebook and CA;

332.3. the correspondence from suppliers and customers;

332.4. Mr Green's evidence.

333. It was submitted for the Claimants that "*the only development in events that would explain Mr Nix's sudden contrition and acceptance of responsibility were the Nix Broadcast and the ICO's raid."*

334. The Claimants referred to the email which Mr Nix sent to the Mercers in December 2017 where he made reference to the adverse events which had already affected the business:

"…it has been a horrible year for all of us. Specifically, there is no doubt that the political headwinds have damaged the company. In the US alone we have lost or had cancelled an estimated $8-10m of contracts as a direct result of the "Trump factor" (aka Russia, Bannon, Assange, Brexit! etc) and these are just the ones we know about. For similar reasons, we have also lost number [sic] of important employees and trading has been bogged-down with legal battles, enquiries and investigation into the company

with/by The Guardian Newspaper (UK), the Information Commissions [sic] Office (UK), Electoral Commission Investigation (EU), the House Intelligence Committee, The Senate Intelligence Committee, the Mueller/FBI investigation and countless 'investigative' journalists and conspiracy theorists who have made it their mission to destroy our brand and goodwill."

335. However in my view it is clear that whilst the issue of the Facebook data had originally been raised earlier, it was revived by Mr Wylie in March 2018.

336. The evidence of Mr Nix in cross examination was:

"…The issue regarding data was the perception not the reality, it was the allegation by Mr Wylie that although we had confirmed publicly and to Facebook that we had deleted the data, Mr Wylie had told The Guardian newspaper that there was still evidence of data on our systems that had been seen by employees serving at the company. So the allegation that resurfaced and blew open the whole GSR Facebook data scandal was this idea that we had lied about deleting the data both to Facebook, and to the Select Committee and to everyone else, and that we still had the data on our servers, and that is what reignited the whole data scandal." [Day 4 p41] [emphasis added]

337. Mr Nix's evidence is supported by the documentary evidence of the article in The Guardian (referred to above):

"The allegations about harvesting GSR data were revived in March 2018 by comments by Wylie: "Why is it in the news? Over the weekend, the Observer revealed that in 2014, so million Facebook profiles were harvested by a UK-based academic, Aleksandre Kogan, and his company Global Science Research…Wylie, a Canadian who previously worked for Cambridge Analytica, has lifted the lid on this and other practices at the firm, which he describes as a "full-service propaganda machine". He contradicts claims made in the past by Nix, who in February told British MPs that the company did not use Facebook data in its work…". [emphasis added]

338. It can also be inferred from the correspondence with the ICO and the public statement by Facebook. The ICO in its letter of 19 March 2018 wrote:

"Our reasonable grounds for suspecting that Facebook data and/or derivative data obtained from GSR is held or on behalf of by your client, includes evidence from a whistle blower, previous responses from your client and apparent contradictions on this issue. We are not satisfied that this aspect of our investigation has been in any way resolved by your client's response."

339. In its public statement suspending CA from its platform, Facebook expressed concern that "*contrary to the certifications we were given, not all data was deleted."*

The Facebook suspension

340. Facebook suspended CA on 16 March 2018. Facebook issued a public statement "*Suspending Cambridge Analytica and SCL Group From Facebook-Meta*" on that day. It included the following passage:

"*Breaking the Rules Leads to Suspension*

Several days ago, we received reports that, contrary to the certifications we were given, not all data was deleted. We are moving aggressively to determine the accuracy of these claims. If true, this is another unacceptable violation of trust and the commitments they made. We are suspending SCL/Cambridge Analytica, Wylie and Kogan from Facebook, pending further information." [emphasis added]

341. It was submitted for the Claimants that it was reasonable to infer that Facebook had received notice of the Channel 4 broadcast in the same way as the Companies. As referred to above, Mr Wheatland in his evidence went further and said that he believed *"that Facebook also received notice of the Channel 4 broadcast in advance, and in light of that notice chose to terminate Cambridge Analytica's accounts".* However as set out above, that belief was inconsistent both with the public and private statements made by Facebook and I do not accept his evidence.

342. It was further submitted for the Claimants that Facebook was ready to restore CA's accounts on 19 March and would have done so but were stopped by the ICO which in itself would not have happened had the SCL Companies cooperated.

343. Dr Tayler addressed this in an earlier witness statement:

"After detailed discussions we discussed the possibility of the suspension being lifted on the basis that we:

a. submitted an affidavit confirming that we had continued to comply with their certification to Facebook;

b. submitted to a forensic review of our systems by Stroz Friedberg, a highly regarded auditor who do a lot of work for the ICO;

c. provided Facebook with a list of those who had access to Cambridge Analytica's servers; and

d. investigated whether Christopher Wylie took any Facebook data when he left Cambridge Analytica.

75. We were happy to agree to these requests if it was to mean that we would regain access to the Facebook platform. Solicitors acting on behalf of Facebook attended our offices in the evening of 19 March 2018 with heads of terms for agreement. At that point Facebook were told by the ICO not to proceed with the above actions."

344. I have not found a breach of duty in respect of the alleged lack of cooperation with the ICO but even if CA had allowed access to the ICO I do not accept that the ICO would have allowed Facebook to conduct its own review whilst the ICO were investigating what data was being held and thus in my view Facebook would have been required to await the outcome of the ICO investigation in any event whether this had taken place by SCL Elections allowing access to its premises or following a raid.

Conclusion on Causation

345. The Claimants' pleaded case is that *"either one of the matters referred to above would have resulted in the failure of the Cambridge Analytica business by reason of the adverse publicity generated. In the alternative, DRL contends that one of the matters referred to above, or alternatively both of them cumulatively, led to the failure of Cambridge Analytica."*[emphasis added]

346. It was submitted for the Claimants that their "*primary analysis is this was an equitable breach which caused the loss of the company and for that purpose, it doesn't have to be the only loss of the company. It doesn't have to be the only reason. It just has to be a reason."* [Day 7 p57] It seems to me that the submission moves from the "*but for*" test to relying on a case of multiple competing causes.

347. In my view the Claimants have not shown that "but for" the remarks of Mr Nix at the Meeting (which are pleaded) the Cambridge Analytica business would not have failed by reason of the adverse publicity generated.

348. The Nix Broadcast, as set out elsewhere, was one of a series of seven broadcasts of which only one was devoted to the Meeting. In my view Channel 4 could and would still have broadcast the other reports in the Cambridge Analytica series and all the other parts of the same reports, without the Defendant's (alleged) comments.

349. As discussed above the adverse publicity centred on the alleged harvesting and use of the Facebook data with its ramifications for the US election and to a lesser extent Brexit.

350. Whilst the remarks of Mr Nix were reported as for example in the BBC report referred to in the Claimants' skeleton for trial they were only a small part of the larger story. As is evident from that particular report it was described as *"a dispute over the harvesting and use of personal data - and whether it was used to influence the outcome of the US 2016 presidential election or the UK Brexit referendum".*

351. It was the suspension by Facebook of CA's access to its platform that rendered the business largely unable to provide its data services and as set out above that was stated both publicly and privately to be as a result of the fact that Facebook was concerned about the recent reports which suggested that contrary to the earlier assurances, the GSR data had not in fact been deleted. On the evidence it is also likely that it was the adverse publicity concerning the use of the Facebook data which led to clients and suppliers withdrawing from their contracts.

352. It was submitted for the Claimants that the seizure of laptops did not mean the business could not function at all [day 7 p58**]:** there were "*workarounds"*. Dr Tayler in cross examination accepted that they had a workaround in due course by using the laptops of members of staff who had taken them home and by bringing old laptops back into service and he agreed that "*imperfect that may have been, that did allow the company to function*". [Day 5, p33:16-33:22]

353. However the issue was not just whether staff had access to a laptop but whether they could access records and data management systems. Mr Green's evidence is clear as to the impact on the business in this regard. Of even greater significance is the loss of customers and suppliers as without access to social media and external data management platforms and without customers, the business could not continue to operate.

354. In my view the evidence supports Mr Nix's view expressed in cross examination that it was a data scandal and the business could not survive without access to its data platforms:

"Q. – but you recognised, didn't you, that the broadcast going out on the 19th threatened the very future of the company?

A. Which broadcast, the Channel 4 broadcast?

Q. The one about you, in the Berkeley Hotel.

A. Of much more, of paramount concern, was the issue about data. That was the concern; the data scandal. We were a data company. Cambridge Analytica, the clue is in the name; Analytica. We were a data company, we were set up to do data analytics. Our entire business was based on data, using data, modelling data and employing data. That is what we did. If the data scandal went ahead and/or Facebook shut us off their platforms and other service providers, we were dead as a company. It was a data scandal. It is still a data scandal today; "the Facebook data scandal". That is what it was about."

"*The Cambridge Analytica scandal and the demise of the company was about the perception of wrongdoing. As Ms Mercer said, it transpired one, two, three years later that many -- well, not many, all of the allegations against the company were false, okay? But the perception was at the time that they were all real and it was the perception that was driving the news media and the perception that was driving our customers' and suppliers' decisions to leave us and the perception that informed all of the investigations. It was the perception. It had nothing to do with the reality. So, you can say, well, that didn't turn out to be true, that wasn't true, but it was years later that that was proven. But this scandal was over in six weeks -- rather, the company was over in six weeks. Actually, it was over by 17 March, the moment Facebook cut its platform.*

That is when it was over. The business died on that day, in my view. We couldn't have survived without it." [emphasis added]

355. For all the reasons discussed above, I find on the evidence that the Claimants have not established that "but for" the remarks of Mr Nix at the Meeting (which are pleaded) the Cambridge Analytica business would not have failed by reason of the adverse publicity generated.

356. As to the alleged breach of duty arising out of Mr Nix's dealings with the ICO, as referred to above, in my view it is clear from the contemporaneous correspondence that the ICO investigation would have been publicised whether access had been granted or not. I note that in her interview on Channel 4 news the Information Commissioner said:

"…we need to look at the databases and we need to look at the servers and understand how data was processed or deleted by CA, there are a lot of conflicting stories about the data…

Right now we have parliamentarians, we have the media, we have companies, we have the public's attention on voter surveillance". [emphasis added]

357. It is clear from her remarks in that interview that what was driving the actions of the ICO was the "*conflicting stories about the data*" in circumstances where the ICO was very aware not just of the public focus on voter surveillance but also the attention it had attracted from parliament and the press (which is also evident from the media reports referred to above). In the interview the Information Commissioner stated that she would be applying for a warrant thus pre-empting any response from CA and (as the correspondence set out above in relation to the issue of breach of duty demonstrates) subsequently rejecting the attempt by CA to offer an alternative way forward (see letters and email of 20 March referred to above). Further the letter from the ICO to Mr Nix was clear that she intended to make public her findings in any event.

358. Accordingly if I were wrong on the issue of breach of duty in relation to Mr Nix's dealings with the ICO, I find that the Claimants have not established that "but for" Mr Nix's behaviour towards the ICO, the ICO would not have had to apply for a search warrant, which was then executed in highly publicised circumstances and that but for the resulting publicity the business of CA would not have failed.

359. To the extent that the Claimants submitted that the remarks of Mr Nix were a cause of the collapse of the business where damage was caused by the combination of more than one element, the pleaded elements are the remarks at the Meeting and the approach of Mr Nix to the ICO. In my view neither of these matters were a cause of the collapse of the business of CA either individually or together.

The Funding Case

360. For completeness I will also set out my substantive conclusion on causation if I were wrong on the issue of whether it was open to the Claimants to argue on its pleaded case the funding argument (discussed above).

361. I would still have found that the remarks of Mr Nix at the Meeting as reported in the Nix broadcast and set out in the pleadings did not cause the collapse or failure of the CA business. Ms Mercer's evidence that they would have continued to fund absent Mr Nix's comments has to be weighed against the other evidence. The position of CA in the counterfactual was that the raid by the ICO would have gone ahead and the computers seized, CA would have been suspended from Facebook and other data platforms such that it was unable to provide its services, customers would have terminated their contracts as they were unhappy with the allegations around illegal use of Facebook data and CA could not provide the data services they were contracted to provide.

362. The evidence of Mr Green (set out above) is clear that it was the significant adverse publicity regarding the use of Facebook data that led to the loss of existing and pending contracts, that many clients resolved to withhold or contest payment, that some demanded the return of funds. His evidence was further that the financial viability of the trading entities was further compromised by the seizure of all the computer equipment holding financial and other records and data. His evidence is supported by the correspondence relating to the reactions of clients and suppliers set out above.

363. I also note the evidence that Barclays Bank notified CA on 4 April 2018 that it would close all the SCL Companies bank accounts with effect from 4 June 2018. As Mr Wheatland observed in an email to Mr Nix on 4 April 2018: *"This looks like game over..."*.

364. I further have regard to the fact that Ms Mercer's evidence as discussed above shows that she did not have a good idea of what was happening on the ground and her comments about a willingness to fund absent Mr Nix's comments have to be read in light of this.

365. For all these reasons it is not credible that the Mercers would have continued to fund the business but for the adverse publicity generated by Mr Nix's comments at the Meeting.

366. On this alternative case, I therefore find that the Claimants have not established that but for Mr Nix's comments at the Meeting and the adverse publicity that was generated, the Mercers would have continued to fund the CA business and the business of CA would not have failed.

Quantum

367. In light of my findings above, I do not need to consider quantum.

Alleged Breach of Duty to Emerdata

368. Emerdata's misrepresentation claim has now been abandoned. However there remains the claim for breach of duties to Emerdata.

369. Emerdata's pleaded case on the alleged breach of duty toward Emerdata is as follows:

> *"52. At the time at which Emerdata entered into the SPA, Mr Nix was a director of Emerdata, having been appointed at an earlier stage of completion of Project Dynamo. As such, at the point at which Emerdata entered into the SPA, Mr Nix owed Emerdata the duties set out at paragraph 46 above. Further or in the alternative, in the particular circumstances of Project Dynamo (in particular that Mr Nix was orchestrating Project Dynamo and was about to become a director of Emerdata), Mr Nix owed Emerdata fiduciary duties in like terms to the statutory duties identified at paragraph 46 above.*
>
> *53. Mr Nix breached one or more of those duties by failing to notify the rest of the board of Emerdata, as he should have done prior to it entering into the SPA, of the comments he had made at the Meeting. This Notice of this kind would naturally have been particularly important to Emerdata, given that investment was being made in circumstances where Cambridge Analytica was subject to intense media scrutiny and was the subject of allegations of unethical conduct that had damaged its business.*
>
> *54. Had Mr Nix notified the rest of the board of Emerdata of the comments that he had made at the Meeting in advance of the execution of the SPA, Emerdata would not have entered into the SPA. Accordingly, Mr Nix's breach of duty caused Emerdata to invest US$19m in acquiring Group's shares, which investment was wasted in view of the failure of Cambridge Analytica. DRL, as assignee of Emerdata (or alternatively Emerdata on its own account as pleaded above), is accordingly entitled to, and seeks, damages to compensate it for the Sterling equivalent of the US$19m (at the exchange rates prevailing at the date of trial or at such other date as the Court may find) Emerdata paid out on completion of Project Dynamo."* [emphasis added]

370. The first issue is whether a duty existed at the relevant time.

371. The first basis on which DRL allege that Mr Nix owed duties to Emerdata is that he was already a director of Emerdata when Emerdata entered into the Share Sale and Purchase Agreement (the "SPA").

372. It was submitted for the Claimants that it was part of the completion process of Project Dynamo that Mr Nix was appointed a director of Emerdata. It was submitted that it was apparent from the detailed steps plan dated 23 August 2017 that this appointment occurred before Emerdata's acquisition of SCL Group.

373. It was submitted for Mr Nix that:

373.1. Mr Nix owed no duties to Emerdata before the completion of Project Dynamo: DRL cannot show that Mr Nix signed the director appointment form before Mr Wheatland signed the SPA;

373.2. in any event this was a composite transaction such that he only owed a duty to prevent the transaction from proceeding because it did proceed; Mr Nix would not have become a director without the SPA completing.

374. Project Dynamo involved a number of steps:

374.1. By a "Share Exchange Agreement" Emerdata acquired the shares ("units") in CA LLC by issuing shares in itself in exchange for the units in CA LLC;

374.2. Emerdata and the third party investors entered into a "Share Subscription Agreement" (the "SSA") by which the investors would subscribe for newly issued shares in Emerdata;

374.3. Emerdata and the shareholders of SCL Group executed the SPA pursuant to which Emerdata would acquire the shares of SCL Group.

375. Mr Nix's evidence in his witness statement was:

"The culmination of Project Dynamo took place on 23 January 2018, known as "Completion Day". The completion process was intricate and unfolded in several stages (though I am not sure in what order): (a) Emerdata acquired the shares in CA LLC in exchange for the units in CA LLC (b) Emerdata and the Investors entered into the "Share Subscription Agreement", whereby the new investors were to subscribe for newly issued shares in Emerdata, with the intention of raising a total of USD 30 million (although only USD 19.795 million was raised in this manner) (c) Emerdata and the shareholders of SCL Group executed a share sale and purchase agreement which outlined the terms for Emerdata's acquisition of the shares of SCL Group and (d) I and other shareholders were appointed as directors of Emerdata."

376. Mr Nix' s evidence was that he was given all the documents to sign on 23 January 2018:

"...I signed the director form and the share purchase agreement as part of the same signing process as explained above. I cannot say in what order I signed the documents, or how many other parties had already signed before I did."

377. In my view the draft steps plan dated 23 August 2017 does not show that Mr Nix would be appointed as a director of Emerdata in advance of the SPA being entered into. The Claimants refer to Step 2 which section is dealing with the Share Exchange Agreement but Step 2.5 relied upon by the Claimants merely states: "*Update Register of Members [and Directors]*" without more. It gives no detail as to who was to be appointed and the reference to Directors is in square brackets which suggests that this step was not finalised.

378. Completion of Project Dynamo took place on a single day and comprised a number of steps and the execution of a number of documents. The Claimants have not established that Mr Nix was already a director at the time Emerdata entered into the SPA.

379. In oral closings it appeared to be accepted for the Claimants that completion took place on a single day and it was acknowledged by Mr Jones KC that "*it may be said against us that there is an element of artificiality*" to the Claimants' case that Mr Nix was appointed a director of Emerdata before Emerdata acquired SCL Group [Day 8 p43]. However it was submitted for the Claimants that "*the risk of injustice and unfairness is avoided by the substance of the duties*": if the person knew that the company of which he was about to be appointed a director was virtually simultaneously about to make a bad acquisition in the same transaction, there would be no injustice in holding that there was a breach of section 174.

380. In my view the existence of the duty cannot be determined by the content of the duty and any consideration of what is just or fair. Further in my view it would be wrong in principle and without authority, to extend the statutory duties of a director to a person who was not yet a director (leaving aside the position of a shadow director). Even if the Court could find that directors' statutory duties could extend to a person who was about to become a director, (and it is unclear when such a duty would commence), it would seem a perverse outcome to impose a duty on Mr Nix in anticipation of becoming a director and as such (on the Claimants' case) under a duty to prevent Emerdata entering into the transaction in circumstances where if the transaction did not complete, the appointment of Mr Nix as a director would not proceed.

381. For these reasons I therefore find that Mr Nix did not owe to Emerdata the statutory duties set out at sections 171 – 177 of the Companies Act 2006 prior to the entry into the SPA.

382. The second basis advanced for DRL in its pleaded case for duties owed to Emerdata by Mr Nix is that DRL alleges that in the circumstances Mr Nix owed fiduciary duties in like terms to the section 171-177 statutory duties.

383. It was submitted for the Claimants that in view of the fact that the established categories of fiduciary relationship are neither exhaustive nor closed, Mr Nix was in a fiduciary relationship with Emerdata prior to the completion of Project Dynamo (and at the latest from the time when Mr Nix made the comments at the Meeting, which was 16 January 2018, because at that point he knew that he was in possession of information that could lead to Emerdata suffering substantial loss if it proceeded to acquire Group). The Claimants relied on the following passage in the judgment in *Arklow Investments v Maclean* [2000] 1 WLR 594 at page 598:

> *"In the present context, the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is*

adverse to the interests of the principal. An example of the obligation relevant to the present case is not to exploit or take advantage of the position of fiduciary at the expense of the principal. The existence and the extent of the duty will be governed by the particular circumstances."

384. It was submitted for Mr Nix that Mr Wheatland and not Mr Nix was "*orchestrating Project Dynamo*". Further that there is no authority for a person in Mr Nix's position to owe fiduciary duties: the test is set out in *Bristol and West Building Society v. Mothew Q [1998] Ch. 1,* cited with approval in *Arklow* at p599:

"The dictum of Millett L.J. in Bristol and West Building Society v. Mothew Q [1998] Ch. 1, 18 is apposite:

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations…"." [emphasis added]

385. Mr Nix was a seller of shares in SCL Group to Emerdata under the SPA and in those circumstances it is difficult to see how he could owe a duty of loyalty to the buyer, Emerdata. A seller is not in a relationship of trust and confidence with the buyer.

386. It was submitted for the Claimants in oral closings that every case turns on its facts and this is a situation where they were going to create a new holding company for the group of companies and this was not a "*conventional sale and purchase*"; everybody involved had agreed to restructure the Group and it would be "*wholly artificial*" to say that Mr Nix owed no duties merely because he was going to be a selling shareholder. [Day 8 p47]

387. A further basis for this alleged fiduciary duty was advanced by the Claimants in oral closings. It was submitted that Mr Nix was entrusted with the role of negotiating and concluding the SSA. It was submitted that he assumed a responsibility to Emerdata that entitled Emerdata to expect that he would act with loyalty towards it. The Claimants referred to an express duty of good faith in Clause 4 of the SSA which provided that:

"The Shareholders agree to act in good faith in respect of all matters provided for or contemplated by this agreement and to co-operate with each other in the running and operation of the Company for the purpose of the Business."

388. There is no specific authority relied on by the Claimants which would impose a fiduciary duty in these circumstances. Accepting however that the category is not

closed, nevertheless in my view this is not a situation where *"one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal".*

389. I do not accept that the circumstances of Mr Nix's involvement in Project Dynamo were such that they gave rise to a relationship of trust and confidence towards Emerdata. He was a director of the SCL Companies and as such had statutory duties towards those companies. He was not, as found above, prior to the completion of Project Dynamo, a director of Emerdata and as discussed below, he was not a "shadow director" of Emerdata. Further he had his own interests as a selling shareholder. In my view there could be no legitimate expectation that (prior to his appointment as a *de iure* director) Mr Nix would or could not use his position as director and shareholder of the SCL Companies in a way which could be adverse to the interests of Emerdata. It was an arm's length relationship: the SCL Companies and Emerdata were independent and separate legal entities and Mr Nix's role and duties lay with the SCL Companies.

390. In my view Mr Nix's role in negotiating with the third party investors as part of Project Dynamo did not override his duties to the SCL Companies so as to lead to a legitimate expectation that he owed a duty of loyalty to Emerdata. Clause 4 of the SSA is irrelevant to the prior negotiation of that agreement and in any event only imposes a duty on shareholders to act in good faith and does not go further and impose a fiduciary duty such that one shareholder could not act in a way which was adverse to another.

391. Accordingly for these reasons, I find that prior to his appointment as a director of Emerdata, Mr Nix did not owe Emerdata any fiduciary duties.

392. The third basis advanced for DRL is that Mr Nix was a shadow director of Emerdata.

393. This was not pleaded and that is therefore the end of that issue. However even if it were pleaded, there is no merit in the Claimants' contention.

394. Section 251 of the Companies Act 2006 defines a "shadow director" as follows:

"*(1) In the Companies Acts "shadow director", in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act."*

395. On the evidence Mr Wheatland acted on the instructions of Mr Nix relation to the SCL Companies (because Mr Nix was the CEO) but he did not so act in relation to Emerdata. There is no basis for a finding that Mr Nix was a shadow director of Emerdata.

396. Given my conclusions above that the Claimants have not established that Mr Nix owed a duty to Emerdata as pleaded, I do not need to consider whether any breach occurred

of any such duty and I do not propose to do so. Further there is no need to consider the claims for equitable compensation or an account of profits.

Claim by Mr Nix against Emerdata

397. Upon the completion of Project Dynamo Mr Nix received US$8,775,249.30 in cash and a further US$10,283,495.27 under convertible loan notes that (unless converted) were redeemable on 23 January 2021 (the "Loan Notes" or the "Deferred Consideration").

398. In this claim, as originally issued, Mr Nix claimed the following:

398.1. US$10,283,495.27 by way of the Deferred Consideration;

398.1. US$1,454,036, as an investment in return for shares that Mr Nix believed he was never issued. This limb of Mr Nix's claim was subsequently discontinued by Mr Nix, because the shares had in fact been issued to him;

398.3. US$1,545,000 in respect of a loan, alternatively an equity investment, made to Emerdata on or around 23 April 2018 (the "First Further Loan"); and

398.4. US$290,000 in respect of a loan made to Emerdata on or around 14 May 2018 (the "Second Further Loan").

399. Emerdata has now abandoned (on the last day of the trial) its defence of misrepresentation in respect of the Loan Notes (paragraphs 9.1-9.7 of the Amended Defence).

400. Emerdata's remaining defence in respect of the Loan Notes is in summary that Mr Nix has waived his right to receive payment of the Deferred Consideration and/or is estopped from asserting the right to repayment. Alternatively, Mr Nix and Emerdata discharged the contract requiring payment of the Deferred Consideration by agreement.

401. In relation to the claim in respect of the First Further Loan, Emerdata's defence is that Mr Nix was engaged in the business of repaying money he had been paid as a result of Project Dynamo's completion with a view to facilitating the orderly wind-down of the business, and in the hope of salvaging his reputation. The payment of the US$1,545,000 was therefore a gift, and therefore Mr Nix has no right to recover that sum.

402. In relation to the Second Further Loan of US$290,000 Emerdata's defence is that Mr Nix agreed to provide and provided further funds to enable payroll obligations to be met without imposing any conditions and without describing them as or securing agreement to them as being a loan. Accordingly the transfer of the US$290,000 was not made pursuant to any agreed loan, but rather was a gift. Alternatively, the US$290,000 was originally advanced as a gift, even if an intention later developed that it would be repaid, but no consideration was ever offered by Emerdata to create a binding obligation to repay.

Did Mr Nix waive his right to receive payment of the Loan Notes and/or did the parties discharge by agreement the contract pursuant to which Mr Nix was prima facie entitled to payment of the Loan Notes?

403. The key contemporaneous correspondence relied on by Emerdata in the Amended Defence in this regard are the letters from Mr Nix of 26 March 2018, 29 March 2018 and 21 April 2018 to the Board of Directors and Shareholders of Emerdata.

26 March 2018 Letter

404. This is set out in full above. The extract from the letter of 26 March 2018 relied on by Emerdata in its Amended Defence was that Mr Nix wrote saying that he felt, "*personally and entirely responsible for a catalogue of misjudgments that have all been uncovered and magnified*". He wrote that the impact, "*will be significant, if not terminal".*

29 March 2018

405. The letter of 29 March 2018 read:

> *"Dear Board and Shareholders of Emerdata Ltd.,*
>
> *As you are aware, as part of the recent capital raise Emerdata Ltd. acquired SCL Group for $20m. This transaction was structured 25% cash ($Sm) and 75% convertible debt ($15m). As a 70% shareholder in SCL Group I therefore received c.$3.5min cash from this transaction in consideration for my shares in SCL Group.*
>
> *In light of the recent scandals surrounding the Company I have been carefully re evaluating this transaction. Specifically, as the senior executive in charge of the company at this testing time, I do not think that it is right, nor fair, that I should have benefited at the expense of the shareholders. As a matter of principal and honour, and also to show my commitment to repairing the damage that has been caused to the Company today I signed a subscription agreement for c.$1.5m of investment into the Company.*
>
> *You will very shortly be receiving Board minutes from Julian Wheatland that require Board approval to ratify this investment. I would be grateful if you could confirm, by email, your agreement to these minutes at your earliest convenience.*
>
> *Furthermore, I have committed the balance of the proceeds that I received from the transaction c.$2m. (less entrepreneurs tax at 10%) as additional investment into the Company. These funds will be transferred as soon as the paperwork can be drafted.*
>
> *It will be for the Board of Emerdata Ltd. to decide whether these funds are best applied to increasing the operating capital of Cambridge Analytica to help it weather the current storm and consequential fall off in revenue; seeding a New Company in which*

the shareholders of Emerdata Ltd. will receive equity; or whether they are best invested into a 'fighting fund' to engage a legal team to start preparing our defence against the numerous law suits that are pending.

The management team are working to prepare a document that sets out all the strategic options that are available to the Board, together with a complete financial breakdown for each scenario. I understand that they will send this to you in early course.

Once again, my sincere apologies for letting this happen to the Company 'on my watch'. If there is a small consolation at this difficult time, it has been heart-warming to learn that some of our most significant clients are sticking with us." [emphasis added]

21 April 2018 Letter

406. The letter of 21 April 2018 read:

"Dear Board and shareholders of Emerdata

Background

It has been brought to my attention that some shareholders of Emerdata Ltd. feel blindsided by the fact that the shareholders of SCL Group were paid $7.8m of accrued debts immediately following the capital round completed in January. For the sake of clarity and transparency, I would like to point out that these were monies that were owed to SCL by CA as part of the original Shareholder Agreement, entered into in 2014, which provided for a 15% Management Fee for servicing the company. They also included funds that SCL paid to CA to help CA manage cash flow between 2015-2017, where for much of this period SCL was financing (from its profits from global political and government work) some of the hard costs of running CA.

In order to maximise the success of CA, the Board of SCL agreed NOT to take receipt of these funds for a period of nearly two years. Clearly, however, this debt had to be settled upon sale of the SCL Group to Emerdata. I can understand that this must have been a big shock for those shareholders who did not understand this arrangement or did not get the opportunity to read the documentation/financials in respect of the capital raise, but I want to assure you that not only was this payment legally binding, it was fair and fully transparent.

I think that I should also point out that due to the delays in closing the financing round, by the time the Investment Agreement was actually signed in January 2018 the debts owed to SCL by Emerdata were closer to $9m, but the Board of SCL agreed to receive the amount as determined in September 2017 i.e. $7.8m.

• Of the $7.8m paid by Emerdata to SCL, I received c.$5.2m from this transaction

• This was in addition to the c.$3.5m that I received from the sale of my shares in SCL Group to Emerdata

• Therefore, the total that compensation I received was $8. 7m

As a commitment to do right by the Company, together with the wounded investors, I am willing to invest ALL of the monies ($8. 7m) that I received from these payments to assist the wind-down of CA and the capitalisation of a new business.

Unfortunately, these funds will have to suffer tax, the amount of which I will confirm in early course, but which is estimated at c.$lm. I would also ask the Board to agree to let me retain a modest fighting fund to help me to finance my legal fees (currently £25k per week) in respect of the various regulatory and criminal investigations being brought against me personally in the UK. I would like to propose £300k. This will leave a balance of funds of c.$7.3m

I hope these will go some way to ensuring that the 110 employees for whom I am responsible for receive a proper redundancy, will ensure that the assets of Emerdata do not fall into the hands of those who would seek to do us further harm and will provide an avenue in the future for investors to recoup some or all of their investment. Finally, I hope that this will once again prove to the Board and shareholders that I have only ever had the best interests of the Company at heart.

Investment into Emerdata Ltd.

I wrote to you on the 29th March, 10 days after the first C4 news expose into CA aired on TV, immediately offering to reinvest the c.$3.5m I had received from the sale of my shares of SCL Group into CA to try and save the Company. Unfortunately, at that time the extent of the damage to the Company was not known, and compounded by a failure to take immediate action, it is now clear that the best that Management can hope to achieve is an orderly wind down of the business. The estimated costs for this are $5-6m. I have already invested $1,455,000 into Emerdata and on Monday morning, 23rd April, I will be transferring an additional $1,545,000 into Emerdata. These funds will ensure that the Company can meet US/UK payroll and will 'buy more time' for the Board as they consider the options for moving forward.

I further commit additional funds to ensure that the Company can meet the redundancy of the employees in an orderly and professional manner. CA Management are working to determine what this cost will be, but it will likely be an additional $1.5m.

Firecrest Ltd.

Following the (above) investment into Emerdata Ltd., taxes and a small fighting fund this will leave c.$2.8m

…

I would be prepared to discuss with the Board an investment of $1m to seed this business, on the condition that the business plan was restructured to ensure that the Company is not exposed to violation of SEC regulations. I would also be interested to help Firecrest to identify new investment into the business, where I was already in advanced discussions with a number of very interested parties.

(Government) NewCo.

I fully appreciate that my personal reputation is tarnished and certainly not in the short-term, and perhaps never, will there be a role for me in Firecrest. However, I do believe that I could provide material shareholder value by continuing to operate the traditional SCL/CA government and political business (outside of the USA).

I propose to incorporate a new (off shore) vehicle to take this forward, but in due course, and following the wind-down of Emerdata and I would like to discuss with the Board taking over the CA brand - which I think that I could develop into a valuable asset. In order to give shareholders the maximum opportunity for success, in addition to their equity in Firecrest, I would like to offer them comparable equity in this business.

In order to take this business forward I would like to invite a team from CA to join this business. This will not only reduce the redundancy costs of Emerdata, but will also provide additional job security to some of those employees who do not receive the opportunity to work for Firecrest Ltd.

I can confirm that I already have an initial contact lined up (c.$2m) and clearly this Company would be well positioned to close any existing business that would otherwise be lost when CA Political is wound-down. The estimated costs of establishing and operating this company are $3m.…

I am interested to invest the balance of the funds that I received ($1.8m) into developing this business.

Integrity

Following the above disbursement and investment of funds I will retain $0.00 from the 14 years I committed to building SCL / CA…

… things did go wrong, and I remain very sorry and ashamed that it happened on my watch, and most specifically for my involvement in the C4 undercover documentary. However, I want to remind you all that the vast majority of allegations that have been made against the Company and its management are simply not true. In due course I am hopeful that this will be demonstrated, and you will understand that we are not the monsters that some would have us be.

I look forward to discussing this proposal with the Board in early course, and in the first instance would like to offer to fly to NYC next week to meet with the Founder Investors to discuss face-to- face." [emphasis added]

Discharge by Agreement

407. Emerdata's pleaded case on discharge by agreement/waiver relied in particular on the letter of 21 April 2018 and was as follows:

"9.5 It is therefore obvious from the correspondence above that the parties had acknowledged the impossibility of Cambridge Analytica surviving as a business, and all that would be left was an attempt to wind down the business in an orderly way. It is a necessary implication of that correspondence, including in particular Mr Nix's statement that he would, "retain $0.00 from the 14 years I committed to building SCL/CA" that the Loan Notes would not be repaid. This implication is fortified by the fact that Mr Nix did not attempt to avail himself of his prima facie rights under clause 3.1 and paragraph 3.2 of the Conditions (at Schedule 1 of the Instrument). Those provisions prima facie entitled Mr Nix to demand the redemption of the Loan Notes in the event of the SCL Group Companies entering into administration and/or liquidation, which they did in May 2018 and April 2019 respectively. There can be no credible rationale for Mr Nix not exercising the purported rights he now relies on at that time, other than that he considered that he had relinquished those rights. The correct legal analysis is therefore as follows:

9.15.1. Mr Nix by implication waived his rights to receive repayment of the Loan Notes and/or is estopped from asserting the right to repayment. Emerdata acted in reliance on the assurance that it would not be called upon to repay the Loan Notes in that, in May 2018, it procured the SCL Group Companies being put into administration, as a result of which there was no prospect of funds being generated to repay the Loan Notes, since Emerdata had and has no assets other than the SCL Group Companies.

9.15.2. Further or alternatively, Mr Nix and Emerdata discharged the Loan Notes and the SPA as between them by agreement.

Insofar as consideration was required for that process, consideration was given by Emerdata:

9.15.2.1. Issuing Mr Nix with 25,496 preference shares, which it did on or around 16 April 2018; and

9.15.2.2. In the alternative, refraining from criticising Mr Nix in the media." [emphasis added]

408. Emerdata's case is that it is *"a necessary implication of that correspondence, including in particular Mr Nix's statement that he would, "retain $0.00 from the 14 years I committed to building SCL/CA""* that the Loan Notes would not be repaid.

409. It was submitted for Emerdata in its written oral closings that:

409.1 When Mr Nix subscribed for new shares in Emerdata, he did so in the belief that he was investing in a doomed business as part of a process that would enable him to return all the funds he had received from Project Dynamo to help with the orderly wind down of Cambridge Analytica and possibly the establishment of a successor company.

409.2 It necessarily followed from that arrangement that the Deferred Consideration would not be paid to Mr Nix, and his right to it was relinquished by agreement, supported by consideration in the form of the new shares that were issued to him.

410. Emerdata's reference to the statement that he would "*retain $0.00 from the 14 years I committed to building SCL/CA"* is a reference to the letter of 21 April 2018. However there is no reference in that letter of 21 April to the Loan Notes. Rather the letter refers only to the cash payment totalling US$8.7m that Mr Nix had received:

"…As a commitment to do right by the Company, together with the wounded investors, I am willing to invest ALL of the monies ($8. 7m) that I received from these payments to assist the wind-down of CA and the capitalisation of a new business…".

411. There is no basis therefore to infer that this letter was dealing with the Loan Notes.

412. Although there was a reference in the letter of 29 March 2018 to the Loan Notes at the start ("*…Emerdata Ltd. acquired SCL Group for $20m. This transaction was structured 25% cash ($Sm) and 75% convertible debt ($15m) …*") there was no express or, in my view, implicit reference which could amount to an offer to discharge or waive his rights to payment under the Loan Notes.

413. Insofar as the Claimants submitted that Mr Nix was investing "*as part of a process that would enable him to return all the funds he had received from Project Dynamo*" both letters refer only to the cash proceeds which he had received. The figures mentioned in the letter of 29 March 2018 clearly relate to the cash received by Mr Nix from Project Dynamo and not the Loan Notes: Mr Nix received US$3.5m of which he subscribed for new shares in an amount of US$1.5m leaving a balance of US$2m (less a deduction) to be invested.

"As you are aware, as part of the recent capital raise Emerdata Ltd. acquired SCL Group for $20m. This transaction was structured 25% cash ($5m) and 75% convertible debt ($15m). As a 70% shareholder in SCL Group I therefore received c.$3.5min cash from this transaction in consideration for my shares in SCL Group.

…As a matter of principal and honour, and also to show my commitment to repairing the damage that has been caused to the Company today I signed a subscription agreement for c.$1.5m of investment into the Company…

Furthermore, I have committed the balance of the proceeds that I received from the transaction c.$2m. (less entrepreneurs tax at 10%) as additional investment into the Company. These funds will be transferred as soon as the paperwork can be drafted…". [emphasis added]

414. There is no statement in either letter in my view from which it can be inferred that Mr Nix offered to discharge or waive his rights to payment under the Loan Notes.

415. To the extent that Emerdata sought to rely on the fact that Mr Nix subsequently did not seek to accelerate the Loan Notes as suggesting that he considered that he had relinquished his rights, there is no evidence to support this inference.

416. Even if the letters either individually or together could found an implication that Mr Nix offered to discharge his rights under the Loan Notes, there is no evidence of any acceptance of that offer by Emerdata.

417. Further, even if I were wrong on that, such an agreement would require consideration.

418. It was submitted for Emerdata (paragraph 81 of its opening skeleton) that there had been a parol release of Emerdata's obligation to pay the Loan Notes. Emerdata referred the Court to *Chitty on Contract 35th edition* paras 26-001-26-010.

419. It is clear from paragraph 26-005 that a parol release requires consideration:

"*A mere parol release, whether oral or in writing, without valuable consideration amounts to nudum pactum and is normally insufficient to effect a discharge either at law or in equity. In order to be effective a parol release must generally be given in return for valuable consideration."*

420. *Chitty* at 26-012 states:

"In the case where the parties do not make use of a deed, the release, whether it is described as an "accord and satisfaction" or simply the purchase of a release, must be supported by consideration. Similarly, a compromise which is not in the form of a deed must be supported by consideration."

421. Emerdata's pleaded case on consideration (as set out above) is that the consideration was either issuing Mr Nix with 25,496 preference shares, which it did on or around 16 April 2018; or refraining from criticising Mr Nix in the media.

422. It was submitted for the Claimants in their oral Reply submissions that the penultimate paragraph of the letter of 21 April showed "*his contrition*" and taken in the context that he would be reinvesting everything he had already received from Project Dynamo, it was plain that he was not expecting to receive any future consideration and that the shares were consideration not only for amounts subscribed but also for a relinquishment of any further entitlement.

423. The penultimate paragraph of the letter of 21 April, referred to in the Claimants' submissions, said:

"Nonetheless, things did go wrong, and I remain very sorry and ashamed that it happened on my watch, and most specifically for my involvement in the C4 undercover documentary. However, I want to remind you all that the vast majority of allegations that have been made against the Company and its management are simply not true. In due course I am hopeful that this will be demonstrated, and you will understand that we are not the monsters that some would have us be."

424. In my view as discussed above, the letters do not address the Loan Notes but only refer to investing the cash which Mr Nix had received. Further the other contemporaneous evidence does not support a conclusion that the issue of the further shares was in part in consideration for a waiver or discharge of the Loan Notes. Rather the evidence before the Court of the application letter from Mr Nix for the shares and the board minutes of Emerdata dated 28 March 2018 refer only to the issue of the shares in consideration of a cash amount of US$ 1,454,322.03. It seems highly unlikely that the Board minutes would not have recorded the discharge of the Loan Notes if in fact that had been part of the consideration.

425. Given the clear contemporaneous evidence in relation to the share subscription, I do not therefore accept the Claimants' submission that the further shares in an amount of approximately US$1.454m were issued as consideration for a waiver or discharge of Mr Nix's rights to receive payment under the Loan Notes.

426. There is also no evidence to support the alternative case that there was any consideration in the form of refraining from criticising Mr Nix in the media and it did not appear to be pursued in the Claimants' submissions. There was evidence of correspondence between Mr Nix and Emerdata's US lawyers around this time but no agreement was reached in that regard.

427. Accordingly for the reasons set out above Emerdata's defence that there has been a discharge by agreement must fail.

Waiver by estoppel/promissory estoppel

428. Emerdata submitted (para 82 of its skeleton) that waiver by estoppel/promissory estoppel arose from the letter of 21 April and in particular the statement that:

"Following the above disbursement and investment of funds I will retain $0.00 from the 14 years I committed to building SCL / CA…".

429. It was submitted for Emerdata that it would not be a "*comprehensible construction*" for Mr Nix to be setting out a willingness to contribute funds to wind down the business and stating that it would lead him to receive nothing for this work if he was maintaining his entitlement to be paid on the Loan Notes.

430. It was submitted for Mr Nix that the letter contained a complex and multi-faceted proposal and the statement relied on by Emerdata is not sufficiently clear and unambiguous to found an estoppel.

431. In my view the letter of 21 April was not only dealing with funds to wind down the business but also proposed investment in future projects such as Firecrest and Government (NewCo). Further as discussed above, it is clear that the letter is only referring to the cash amounts which Mr Nix had received.

432. However even if that statement in the letter of 21 April was sufficient to amount to a representation in respect of the Loan Notes, Emerdata have to establish reliance and detriment.

433. Emerdata submitted that it relied on that waiver to place the SCL Companies into administration. In my view Emerdata has not shown any evidence that there was any such reliance on any such alleged representation. There is no evidence that the decision to put the SCL Companies into administration was affected any assurance that the Loan Notes were not going to be payable.

434. As to detriment Emerdata in its Amended Defence stated that "*as a result of which there was no prospect of funds being generated to repay the Loan Notes".* In its skeleton Emerdata submitted that it incurred wasted fees which could have been avoided if the companies had been placed into liquidation.

435. However, neither of these matters have been shown by Emerdata to result from any representation that the Loan Notes would not be payable.

436. For these reasons the defence based on waiver by estoppel/promissory estoppel must fail.

First Further Loan of US$1.545m

437. It was submitted for Emerdata that in the correspondence of 26 March, 29 March, 4 April and 21 April, Mr Nix repeatedly accepted responsibility for what had happened to Cambridge Analytica and once the collapse of CA was recognised as inevitable promised to return all the proceeds of Project Dynamo. It was submitted that none of the tone and phraseology of the letters is consistent with the idea that Mr Nix was transferring money on the basis that he was entitled to have it paid back.

438. It was submitted for Mr Nix that the onus is on the Claimants to prove that this payment was a gift and this depends on the intention of the transferor (Chitty 42-277):

> *"If money is proved, or admitted, to have been paid by A to B, then in the absence of any circumstances suggesting a presumption of advancement, there is prima facie an obligation to repay the money; accordingly if B claims that the money was intended as a gift, the onus is on B to prove this fact."*

439. In the letter of 29 March Mr Nix wrote:

"…Furthermore, I have committed the balance of the proceeds that I received from the transaction c.$2m. (less entrepreneurs tax at 10%) as additional investment into the Company. These funds will be transferred as soon as the paperwork can be drafted…" [emphasis added]

440. The evidence of Mr Nix in cross examination in relation to the 29 March letter was:

Q. So on the face of it, then, were you accepting, albeit in this informal language, that you weren't entitled to walk away from the company with 7.6 million dollars, or whatever the number was? …You were accepting that given that you were the responsible executive in charge, that that would not be right outcome?

A. No. I think that is a slight misinterpretation of this letter and what was happening at the time. There is no question, there is absolutely, categorically no question that I was entitled to those monies. Those monies were the proceeds of a share sale of SCL that had been drawn up, and agreed between the parties and signed a couple of months previously. So by all legal accounts, I was due those funds. I think my position was an ethical one, or maybe a moral one is the dilemma here. When it became more apparent or increasingly apparent that the company was unlikely to be recoverable, largely because of Facebook cutting off its accounts and maybe the bank by this stage, maybe that was a few days later, I did not think it was morally fair that I should benefit from a transaction only a few months before everyone else lost. That was a moral decision. That was my decision. And I was interested to do morally the right thing, and that was my knee-jerk reaction, to try and invest funds initially to try and save the company. And then when that looked unlikely to be able to be possible, to loan funds to the business to make sure that my staff were looked after as best they could be in the circumstances. That was the premise behind this initial offer." [Day 4, p102:16-103:23] [emphasis added]

441. In the letter of 21 April Mr Nix wrote:

"…I wrote to you on the 29th March, 10 days after the first C4 news expose into CA aired on TV, immediately offering to reinvest the c.$3.5m I had received from the sale of my shares of SCL Group into CA to try and save the Company. Unfortunately, at that time the extent of the damage to the Company was not known, and compounded by a failure to take immediate action, it is now clear that the best that Management can hope to achieve is an orderly wind down of the business…. I have already invested $1,455,000 into Emerdata and on Monday morning, 23rd April, I will be transferring an additional $1,545,000 into Emerdata. These funds will ensure that the Company can meet US/UK payroll and will 'buy more time' for the Board as they consider the options for moving forward…". [emphasis added]

442. Both these letters refer to "*investment*" "*reinvest* "and "*invested*". The natural and ordinary meaning of "*invest*" or "*investment*" is the use of money in anticipation of some form of return.

443. The statement in the letter of 21 April that Mr Nix would be "*transferring*" a further sum is ambiguous but has to be read in context. Mr Nix refers to his offer to "*reinvest*" the US$3.5m and then refers to the investment that he has already made in the form of the subscription for equity. Read in context it is clear that he is looking to invest the additional money not to gift it. This interpretation is also consistent with the use of the

term "*investment*" elsewhere in the letter for example in relation to Firecrest ("*I would be prepared to discuss with the Board an investment of $1m to seed this business…*") and NewCo ("*I am interested to invest the balance of the funds that I received ($1.8m) into developing this business*").

444. This interpretation is consistent with the terminology used in the email that Mr Nix sent to Emerdata's US lawyers, Schulte Roth & Zabel on 19 April 2018 in relation to the 29 March letter which whilst it is not specific as to the form of the investment in my view implies that it is not a gift, referring as it does to the need for "*appropriate paperwork*":

"…As a separate matter, I can confirm that I remain committed to invest the c.$3.5m that I received as a cash consideration for my shares in SCL Group Ltd. (less $1.45 already invested, together with applicable taxes and costs). I am prepared to do this with immediate effect, however, and as set out in my letter to the Board and Shareholders of 29th March 2018, I am still waiting for direction from the Board as to where this funds should be invested (e.g. into Emerdata Ltd. into NewCo or into a legal fighting fund etc), and an understanding on what basis these monies should be received (including appropriate paperwork)." [emphasis added]

445. In my view Emerdata has not established on the evidence that the First Further Loan was a gift.

446. Although the word "*investment*" is ambiguous as to whether a loan or equity investment was intended, the Claimants have not advanced any submissions which would make it significant to the outcome of Mr Nix's claim to the First Further Loan. If it is necessary for me to decide the point, on balance it seems to me that had Mr Nix intended to make an additional or further equity investment he would have expressly referred to this given that he refers in that sentence to the earlier subscription: "*…. I have already invested $1,455,000 into Emerdata and on Monday morning, 23rd April, I will be transferring an additional $1,545,000 into Emerdata.".*

447. On balance therefore I find that the First Further Loan was a loan and Mr Nix's claim for this amount therefore succeeds.

Second Further Loan of US$290,000

448. In relation to the second payment of US$290,000 there is an email from Mr Wheatland on 11 May 2018 that read:

"Alexander confirmed that, in the spirit of our constructive conversation yesterday and in a willingness to be helpful and find a mutually acceptable resolution, he transferred to Emerdata this afternoon $290,000 to cover US payroll next week."

449. Subsequent to that is an email from Schulte Roth & Zabel to Mr Nix on 14 May 2018:

"This email is to confirm that Alexander Nix ("Mr. Nix") has provided a loan of $290,000 (the "Loan") to Emerdata Limited (the "Company" and, together with Mr. Nix, the "Parties") to be used to fund payroll obligations of the Company and/or any direct or indirect affiliates of the Company. The Loan will accrue interest at a rate per annum equal to 2.25 percent compounding annually, which interest shall be payable upon repayment of the Loan. The Company expressly acknowledges that the Loan will

be payable within five business days of any demand for repayment by Mr. Nix, provided however, that such demand may not be made prior to 180 days from the date of this email. The Parties further agree that the amount of the Loan shall be credited against any payment Mr. Nix may make to the Company and/or its individual investors in connection with an agreed to settlement, and, upon such credit, the principal amount of the Loan will be reduced by the amount so credited, but, in no event, not below zero. The Parties further agree that the Loan is being made without prejudice to the Parties' respective positions in connection with any dispute they may have relating to the Company and/or any of its direct or indirect subsidiaries. The Parties further agree that the foregoing terms shall apply to any other loans Mr. Nix makes to the Company to assist in the funding of wind-up or payroll obligations incurred by the Company and/or any direct or indirect affiliates of the Company."

450. It was submitted for Emerdata that the second payment was made on 11 May 2018 and when made the evidence does not suggest that it was a loan but was a gratuitous payment "*out of a willingness to be helpful*". It was further submitted that any recharacterization of the second payment as a loan was only in the context of an overall settlement which never took place and the payment had already been made as a gift.

451. In my view Mr Wheatland's email cannot be read in isolation but must be read in conjunction with the other letters referred to above which preceded it. In the context of the preceding correspondence for the reasons discussed above in my view Mr Nix intended to re-invest the cash he had received in order to help CA.

452. For these reasons I find that Emerdata has not established that the second payment was a gift and Mr Nix's claim to the Second Further Loan succeeds.

Relief under Section 1157 CA 2006

453. In view of my conclusions above, I do not need to consider relief under Section 1157 of the Companies Act 2006.

Set-off and Assignments

454. As set out above, on 30 October 2020 Emerdata entered into an assignment agreement with the Companies and the Companies' liquidators, whereby Emerdata was assigned the SCL Claims. On 18 March 2021 the SCL Claims were assigned onward to DRL. By separate assignment on the same day, Emerdata assigned the Emerdata Claims against Mr Nix to DRL.

455. Mr Nix has challenged the validity of the assignments by Emerdata to DRL, maintaining that they ought to be void as transactions defrauding a creditor under s.423 Insolvency Act 1986, or alternatively because they amounted in substance to an unlawful return of capital to Emerdata's shareholders.

456. DRL and Emerdata deny any attempt to defraud creditors and maintain that the assignments are valid.

457. It was accepted by Mr Allcock in oral closings [Day 9 p24] that the set off issue only arises if the claim that originated in the SCL Companies were to succeed and the assignment challenge only arises if the Court if the DRL breach of duty claims succeed.

458. Given my findings above and in light of the submissions for Mr Nix I do not have to decide the question of set off or validity of the assignments and do not propose to address these.