

JERSEY / JUDGMENT

The Channel Islands Cooperative Society Limited v MacLeod 01-Sep-2026

COURT

a tribunal claim for unfair dismissal and discrimination has been compromised.

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Source record**Claim for**

damages for psychiatric injury caused by employer. Injury not reasonably foreseeable. Observations on claims for damages where a tribunal claim for unfair dismissal and discrimination has been compromised.

[2026]JCA213

Court of Appeal

1 September 2026

Before :

Mr Michael Furness KC, JA, President;

Mr Angus McCullough KC, JA, and;

The Rt Hon Dame Julia Macur, JA

Between

The Channel Islands Cooperative Society

Limited

Appellant

And

Colin Sinclair MacLeod

Respondent

Advocate J. N. Heywood for the Appellant.

Advocate M. St J. O'Connell for the Respondent.

JUDGMENT

THE PRESIDENT: This is the judgment of the Court, to which all members have contributed. A. Introduction 1. This appeal arises out of the events which occurred in the latter part of the employment of Mr Colin MacLeod (“the Respondent”) with the Channel Islands Cooperative Society Limited (“CICS”), (“the Appellant”). The Respondent had joined the CICS in 1990 at the age of 20 as a management trainee and was employed continuously by it until his employment ended in June 2020. From 2010 he had served as its Chief Executive Officer. 2. The Respondent’s claim before the Royal Court was for damages for the psychiatric injury and consequential losses that

he sustained as a result of his treatment by CSIS which he alleged constituted breaches of its duties to him in tort and contract, as well as breach of statutory duty. 3. The Respondent succeeded in his claim, with the Royal Court (Commissioner Matthew Thompson and Jurats Le Cornu and Powell) handing down its judgment on 16 December 2025. By that judgment it found that the CICS was in breach of its duty of care to the Respondent, foreseeably causing psychiatric injury and financial losses, including substantial loss of earnings. 4. Independently of the present proceedings the Respondent made a complaint to the Employment and Discrimination Tribunal ('the Tribunal') claiming unfair dismissal pursuant to the Employment (Jersey) Law 2003 and discrimination on grounds of disability under the Discrimination (Jersey) Law 2013. Those claims were settled on terms set out in a confidential written agreement dated 8 March 2021 by which the sum of £200,847.68 was paid by the Appellant to the Respondent "in full and final settlement of all and any claims falling within the jurisdiction of the Tribunal". 5. The Appellant, represented by Advocate Heywood as it was in the Royal Court, now appeals against the judgment of the Royal Court on numerous grounds, attacking many of its findings of fact, as well as its application of the law to the facts found. These grounds of appeal may be conveniently considered under the following headings:

- (1) Foreseeability (including the relevance of the Royal Court's findings on 'bad faith'); (2) Relationship with the employment tribunal claim; and (3) Predetermination and the attack on the factual findings. 6. The Respondent, represented by Advocate O'Connell, as he was in the Court below, seeks to uphold all aspects of the Royal Court's judgment. 7. In the present judgment it is convenient to set out the essential facts, whether as undisputed or determined by the findings of the Royal Court and first deal with the overarching ground of appeal criticising the making of those findings of facts, before turning to those grounds advanced by the Appellant that are based on the legal approach and evaluation adopted below. B. The primary findings of facts and the attack made upon them 8. The Royal Court's judgment comprises 743 paragraphs and followed a hard-fought trial in which hearing of the evidence took place over 14 days in June and July 2025, with closing submissions in September 2025 (*MacLeod v The Channel Islands Cooperative Society Limited* [2025] JRC 321). It is a judgment which appears to us to articulate the background, issues and decision in a balanced, considered and methodical fashion. Nevertheless, the Appellant contends that the Royal Court made findings that "were flawed and appear to have been sifted and formulated with a view to justifying a pre-determined outcome. As such, no reasonable court viewing the matter fairly could have come to a number of the factual conclusions reached". We make clear from the outset, that we do not accept that criticism. We are certain that the Royal Court discharged its duties conscientiously in this difficult case and made findings of primary fact that were open to them upon the evidence they preferred. 9. The evidence included a substantial amount of documentary material, together with written and oral testimony from 12 factual witnesses and experts in psychiatry (Dr O'Flynn for the Plaintiff/ Respondent) and Professor Fahy for the Defendant/ Appellant) and as regards the Respondent's employment prospects (Mr Gilbert and Mr MacNaught).

10. The Royal Court gave its assessment of the witnesses in some detail. In summary, the Royal Court found the Respondent "... to be truthful. Where there was a conflict between the evidence of [the Respondent] [or witnesses called on his behalf] and Ms Carnegie, Ms Champion or Ms Williams [members of the Recruitment and Remuneration Committee ('RemCo')], we had no hesitation in preferring the evidence of [the Respondent]". Tellingly, as regards the witnesses Ms Carnegie and Ms Champion, the Royal Court indicated that before accepting their evidence upon any relevant event it had looked for corroboration in "independent contemporaneous documents". As to Ms Williams, the Royal Court formed the view that "at times [she] wanted to assist the Court and to provide a true account of events. ... parts of her evidence did ring true ... However, at other times she was defensive and relied on the stock line that she did not understand the context and so was unable to answer the specific question put to her. ... In particular, we were unable to accept her evidence in relation to whether or not she applied to replace [the Respondent] as CEO or her responses to the criticisms put to her of the ... [independent] investigation [into the Respondent's complaint against Ms Carnegie.]".
11. The Royal Court considered the expert psychiatric witnesses to be largely agreed on issues of foreseeability and the effect of the dismissal upon the Respondent. Where they differed, in relation to how the Respondent was "treated by the [Appellant] between being signed off and his dismissal" the Royal Court preferred the evidence of Dr O'Flynn (the Respondent's expert). However, and permissibly, the Royal Court did not confine itself only to this expert evidence when considering, in particular, whether the Respondent had made a complete recovery at the time he was dismissed.
12. The Royal Court preferred the evidence of the Respondent's expert employment witness on the question of earning capacity, for they were "not persuaded that [the Appellant's expert's] assumptions were justifiable ... he failed to take into account the limited opportunities available to [the Respondent] in Jersey. Rather we felt it was a hypothetical desk top exercise based on options available in the UK". The Royal Court were not persuaded by either expert's evidence on the Respondent's likely longevity in post but for his dismissal.
13. The assessment of the witnesses was quintessentially a matter for the Royal Court. The Royal Court gave sufficient reasons for basing their determination of the reliability of the dramatis personae and had an abundant basis upon which to do so. This Court will not interfere with that assessment absent clear and compelling grounds. We find none in this case. That the Appellant may be affronted, or even outraged, by the Royal Court's candid assessment of the witnesses called on its behalf and seeks to avoid the inevitable reputational damage that ensues can provide no legitimate ground of appeal.
14. It was common ground that the Appellant suffered a psychiatric injury on 28 May 2019. Advocate O'Connell conceded and the Royal Court found that there were no overt signs of the Respondent's vulnerability to psychiatric injury in the events leading up the Respondent being signed off work on 28 May. As indicated above, the issues for the Royal Court in so far as this appeal is concerned, were causation, foreseeability and, if applicable, the basis of any

award of special damages in the context of a settlement agreement arising in the Employment Tribunal proceedings.

15. The Royal Court set out a detailed chronology of ‘key events’ in paragraphs [207] to [486] of its judgment which intersperses uncontroversial dates of events, references various written materials and reproduces extracts from many reports, policy documents, e-mails and WhatsApp messages, the latter of which were ordered to be disclosed in the proceedings. There is no issue regarding the dates. There can be no argument as to the accuracy of the contents of the specified materials, nor as to the Royal Court’s stated and essential purpose of providing a “context [for] the findings we were asked to make by both parties and our conclusions on the specific evidence of the factual and expert witnesses” [207]. The Appellant makes a scathing commentary upon the same which we find to be entirely partisan and selective. That the Appellant had an ‘alternative’ view of what was going on and why is obvious from the case it unsuccessfully pursued in the Royal Court.
16. For example, the Appellant contends that the Royal Court made no finding as to the motivation of the directors, Ms’ Carnegie, Champion and Williams, in seeking to depose the Respondent which “might be thought of as irrational”. We reject the contention. The proposition depends upon a false premise. The Royal Court’s judgment clearly finds, and was entitled to do so upon the evidence it preferred, that there was a ‘power struggle’ between the RemCo directors and the Respondent, and subsequently Ms Williams sought to replace him with herself. However, even if the premise was correct, we do not understand the argument that this incorporates an ‘irrationality’ into the Royal Court’s assessment of the situation. As the Appellant legitimately argues, ‘bad faith’ is an unnecessary component in the commission of tort.
17. Any attempt to summarise the chronology would fail to do it justice. We commend its reading in full and only draw upon it as necessary to deal with the Appellant’s overarching ground of appeal which asserts that the Royal Court made findings of fact to support a predetermined view favouring the Respondent’s claim. It is sufficient to say that the Royal Court’s chronology is intended and succeeds in providing a panorama, as opposed to a snapshot, of developing tensions and conflicts between the Respondent and RemCo and, what can only be described as, the dysfunctional reactions of Mr Ben Shenton, President of the CICS, in his clumsy attempts to run with the hare and hunt with the hounds. The Appellant’s attempt to isolate incidents one from another is misguided. The Royal Court rightly had regard to the whole of the evidence when reaching its conclusions. Consequently, the Appellant’s attempts to ‘neutralise’ individual communications passing in private between RemCo members or, otherwise, individual events inevitably fails.
18. We turn then to the relevant findings of fact made by the Royal Court and interweave the reasoning behind them extracted from the chronology. So far as relevant to the appeal, the Royal Court found that: (i) Certain members of RemCo, predominantly the Ms’ Carnegie, Champion and Williams started “gathering evidence” against the Appellant “the moment Ms Carnegie took over RemCo in September 2018”. A WhatsApp group comprising the Ms’

Carnegie, Champion, Williams and one other had been created in August 2018. In a message dated 14 August, 2018 there is indication that the group had already discussed “the need for action sooner rather than later” and seeking “evidence we currently have/can get before we take it to the Board”. WhatsApp messages on 2 September were self-congratulatory, referring to “squirm-shame”, the need to “keep on it and make sure things get sorted” during the meeting held that day. (ii) Although part of these actions were legitimate, “more troubling” was that members of RemCo were acting in secret, and from at least February 2019 onwards were “clearly looking for information to remove [the Appellant].” On 7 February 2019, Ms Carnegie reported to the WhatsApp the disparity in salary between the CEO of Southern Co-Op and that of the Respondent, commenting that “Given that our CEO is on significantly more than that, something feels a bit out of whack”, eliciting a response including “this could be the extra support we need to change things...”. Consequently, Ms Carnegie contacted the chair of the Audit and Risk Committee, asking that he should “prioritize the audit into Expenses...to include remuneration...”. On 2 April 2019, Ms Carnegie’s WhatsApp message asked “how everyone [was] getting on with their evidence gathering”. (iii) In the first half of 2019, RemCo were “clearly targeting [the Respondent] more and more...to the exclusion of their other responsibilities...”. While the Respondent was not aware of the secret WhatsApp messages until 2024, they show the “true motivation” of the members of RemCo at the time. On 16 April, 2019, Ms Williams’ WhatsApp message demanded “how much more do we need to say enough is enough and pull a no confidence vote” before realising that the group had misled themselves regarding an advertisement advertising an HR position, and posting “I know we are all frustrated at the lack of information coming from our ‘Leadership’ team but we will be in danger of getting ‘egg on our face’ if we jump all over this.” Ms Carnegie replied: “Teamwork! I was getting all revved up then”. (iv) On 14 April 2019 during the Board meeting at which the audit findings were presented by a KPMG employee – ineptly as it transpired – messages between the WhatsApp group included one from Ms Carnegie expressing frustration at “not being in the room with you all today. ... The messages are muddled for me as he [i.e. the KPMG auditor] changed his tune throughout the presentation but it would be helpful to really understand what he is getting at about the management team not rising to the challenge. It goes to the heart of our concerns about the organization.”

- (v) On 30 April 2019, a meeting of the Audit and Risk Committee attended by different representatives of KPMG took place. The lead partner was Mr Quinn who had produced a fresh audit report since the meeting of 14 April. Noted in the minutes was the indication that KPMG had been provided with a written assessment of the Society's status as a going concern, which it was willing to accept but “required the Board to approve the going concern assessment when considering the Society's Financial Statements on 5th May 2019.” (vi) On 5 May 2019, the KPMG audit partner “expected to be able to provide an unqualified audit opinion ... the Society had reported a Net Current Deficit of £1.7 million, which was £1.6 million greater than in the previous financial year. He said this meant that the Society was technically unable to meet its liabilities as they fell due. He explained

however that he had received an assessment of the Society's status as a going concern, signed by [the management team], (the "Assessment"), which stated that the Society had the reserves required to meet its Current Liabilities and to reduce or eradicate the Net Current Deficit. He said he was prepared to accept the Assessment ...". His overall conclusions included findings that: (i) the level of diligence over financial reporting was not to the required standard, as evidenced by the volume and scale of the Unadjusted and Adjusted Audit Difference; (ii) he had significant concern over the key controls in place; and (iii) the Board could be criticised for not challenging the Executive Management Team sufficiently. Nevertheless, members of RemCo, and in particular Ms Carnegie, sought to use the KPMG audit report, which she had misunderstood and misconstrued, to continue an attack upon the Respondent. Another director attending the meeting emailed Mr Shenton, complaining that it was "the worst ever Board meeting" and describing Ms Carnegie as "an aggressive disruptor". The director feared that the "baying for blood the endless build-up of negative events and constant report-making demands from the Board is going to lead to the CICS leadership heading for the 'perfect storm' of implosion." (vii) The Chair of the Audit Committee resigned. Ms Carnegie stated (in the Respondent's presence), "he won't be the last to go", directing the comment at the Respondent. In the following session at which the Respondent was not present, the Board passed a vote of no confidence in the management team delivering quality results of which the "main target was clearly [the Respondent]." (viii) The members of RemCo continued to seek the Respondent's removal in a meeting which he reluctantly attended on 10 May 2019. On 6 May 2019, Ms Williams in a private email exchange stated that RemCo needed "to be mindful of not letting him off the hook or digging him out. If we do not agree with what he proposes, then it is just another piece of evidence that we can use to support our position." Later in another email "As [Ms Carnegie] said, lets keep the pressure on." On 7 May 2019 the Respondent emailed Mr Shenton expressing concern about attending the meeting of RemCo on 10 May, "On the other hand, a meeting may give me a better understanding of what is actually driving their aggression." On 9 May 2019, the Respondent suggested to Mr Shenton, whom the Respondent understood to have advised him to "fight fire with fire" that he had "concluded that there is another way ...," namely that he, Mr Shenton may consider sending an email pointing out that "aggression" displayed at the 5 May meeting was "not setting the right tone" and that the same could be described as "bullying". (ix) On 10 May 2019, the Respondent met with RemCo, and believed the meeting to be positive. This was also apparently regarded by Ms Carnegie and Ms Williams as the Respondent working in a "more collaborative way". However, in emails passing between them, both commented on the change in somewhat cynical terms. At around this time Ms Williams looked to replace the Respondent and for him to be removed as subsequently became known to the Respondent Ms Carnegie praised Ms Williams "thinking ... on the strategy for the business." Ms Williams indicated that she would "continue to progress it." Subsequently, the Respondent was informed that, at the conclusion of the Guernsey AGM on 15 May 2019, Ms Williams had a conversation with Mr Shenton, proposing that she replaced the Respondent.

- (x) On 17 May, Ms Carnegie in a chain of messages to other members of RemCo said: “We need to consider the CEO getting a bonus at all, given what we would like to happen”. She asked for bullet points on the Respondent’s performance. The Royal Court considered that “She clearly wanted to conduct a tough appraisal against [the Respondent] ...[which] seemed to be pre-determined and part of the plan to force [the Respondent] out.” [599] RemCo sought an external audit of the Respondent’s expenses, which the Royal Court concluded “is a very serious step to take...[and] would not normally occur without some indication of wrongdoing...[and] very much part of the tactics to target [the Respondent]” [593]. On 27 May 2019, Mr Shenton emailed Mr Lintell and Ms Carnegie concerning the audit of the CEO and Mr Lintell’s expenses. The email to Mr Lintell was to reassure him that his name was included “merely as a result of being specified in the RemCo terms of reference”, and to Ms Carnegie to explain why he had done so. Ms Carnegie replied in terms: “I think it might freak Chris out a little that he has been singled out in name, as well as the CEO, for close scrutiny. It makes sense though given that both positions effectively report to the Board. Are you going to formally state that Chris [Lintell] now reports to the Board to take him out of being a direct report of [the Respondent]? We might need Chris’s help with this and he is currently compromised as he works for [the Respondent].” Ms Carnegie then sent WhatsApp messages to Ms’ Champion and Williams indicating that she had only just realised that Mr Shenton “needs documented proof to be comfortable.... The documented results of an audit though give him something to work with.” On 19 June 2019 the external audit report on expenses made various recommendations about updating the process but did not make any adverse finding regarding the Respondent’s expenses claims. (xi) On 18 May 2019, the Respondent emailed to Mr Shenton a draft note he proposed to send to RemCo, which attached a document headed “Organising Thoughts”. He questioned the positions of Ms’ Carnegie, Champion and Williams but also asked “Do we think this is recoverable? Can it be mediated?” He also emailed the members of RemCo, thanking them for their constructive engagement, referring to new objectives in response to RemCo suggestions. He offered further dates for face-to-face discussions with the Committee. Remco did not respond to the email, but some members emailed each other mocking the Respondent. (xii) On 21 May 2019, the Respondent sent an email to Mr Shenton expressing his shock that Ms Williams had sought to take his place. He sent a draft letter for Mr Shenton to send to Ms Williams recommending her immediate removal from office. On 22 May 2019, Mr Shenton asked the Respondent to prepare a letter of complaint on behalf of the Executive Management Team “about the increasingly aggressive behaviour at Board Meetings, the lack of trust, the lack of co-operative principles, and everything else you want to throw in. ...”. The Respondent agreed “With pleasure” and a smiling emoji face. On 23 May 2019, Mr Shenton emailed the Respondent telling him to “Make the complaint about [Ms Carnegie] as personal as possible, something that she would not want to get into the public domain or go to the Board In terms of [Ms Williams] I will write a letter over the weekend asking for her resignation ...”. (xiii) On 24 May 2019, the Respondent produced a letter of complaint. This was to be the date of the Respondent’s appraisal by Ms Carnegie and Mr Shenton. Mr Shenton presented Ms Carnegie with the complaint. Ms Carnegie offered to resign, but this was not accepted by Mr

Shenton who, instead, asked her not to mention the complaint to anyone at that time. On 26 May 2019, the Respondent sent a message to Mr Shenton, shocked “From being told just over a week ago that [Ms Carnegie] said I “had to be fired this week” to being told by you on Friday to write a complaint so personal that she had no choice but to resign, I didn’t expect to hear that you were now reconsidering ...

- (1) Some form of clear the air meeting with JC
- (2) That you now may not send PW the note asking for her resignation. This has left me in a virtually impossible position. On one hand, I have led the delivery of a ‘terrific’ performance with an increasingly impossible management structure in the most competitive market in our history, on the other, we are not trusted and JC has no confidence in the Executive, apparently based on a clean (albeit unusual) audit, she has called for my head and idly spectated on the quite unbelievable and utterly disillusioned nature of PW’s application for my job. To add to this, I have now been getting confused messages from you and have had to field deep unrest in the team at work whilst protecting Board confidence.”. However, he went on to suggest ways in which he could continue to work with Ms Carnegie, but not with Ms Williams. “The transition will not be easy. But it is doable if we work together.”. The Royal Court found this was not the Respondent engaged in “political machinations” or a coup against Ms Carnegie. Rather “Mr Shenton performed a volte face leaving [the Respondent] vulnerable to the ongoing actions of the members of RemCo, it was this in our view that caused [the Respondent] to snap.” [620] (xiv) On 28 May 2019 the Respondent was signed off work for a “stress related disorder”. The Respondent informed his team by email, and suggested arrangements to cover for his absence. A copy of this email was forwarded to Board members by Mr Shenton. On receipt of the email, Ms Champion messaged Ms’ Carnegie and Ms Williams: “Totally non-PC comment coming up here... but when the noose starts tightening you get more stressed and end up off work! Mmmmm!!!!!! Wonder how many nooses there are?” Ms Williams responded: “Um thought the timing was interesting”. (xv) Like conduct continued after the Respondent, in the words of the Royal Court, “went off sick”. On 1 June 2019 Ms Williams wrote to Board members, acknowledging the challenges the Respondent had faced over the past year and suggesting that he be given “space” to fully step back from his workload. Ms Carnegie agreed with the appointment of a stand in CEO. Mr Shenton disagreed and wrote to Ms Williams castigating her, and making clear that he saw her ulterior motive to usurp the Respondent and which now cast doubt on many of the criticisms made, concluding “I believe that you should seriously consider your position on the Board because I have a moral duty to expose your agenda if you do not.”. He wrote to Ms Carnegie in less strident terms but making clear his disapproval of Ms Williams behaviour. (xvi) The Respondent was isolated and, on 30 June, in his absence and without his knowledge, the Board voted on his removal as CEO. The meeting lacked due process. Ms Carnegie and Ms Williams failed to disclose a conflict of interest. The former was subject of an unresolved complaint made against her by the Respondent; the latter wished to replace him. Ms Williams suggested that [the Respondent] should not be “burdened” by access to his work email account. Although others present counselled against this, on 18 July 2019 Mr

Shenton informed the Respondent that his email account was being “suspended in order to allow you to fully focus on your recuperation”. Legal advice was sought regarding the Respondent’s removal. This was subsequently described by Mr Shenton in an email as “fast tracking with no empathy or sympathy” and he requested an explanation for “the deviation from the plan you agreed, and why the ultra-urgent haste”. (xvii) On 5 August 2019 Mr Shenton decided to proceed with the Respondent’s complaint against Ms Carnegie. On 13 August Mr Shenton wrote to the Board indicating that he wanted to investigate the complaint and attaching his views. On 14 August, 2019 he sent an email to the Board which indicated the apparent undisclosed conflict of interest by Ms Carnegie, because of the outstanding complaint against her and by Ms Williams because of her desire to replace the Respondent. On 23 August 2019, Mr Shenton resigned as President and was replaced by Ms Williams. (xviii) On 13 September 2019 Ms Williams wrote to the Respondent stating that the Society would proceed to investigate his complaint via a partner in Lewis Silkin LLP, who had “no dealings with the Society prior to his engagement”. The Respondent was not aware that the firm had already given legal advice about his dismissal and that the partner dealing with the employment issue had been present at the first meeting when instructions were taken about the complaint. On 19 December 2019 Ms Williams wrote to the Respondent enclosing the report from Lewis Silkin and dismissing his complaint. At this stage the Respondent was unaware of the moves afoot to terminate his employment. (xix) The Royal Court found the actions of Ms Carnegie, Williams and Champion were “improper, commercially unacceptable and unconscionable and therefore amounts to bad faith”. [617] (xx) By the beginning of January 2020, the Respondent was ready to start exploring a return to work, and on 7 January 2020 he requested that his email be reconnected from February and suggested a meeting to discuss his return. Ms Williams responded by return, indicating that this would not happen since it was necessary for the Society “to establish your fitness to return to work before you may do so. In view of all these circumstances I have arranged, subject to your consent, for an independent occupational health practitioner to carry out a psychiatric assessment in order to form a clearer picture of your psychological difficulties and to report on your fitness to return to work. This is as much to protect you as it is for the Society”. (xxi) On 20 January 2020 his GP observed that “further delay in getting closure re work is likely to undermine recovery”, and on 18 February that the underlying trauma and its negative effect in the Respondent’s “self-belief” was “still evident”. (xxii) On 3 March 2020 the Appellant sent to the Respondent details of a Private Health Insurance policy which may be relevant for those absent on long term sick leave following an absence of six months or more. The Respondent explored permanent health insurance, but he had good reason to consider that he would be unable to claim in relation to his psychiatric injury. The Respondent was well aware that the Appellant would not have to pay him beyond the end of May 2020. This was “driving the Appellant’s desire to return to work.” While the Respondent was functioning socially, “his recovery was very much dependent on being able to achieve a return to work.” On 17 March, the Respondent informed the Appellant: “My medical advice is not only that I am to make a complete recovery, but also that I am on the verge of returning to work. ...” (xxiii) On 27 March 2020 the Respondent received a letter of

termination. The Respondent sought to appeal but was rebuffed. The Respondent thereafter initiated a Tribunal claim which was compromised by a settlement agreement on 8 March 2021. Clause 4 of the agreement provided that: "(4) Subject to the terms of this Agreement, the Payments referred to at clauses 2[a], (b) and 3 (above) are made in full and final settlement of all and any claims falling within the jurisdiction of the Tribunal, whether past, present, future or contingent that the Claimant has, or may have brought against the Respondent and/or any Associated Company of the Respondent and/or any of their respective officers, partners, shareholders or employees, in the Tribunal Proceedings." (xxiv) The dismissal of the Respondent caused a 'relapse'. "At the point of his dismissal, he was therefore still suffering from the adjustment disorder which led him to being signed off at the end of May 2019." The Respondent had continued to consult with his GP practice following 28 May 2019. He was signed off work for 8-week consecutive periods due to stress. Dr Garcia, a psychologist, saw him regularly during this period and reported fluctuating mood and presentation. On 18 February 2020 Dr Garcia's impression was "underlying trauma and its negative effect in his self-belief still evident". A letter dated 24 March 2020, from a consultant psychotherapist and CBT therapist stated that "Mr MacLeod has achieved full recovery and I believe he is capable and ready to go back to performing according to his high standards ..." but this was not determinative. On 9 June 2020 Dr Garcia wrote that "The Respondent engaged meaningfully with his treatment with included medication ... and combination of therapy (CBT and EMDR) after which he made a remarkable improvement after 6 months." This did not suggest that the Respondent had fully recovered. (xxv) But for his dismissal the Respondent would have retired aged 60. His mental health would not improve until the conclusion of the litigation. His future prospects of employment were constrained, and most probably involve work in the charitable sector or freelance coach at a much-reduced income.

19. We agree with Advocate O'Connell that the Appellant's attempt to undermine and set aside these findings of fact has proceeded as a barely concealed attempt to re-run the Appellant's case in the Royal Court. It is apt in the circumstances to set out the well settled principles collated from the relevant Supreme Court and Court of Appeal authorities on the point as reproduced in *Volpi v Volpi* [2022] EWCA Civ 464 in paragraphs [2] to
- [5] which have been fully adopted in this jurisdiction (see for example, most recently *Pender v Punter Southall Group Limited* [2026] JCA 039.) That is: (i) An appeal court should not interfere with the lower Court's conclusions on primary facts unless it is satisfied that the decision below was plainly wrong, as being one that no reasonable court could have reached. (ii) Tribunals are free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the lower Court has taken the whole of the evidence into consideration. The mere fact that the lower Court does not mention a specific piece of evidence does not mean that it overlooked it. (iv) The validity of the findings of fact made by a lower Court is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The lower Court must consider all the material

evidence although it need not all be discussed in the judgment. The weight which is given to it is however pre-eminently a matter for the lower Court.

- (v) An appeal court can therefore only set aside a judgment if the lower Court failed to give the evidence a balanced consideration and the conclusion reached was rationally insupportable.
 - (vi) Reasons for a judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.
20. Turning then to address the Appellant's specific contentions in this regard, Advocate Heywood acknowledges "that matters came somewhat to a head at [the] key Board meeting on 5 May 2019" but attacks the Royal Court's assessment of the same as "irrational, perverse and self-serving". It is argued that the Royal Court misinterpreted WhatsApp messages passing between Ms' Carnegie, Champion and Williams on the 14 April, that there was no evidence to support a conclusion that RemCo continued "their attack on [the Respondent] consistent with the exchanges about the first audit report at the 14 April Board meeting" and that the Court itself determined the accuracy of a second audit report and used this as a basis to discredit the valid, if mistaken, concerns of RemCo when questioning the Respondent at the meeting. Further the Appellant seeks to elevate the Minutes of the meeting as determinative of what transpired.
21. We find these criticisms to be entirely misconceived. An objective review of their content and timing of the WhatsApp messages, as indicated above, could not possibly be described as "anodyne". They clearly entitled the Royal Court to reach the overall finding that members of RemCo wanted to depose the Respondent. Further, the Royal Court accepted the evidence of one of the Respondent's witnesses who had been present in the meeting on 5 May 2019 that the Respondent was targeted by Ms Carnegie; the Respondent undoubtedly believed this to be the case.
22. Further, in the context of such WhatsApp messages we find the Royal Court was entitled to conclude on the available evidence that Ms Carnegie had misunderstood the auditor's report, but regardless, was determined to cross-examine the Respondent with somewhat florid assertions as to the Society's grave predicament, with no intrinsic interest in the answers he gave other than those which damaged his position. The Royal Court concluded implicitly and reasonably that Ms Carnegie was determined to discomfit the Respondent. The Minutes, upon which Advocate Heywood seeks to rely contain nothing more than an overview of the meeting. The suggestion that the unchallenged Minutes constrain the Royal Court's determination of the facts is untenable. That the Royal Court did conduct its own assessment of the auditor's report is something of a red herring.
23. That there was evidence that RemCo were seeking an audit of the Respondent's expense claims and specifically targeting him (under cover of also including Mr Lintell in the terms of reference) is clear from the email exchange between Mr Shenton and Ms Carnegie referred to in paragraph 18(x) above. The support that could be garnered from Ms Henley's

evidence of a conversation which she heard between Ms Carnegie and Ms Champion talking of 'getting' the Respondent on fraud was accepted in so far as the Royal Court were satisfied that she had heard the conversation, albeit that she was uncertain or mistaken as to when and where it had taken place. As indicated above, the Royal Court is arbiter of credibility. That Ms Henley's evidence was preferred over that of Ms Carnegie and Ms Champion is presented as establishing the assertion that the Royal Court had pre-determined the facts and was retro fitting the evidence to fit its own narrative. Such pejorative assessment fails to contemplate that the abundant evidence, which independently and assuredly entitled the Royal Court to find that Ms Carnegie and Ms Champion were interested in finding evidence against the Respondent (see references to the contents of the WhatsApp messages above), corroborated essential and relevant detail of Ms Henley's evidence of the substance of the conversation she overheard, whenever and wherever that was.

24. The Appellant's response to the Royal Court's finding that RemCo failed to produce minutes of its meetings is inconsequential to the finding that they conducted other communications in an entirely secretive fashion. We find no good reason to lengthen this judgment further by dealing with this point. Even if merited as a criticism, it certainly does not bring down a 'house of cards'.
25. We unhesitatingly reject the argument that the Royal Court's refusal to categorise the Respondent's complaint against Ms Carnegie and his demand that Ms Williams be asked to resign as either "political machinations" or a "coup" demonstrate irrationality or "judicial naivety". These expressions, upon which the Appellant places unwarranted reliance of unfairness, are simply terminology. The Royal Court had ample evidence upon which to find that the Respondent had been subject of a vendetta to secure his removal prior to his emails to Mr Shenton. The evidence in the emails entitled the Royal Court to conclude that that the Respondent had attempted to be conciliatory, had indicated that he was prepared to work with Ms Carnegie on certain conditions, but was justified in refusing to countenance Ms Williams continuing in role.
26. The Appellant's arguments challenging the Royal Court's findings that the Respondent suffered a 'relapse' of his psychiatric injury at the point of dismissal rather than experiencing the onset of a new psychiatric injury, are focused upon an analysis of the expert evidence of Professor Fahy and Dr Flynn. They are misconceived. Where facts are disputed it is for the Royal Court, not the expert, to decide those facts. Even where expert evidence is agreed, the Royal Court is not bound to accept it in reaching its findings of fact. The Royal Court had a wider purview of the evidence than did either of the expert witnesses. They were entitled to draw inferences from all the surrounding evidence as to the reality of the Respondent's recovery at the time of his notified dismissal. Advocate O'Connell has convincingly demonstrated that the Royal Court's finding was not solely dependent upon a medical note signing the Respondent off work immediately prior to the notification of his dismissal. There was considerably more evidence upon which the Royal Court were entitled to rely to reach the conclusion that, regardless of what the Respondent said, he was not fully

recovered at the time he sought to return to work.

27. In conclusion, our certain view is that the Appellant's challenge to the Royal Court's findings of primary fact is entirely without merit and we would dismiss this aspect of the appeal.
28. However, as we make clear below, whilst accepting the primary facts made and taking them at their highest, we nevertheless feel compelled to intervene in the evaluative judgment made upon them by the Royal Court in terms of whether the behaviour was so objectively 'egregious' or 'disastrous' as to render psychiatric injury foreseeable in circumstances in which there was a finding that there was no observable signs of 'vulnerability' to psychiatric injury. We do so with extreme diffidence having regard to the conscientious approach we detect in the Royal Court's approach to the evidence as a whole. However, in line with the approach of Underhill LJ in Yapp, as considered below, accepting the primary findings of fact made by the Court below, we find ourselves in the same position in being required to adjudicate upon the consequences that flow as regards liability. That is, we consider that the Royal Court's evaluative judgment made upon the primary facts was plainly wrong for the reasons we indicate below. C. Foreseeability and 'Bad Faith'
 - (a) The Appellant's essential challenge in relation to Foreseeability and 'Bad Faith'
29. The basis of the challenge brought by the Appellant in this part of the appeal is discursive and has not been reduced to clearly identifiable grounds. Paragraph 7 of the Notice of Appeal contends that the Royal Court was wrong, even on the facts found, to have held that any breach of duty gave rise to a foreseeable risk of psychiatric injury. That is then followed by 10 subparagraphs, (a) to (j) which consist of a mixture of challenges to the Royal Court's findings of primary fact and criticisms of its approach to foreseeability. As set out above, we have rejected the challenges to the findings of fact made by the Royal Court.
30. We identify the kernel of the Appellant's case in this part of the appeal to be that the Royal Court "wrongly applied the dicta of Underhill LJ in Yapp as to what could amount to "extraordinary circumstances" (where it was suggested that the actions themselves could create a foreseeable risk without prior warning / notice)" (paragraph 7(d) of the Notice of Appeal). That is a challenge that Advocate Heywood confirmed was made, even on the basis of the primary facts found by the Royal Court.
31. The Appellant's criticisms under the heading 'bad faith' (paragraphs 8 to 10 of the Notice of Appeal) include a specific contention that the Royal Court erred in the application of its findings that three of the Directors acted in bad faith in reaching its conclusion that the conduct of the CICS created a foreseeable risk of psychiatric injury to the Respondent. (b) The approach of the Royal Court
32. Having made the detailed findings summarised at Part B of our judgment above, at paragraphs [616] to [618] the Royal Court specifically concluded that the conduct of the three directors constituted bad faith, concluding at [618] in relation to the relevant conduct: "This includes meeting and communicating in secret without maintaining records, failing to raise

concerns through formal channels, requiring two expenses audits targeted at Mr MacLeod, looking for evidence to use against him and Ms Williams applying for his job. This conduct continued after Mr MacLeod went off sick. We address further examples of acting in bad faith in the sense of improper, commercially unacceptable or unconscionable conduct. The summary in this paragraph covers all those epithets.”

33. The judgment below then continues by addressing breach of duty, noting at [619] that “... the claim is not against Ms Carnegie, Ms Williams or Ms Champion. They were not accused of dishonesty personally; nor was the tort of causing intentional harm pleaded against them. Rather, the allegation was ultimately one of the Co-op failing in its duty of care. The bad faith of these members alone is not therefore enough to establish a breach of duty on the part of the Co-op.”
34. The Royal Court’s conclusions in relation to breach of duty follow at [620] and [621]: “620 What in our view tips the balance is the conduct of Mr Shenton when taken with Ms Carnegie, Ms Williams and Ms Champion acting in bad faith. While, as an accountant, Mr Shenton may well have been concerned about the audit findings, and he wanted a report produced by Mr MacLeod to address the findings, they were not a basis to seek to remove Mr MacLeod. He also failed to stand up to Ms Williams and to ask the Board to require her resignation. Having invited Mr MacLeod to file a complaint which led to Ms Carnegie initially offering her resignation, he then did not accept it. We do not know why that was the case. This was not Mr MacLeod engaged in machinations as Advocate Heywood contended for the Coop; rather this was Mr MacLeod being encouraged by his President to respond to the way he was being treated. When Mr Shenton performed a volte face leaving Mr MacLeod vulnerable to the ongoing actions of the members of RemCo, it was this in our view that caused Mr MacLeod to snap.
621. We therefore find that the Co-op, through the combined actions of Ms Carnegie, Ms Williams and Ms Champion who were acting in bad faith, and Mr Shenton, has breached its duty of care to Mr MacLeod leading him to suffer psychiatric injury. We also reject the argument that Mr MacLeod contributed to the injuries he suffered. The injuries were all due to the Co-op’s breaches of care.”
35. The next section of the judgment below is headed ‘Foreseeability’ and starts by making clear that this was recognised to be a necessary component for the claim to succeed. The significant concession was realistically made on behalf of the Respondent that as a matter of fact his psychiatric injury was not foreseen by anyone. This was recorded by the Royal Court in the following terms at [622]: “... this finding [of breach of duty causing Mr MacLeod’s psychiatric injury] is not enough of itself for Mr MacLeod to succeed against the Co-op. The psychiatric injury he suffered has to be reasonably foreseeable. Mr O’Connell in closing fairly accepted that no one foresaw that Mr MacLeod was about to suffer a psychiatric injury. He was right to make that concession for the following reasons:

- (i) Firstly, Mr MacLeod himself, although he was on the point of collapse, accepted he was stoical and kept going; (ii) Nor did Ms Dixon see any warning signs and she was the person who worked with him most closely; (iii) There was nothing in Mr MacLeod's medical records that show he was likely to collapse or at risk of doing so; (iv) No one in the Co-op realised that Mr MacLeod was on the point of collapse."
36. The Royal Court then sought to apply what it had identified to be the proper approach to foreseeability derived from the key authorities of *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] 2 All ER 1 ('Hatton') and *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512 ('Yapp'), which it had identified and discussed earlier in the judgment with extensive consideration of *Hatton* from paragraphs 122 to 150, and *Yapp* from paragraphs 152 to 170.
37. The Appellant does not appear to make any criticism of the legal principles that the Royal Court identified in directing itself on the law. Rather, it is the application of those principles to the facts that it had found that is at the heart of this part of the appeal. We set the key passage of the Royal Court's judgment on this issue in full: "624. Normally, unless an employee's psychiatry [sic] injury is actually foreseeable, then an employer cannot be held liable. We refer to the extract at paragraph 22 from *Hatton* set out at paragraph 135 above. We also refer to paragraph 23 of *Hatton* set out at paragraph 137.
625. However, these statements are not conclusive. Within *Hatton* itself at paragraph 25, as we have emphasised (see paragraph 138), foreseeability depends on the inter-relationship between the particular characteristics of the employee concerned and the particular demands which the employer casts upon him.
626. Paragraph 26 is also pertinent where it states that it would be easier to conclude that harm is foreseeable if the employer is putting pressure upon the individual employee which is, in all the circumstances of the case, unreasonable (see paragraph 139 above).
627. We are entirely satisfied that the pressure being put on Mr MacLeod in relation to the 5 May Board meeting, his expenses, not dealing with his complaint and seeking to replace him was totally unreasonable.
628. Paragraph 33 of *Yapp* emphasised that it is important what the employer not only could but should have done to prevent harm. Mr Shenton in this case should have accepted the resignation of Ms Carnegie in response to the complaint and should have asked Ms Williams to resign. The audits of expenses, both internal and external, pushed for by Remco led by Ms Carnegie were wholly unnecessary. The tough appraisal was simply designed to cause additional pressure
629. In the overall summary contained in *Hatton* at paragraph 43, *Hatton* recognised that foreseeability depended not only on what an employer knew but what the employer ought reasonably to know. While the same extract emphasised that an employer is usually entitled to assume that an employee could withstand the normal pressures of the job and to take what he is told by his employee at face value, and therefore at the employer is only in breach

of duty if he has failed to take the steps which are reasonable in the circumstances, this does not mean that the risk of psychiatric illness is not foreseeable simply because the employer did not foresee that risk.

630. This is also clear from the analysis in Yapp. Firstly, paragraph 85 of Yapp is significant where it cited with the approval the decision of the Court of Appeal in *Attia v British Gas Plc*. We have emphasised ultimately it is a matter for the judge (in this case, the Jurats) to form their own view of what happened and whether it was reasonably foreseeable “to the reasonable onlooker that the particular cause produced the particular effect in a person of normal disposition”.
631. This led Lord Justice Underhill at paragraph 119 (paragraph 163 above) to contend that psychiatric illness would not usually be foreseeable unless there are indications of which the employer was or should have been aware. In making this observation, Lord Justice Underhill was keen to stress that each case must turn on its own facts. He repeated this observation at paragraph 123(ii) which we have set out at paragraph 164, where he recognised that in principle an employer’s conduct in a particular case might be so devastating that it was foreseeable that even a person of ordinary robustness might develop a depressive illness as a result.
632. In the present case, Mr MacLeod, as has been noted on several occasions, had spent his entire life with the Co-op. He had worked his way up and became CEO at the age of forty. He was the driving force as well as being a dominant personality. While there is nothing wrong in principle with directors seeking to hold a dominant figure to account, what occurred in this case was a deliberate campaign to remove Mr MacLeod, led by Ms Carnegie and supported by other members of RemCo. Mr MacLeod’s mentor and the person he thought was his ally failed to stop this happening and let him down even though it was Mr Shenton’s responsibility as noted at paragraph 521 above to act “when the standards of governance and fiduciary responsibility require intervention”.
633. The Jurats were absolutely clear that where completely inappropriate conduct occurs without justification to remove a senior executive, even though that executive tries to fight to keep his or her position, if they do not do so there is a serious and foreseeable risk that such an executive could suffer psychiatric injury. In this case, the Jurats have no hesitation in concluding that the conduct of the Co-op through the combination of RemCo and Mr Shenton meant that it was reasonably foreseeable that Mr MacLeod, as he put it, “was in an impossible position”, and would suffer psychiatric injury.
634. This conclusion was supported by the evidence of Professor Fahy that we have set out at paragraph 109 above, where he recognised that a coordinated attack that was planned to undermine Mr MacLeod’s reputation and professional integrity and to oust him could be viewed as a foreseeable cause of psychological harm. Dr O’Flynn agreed with that assessment. The Jurats’ conclusions on foreseeability are therefore supported by the views of the medical experts.

635. In reaching this conclusion, the Jurats are conscious that it is only in exceptional cases that it is foreseeable that an apparently robust employee will develop a depressive illness. They have concluded that this case is one that is exceptional and therefore they have concluded that Mr MacLeod's injury was reasonably foreseeable. Taking the words of Lord Justice Underhill in paragraph 127 in Yapp, the conduct of the Co-op was "sufficiently egregious to render it foreseeable" that the behaviour of RemCo and Mr Shenton's volte face would cause Mr MacLeod a psychiatric injury. Lord Justice Davis at paragraph 156 of the same judgment, in the paragraph we have highlighted at paragraph 168 above, expressly recognised this possibility. We have therefore concluded that there is nothing in principle preventing the Jurats from reaching the conclusion they have. Accordingly, the psychiatric injury suffered by Mr MacLeod was caused by a breach of duty by the Co-op and was foreseeable.

(c) Hatton

38. It was common ground below and on this appeal that there is no significant difference between the law of Jersey in this area, and that in England and Wales. Both parties have relied extensively on English cases, and the first of these which we need to consider is the judgment of the English Court of Appeal in Hatton. This decision involved four conjoined appeals brought by defendant employers against a finding at first instance that they were liable for their employee's psychiatric illness caused by stress at work. One of those cases was taken on further appeal to the House of Lords: *Barber v Somerset County Council*

[2004] 1 WLR 1089.

39. Despite the fact that it was and remains common ground between the parties that the Respondent did not fall within the scope of the circumstances identified in Hatton, as generally applicable, it is nonetheless a useful starting point in setting out the relevant law. The judgment of Hale LJ set out sixteen "practical propositions" of which the first three are pertinent and are as follows: "(1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do (para 22). The ordinary principles of employer's liability apply (para 20).
- (2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para 23): this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) (para 25).
- (3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large (para 23). An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability (para 29)."

40. The list of propositions was endorsed by the House of Lords in Barber to the extent that they provided “useful practical guidance” but should not be read “as having anything like statutory force”, with each case depending on its own facts. The context in which foreseeability was being considered in Hatton was in relation to “the normal pressures of the job”, as referred to in the third proposition quoted above. This has been the subject of further consideration in subsequent cases, as indicated below.
- (d) Yapp
41. Mr Yapp had been appointed as the British High Commissioner in Belize. Some 9 months after taking up that post he was withdrawn from it and suspended with immediate effect pending investigation of allegations of misconduct. Following that investigation some of those allegations were established, but the most serious ones were not. Mr Yapp received a written warning and his suspension was lifted. However during this period between withdrawal from post and the conclusion of the investigation he had developed a depressive illness, and also had to undergo heart surgery, and he did not in fact return to work until he reached retirement age. He brought a claim against the FCO complaining about his withdrawal from his post and the conduct and outcome of the disciplinary process, alleging that the stress of these had caused his depressive illness and a consequential inability to return to work. His claim was heard by Cranston J who found that the withdrawal from post was a breach of duty, both in contract and as a breach of the common law duty of care owed to him by the FCO. The claims in relation to the disciplinary process were dismissed. The breaches found were held to have caused the depressive illness, for which he was entitled to recover damages.
42. On the appeal by the FCO the Court of Appeal (Underhill LJ giving the lead judgment, with whom Davis and Patten LJJ agreed) allowed the FCO’s appeal in relation to the remoteness of the psychiatric injury, and so the finding of breach of the common law duty of care. The judgment contains a comprehensive review of the case law, including Hatton and subsequent cases, leading to the following propositions being identified in relation to the issues of foreseeability and remoteness in this context. These are at paragraph 119, excluding the fifth which is not directly relevant to the issues on the present appeal: “(1) In considering, in the context of the common law duty of care, whether it is reasonably foreseeable that the acts or omissions of the employer may cause an employee to suffer a psychiatric injury, such an injury will not usually be foreseeable unless there were indications, of which the employer was or should have been aware, of some problem or psychological vulnerability on the part of the employee – Hatton.
- (2) That approach is not limited to cases of the Hatton type but extends to cases where the employer has committed a one-off act of unfairness such as the imposition of a disciplinary sanction – Croft and Deadman (also Grieves).

- (3) However, in neither kind of case should that be regarded as an absolute rule: Hatton contains no more than guidance, and each case must turn on its own facts – Hatton itself, but reinforced by Barber and Hartman.
- (4) In claims for breach of the common law duty of care it is immaterial that the duty arises in contract as well as tort: they are in substance treated as covered by tortious rules – Walker, Hatton. In order to establish whether the duty is broken it will be necessary to establish, as above, whether psychiatric injury was reasonably foreseeable; and if that is established no issue as to remoteness can arise when such injury eventuates.
- (5) ...”
43. Recognising the authorities consistently affirm that such cases turn on their own facts, the approach of the Court of Appeal in overturning the conclusions of the trial judge ([2013] EWHC 1098 (QB)) is significant. (i) Cranston J had rejected the FCO’s argument that Mr Yapp during his prior employment had shown himself to be reasonably robust so it was not reasonably foreseeable at the date of his appointment to Belize that a subsequent unfair withdrawal would lead to him developing a psychiatric illness: see paragraph 53 of the Court of Appeal judgment. Whilst accepting that Mr Yapp had an “ostensible robustness” the trial judge found that “it could reasonably be contemplated when the claimant was appointed as High Commissioner in 2007 that depression would be a not unlikely result of a knee-jerk withdrawal from post.” (ii) In relation to that conclusion the Court of Appeal noted at paragraph 122 that this was being considered by the judge in the context of the contractual claim, but that the judge’s findings in relation to remoteness on the common law claim tracked those on the contractual claim, and in any event the test for remoteness at common law was more favourable to a claimant. (iii) The Court of Appeal noted that the judge had not relied on medical evidence, but that was not required, on the basis of the Court of Appeal’s decision in *Attia v British Gas plc* [1988] QB 304 in which the plaintiff had suffered a psychiatric illness as a result of seeing her house seriously damaged by a fire caused by the defendant’s negligence. In *Attia* (at p.312F-H) Dillon LJ had said in relation to whether psychiatric illness was reasonably foreseeable: “Whether it was reasonably foreseeable to the reasonable man ... is to be decided, not on the evidence of psychiatrists as to the degree of probability that the particular cause would produce the particular effect in a person of normal disposition or customary phlegm, but by the judge, relying on his own opinion of the operation of cause and effect in psychiatric medicine, treating himself as the reasonable man, and forming his own view from the primary facts as to whether the chain of cause and effect was reasonably foreseeable: see per Lord Bridge in *McLoughlin*
- v. *O'Brian* [1983] 1 AC 410, 432C–D. The good sense of the judge is, it would seem, to be enlightened by progressive awareness of mental illness: per Lord Bridge at p. 443D.” (iv) Underhill LJ noted that the judge had not relied on “any peculiar features of the way that the Claimant was treated or of his personality”: paragraph 122. We interpose that certainly there was no reliance on any particular personal characteristics of Mr Yapp, but it could be questioned whether the judge had not relied on the specific features of his treatment, in

having been summarily withdrawn from post. At all events, the Court of Appeal identified the basis of the trial judge's finding as follows: "His reasoning was evidently based on a straightforward judgment, based on his own experience and assessment of human nature, that the gravity, and the unfairness, of what happened to the Claimant was such that it could be regarded as sufficiently likely that he would suffer an illness as a result."

- (v) Based on his summary of the principles emerging from the authorities – which we have quoted above at paragraph 42 – Underhill LJ accepted that it was "certainly important that there was no reason for the FCO to believe that the Claimant had some special vulnerability" but that was not necessarily decisive. This was because: "Each case depends on its own facts, and in principle the employer's conduct in a particular case might be so devastating that it was foreseeable that even a person of ordinary robustness might develop a depressive illness as a result ..." (vi) The question identified by the Court of Appeal was therefore whether this was such a case: i.e. in which "the employer's conduct [was] so devastating that it was foreseeable that even a person of ordinary robustness might develop a depressive illness as a result". The Court of Appeal concluded that the judge was wrong to find that it was. (vii) The starting point, in the view of Underhill LJ, was that it would be "exceptional that an apparently robust employee with no history of ill-health, will develop a depressive illness as a result even of a very serious setback at work." That was said by him to be "inevitably, based to some extent on my own assessment of human nature", but also reflected his view of the approach of the English Court of Appeal in *Croft v Broadstairs & St Peter's Town Council* [2003] EWCA Civ 676. He was influenced by the factual evidence of a FCO witness from Health and Welfare at the FCO who had explained that whilst Mr Yapp had been offered counselling, had expressed "feelings of anger and distress", and been prescribed sleeping tablets (as recorded by the trial judge without adverse comment, and quoted at paragraph 126): "She said that the claimant's reactions were not an unusual response to investigations and disciplinary proceedings. She said that many people exhibited similar responses and that the vast majority did not develop depression. She knew of only two instances of psychiatric illness in her fifteen years in Health and Welfare at the FCO and they were different." (viii) This was the background to the conclusion of Underhill LJ at paragraph 127 that there was nothing about the circumstances of Mr Yapp's treatment that were "sufficiently egregious to render it foreseeable" that he would suffer psychiatric injury, whilst acknowledging that it was "bound to cause distress and anger, exacerbated by the unfairness which the Judge found". It was "not tantamount to dismissal" nor was it "a disciplinary sanction or based on any established misconduct". Furthermore, this was "not a case of some gross and arbitrary injustice of the kind alleged, for example, in *Eastwood*." In *Eastwood*, as noted in Yapp at paragraph 116, the case as pleaded was that the two employees had been the victims of a sustained malicious campaign by their employer, involving the manipulation of the disciplinary procedure, deliberately in order to procure their dismissal. (ix) At paragraph 129 Underhill LJ explained why the appellate court was entitled, indeed obliged, to overturn the decision below if it considered it to be wrong: "I have considered carefully whether this is a case where, although I might myself have

reached a different conclusion, I can fairly say that the Judge's decision was wrong. But his decision was not one of primary fact, or indeed one of fact at all. Rather, it was a judgment – based, as I have said, inevitably on his own experience rather than on any medical or other evidence – as to the degree of likelihood that the Claimant would develop a depressive illness. This Court is as well placed to make that judgment as he was; and, having reached a different conclusion I am, I think, obliged to give effect to it.” He went on to say that he was “less reluctant” to differ from the trial judge on the basis that he thought Cranston J might have attached more weight to a previous decision (*Gogay v Hertfordshire County Council* [2000] IRLR 703) than was justified on a proper reading of that case.

- (x) Underhill LJ expressly placed no weight on the fact that Mr Yapp was offered support by the FCO's Health and Welfare Department following his withdrawal and during the disciplinary investigation. He doubted that the provision of such support was relevant in a case, as with Mr Yapp, which does not involve the foreseeability of the risk of psychiatric injury as a result of the “ordinary” stress at work: paragraph 131. (xi) In his concurring judgment Davis LJ agreed that the trial judge's finding could not be sustained in relation to the recoverability of the psychiatric injury. His judgment at paragraph 156 may be read as emphasising how unusual it may be that foreseeability could be established without awareness of a prior relevant susceptibility, but did not exclude that possibility “on appropriately special facts”.

(e) Discussion

44. We have identified above the principles that are apparent from the main authorities, and taken account of numerous other authorities cited by the parties, as well as the survey of the case law conducted by Underhill LJ in Yapp. These establish that a psychiatric injury caused by an employer's conduct “will not usually be foreseeable unless there were indications, of which the employer was or should have been aware, of some problem or psychological vulnerability on the part of the employee” (Yapp proposition (1) derived from *Hatton*). In the present case there was no such problem or vulnerability apparent, as was common ground and accepted by the Royal Court.
45. The Royal Court's formulation of this general proposition appears at [624]: “Normally, unless an employee's psychiatry [sic] injury is actually foreseeable, then an employer cannot be held liable.” That does not seem to us to be entirely accurate, in so far as it is suggested that there may be circumstances in which ‘actual’ foreseeability is not required. In all cases the test remains whether psychiatric injury was reasonably foreseeable. That remains so, even in the exceptional circumstances where a problem or vulnerability on the part of the employee was not apparent to the employer before the injury materialised. It is still necessary for a plaintiff to establish that psychiatric injury is “actually foreseeable”. But it is not always necessary for it actually to have been foreseen.

46. The Royal Court regarded the pressure being put on the Respondent was “totally unreasonable” based on its detailed findings which were referred to at [627]: in particular in relation to the Board meeting on 5 May, his expenses, not dealing with his complaint and seeking to replace him. Their findings make it clear that this is a case in which the treatment of the Respondent was well beyond “the normal pressures of the job” (per Hatton proposition (3), cited at paragraph 39 above).
47. The Royal Court referred to Underhill LJ’s observation at paragraph 123 of Yapp that “a particular case might be so devastating that it was foreseeable that even a person of ordinary robustness might develop a depressive illness as a result”: Royal Court judgment at [631] and quoted at paragraph 43(v) above. It noted that the authorities consistently emphasise that the assessment in each case turns on its own facts, as appears from Yapp proposition (3), based on Croft and Hatton. Whether the circumstances were such as to fall into the exceptional category that is recognised to exist was the key question for the Royal Court.
48. The terms in which the Royal Court concluded that the present case fell within this exceptional category were emphatic and it may be seen that it was primarily based on the views of the Jurats, as recorded at [633] and [635] which we set out again: “633. The Jurats were absolutely clear that where completely inappropriate conduct occurs without justification to remove a senior executive, even though that executive tries to fight to keep his or her position, if they do not do so there is a serious and foreseeable risk that such an executive could suffer psychiatric injury. In this case, the Jurats have no hesitation in concluding that the conduct of the Co-op through the combination of RemCo and Mr Shenton meant that it was reasonably foreseeable that Mr MacLeod, as he put it, “was in an impossible position”, and would suffer psychiatric injury.” ...
635. In reaching this conclusion, the Jurats are conscious that it is only in exceptional cases that it is foreseeable that an apparently robust employee will develop a depressive illness. They have concluded that this case is one that is exceptional and therefore they have concluded that Mr MacLeod’s injury was reasonably foreseeable. Taking the words of Lord Justice Underhill in paragraph 127 in Yapp, the conduct of the Co-op was “sufficiently egregious to render it foreseeable” that the behaviour of RemCo and Mr Shenton’s volte face would cause Mr MacLeod a psychiatric injury.” In support of that conclusion the Royal Court’s judgment invokes the medical evidence from both psychiatric experts (Professor Fahy and Dr O’Flynn) although as set out above, based on Attia, the foreseeability question is ultimately a matter of judgment rather than medical evidence: see paragraph 43(iii) above. Nonetheless, in Yapp both Underhill LJ (at paragraph 128) and Davis LJ (at paragraph 155) did refer to the medical evidence in that case, it appears at least as a cross-check, in relation to the foreseeability of the psychiatric illness.
49. We considered with Advocate O’Connell in the course of his oral submissions the extent to which deference should be paid by this Court to the findings of the Royal Court in concluding that on the primary facts found foreseeability was established. Although he ultimately sought to maintain that the findings below should not be displaced if we merely

disagreed with them, we do not consider that is consistent with the approach of the English Court of Appeal in *Yapp*. It is necessary for this Court to consider for ourselves whether, on the primary facts found by the Royal Court (which we have accepted, having rejected the Appellant's multiple challenges to those facts in Part B above), the psychiatric injury was reasonably foreseeable on the specific facts of this case. For the reasons given by Underhill LJ in *Yapp*, this Court is as well placed to conduct the evaluative judgment, as the Royal Court was on the basis of their findings on the primary facts.

50. We do not agree with Advocate Heywood that the assessment of foreseeability is a matter of law. The test is a matter of law but the application of that test involves primary fact-finding and then an evaluative

judgment.

51. We also do not accept the Appellant's submission that there was any structural error in the order in which the Royal Court identified the issues for it to determine at [512] of its judgment, having acknowledged the existence of the undisputed duty of care owed by the Appellant as employer. It is well recognised that the elements for liability in negligence are interrelated and do not exist in separate compartments, and foreseeability is relevant to each stage: see for example Hale LJ at paragraph 18 of *Hatton*. There was nothing erroneous or illogical in the order of the issues which the Royal Court identified it was required to decide, and in any event they expressly addressed together, as explained at [513].
52. Based on the evidence before the Royal Court, and their findings of primary fact which we have upheld, this Court is required to evaluate for ourselves whether it was reasonably foreseeable that the Respondent would suffer psychiatric injury as a result of the Defendant's conduct. We have considered this with particular care, taking account of the unequivocal conclusions of the Royal Court on that central issue. Our conclusion is that it was not established that it was reasonably foreseeable that such an injury would be caused, whilst fully accepting that it would be entirely foreseeable that the Respondent would be distressed, upset and angry at his treatment. Our reasons are as follows: (i) The Respondent did not have any known pre-existing vulnerability or susceptibility to psychiatric harm. To the contrary the Royal Court found him to be "a strong personality" and as CEO "he was the dominant figure": Royal Court judgment at [80]. (ii) It was common ground that nobody in the Appellant's organisation in fact foresaw that his treatment would lead to psychiatric injury. (iii) The Respondent himself had accepted in his evidence that he himself had not recognised that he was liable to suffer a breakdown. As recorded by the Royal Court at [80]: "He was candid in accepting that he was stoic when acting as CEO and therefore kept going and that he did not himself appreciate in the events leading up to him being signed off work that he was going to suffer a psychological breakdown. He also fairly recognised that if he was not aware of this others were unlikely to be so." (iv) Whilst the undisputed matters set out above are not of themselves conclusively determinative of the issue of foreseeability they make the Respondent's task even more difficult in establishing that his psychiatric injury

was a reasonably foreseeable consequence of his treatment, even in the face of such unacceptable treatment as it was found had taken place.

- (v) It is apparent that the conduct to which the Respondent was subjected, as found by the Royal Court and rehearsed in the earlier part of this judgment, was unpleasant, reprehensible, and would have been distressing to him, eliciting strong emotions. Nevertheless, we do not find ourselves able to conclude that it gave rise to a foreseeable risk of psychiatric injury to the Respondent. As a senior and experienced executive, with a strong personality and no known vulnerability or history to suggest a predisposition, it was not reasonably foreseeable that he would sustain a psychiatric injury. (vi) The unreasonable conduct did not result in the Respondent's dismissal directly. The termination of employment, of which notice was given by letter dated 27 March 2020, followed the extended absence for ill health having been signed off with stress since 29 May 2019. The absence of a dismissal was regarded as being a relevant feature by Underhill LJ in Yapp in noting that Mr Yapp's withdrawal "was not tantamount to dismissal", nor was it "a disciplinary sanction or based on any established misconduct" (paragraph 127). We consider further below the relationship between the present claim and the proceedings for unfair dismissal which were brought and settled. For the purposes of the issue of foreseeability, it is relevant that the conduct up to the Respondent going off work with stress at the end of May 2019 did not include dismissal or disciplinary proceedings. We nevertheless recognise that on the facts found, what the RemCo members (Ms Carnegie, Ms Champion and Ms Williams) were striving for was for the Respondent to be removed and replaced and that had become apparent to the Respondent well before he went off sick. (vii) In all the circumstances we do not consider that, even accepting the view of the Jurats (as recorded at [633]) that the conduct of the Remco members was "completely inappropriate" and "without justification" that in the circumstances of the present case that conduct rendered his psychiatric injury foreseeable. (viii) We are conscious that we are displacing the conclusion of the Royal Court, adopting an equivalent approach to that of the English Court of Appeal in Yapp. In doing so we have adopted the Royal Court's findings of primary fact. We derive further confidence in overturning the finding on foreseeability from our view of the Royal Court's treatment of the medical evidence, as set out below, which suggests that it may have regarded foreseeability of psychological harm (rather than a recognised or diagnosable psychiatric injury) as being sufficient for the Respondent to meet the test. That indicates that the Royal Court may have been applying a less demanding test than the law requires in relation to what must be reasonably foreseen as being a potential consequence of the Appellant's conduct. In any event it seems to us that our conclusion is in line with the outcomes in the English authorities reviewed in Yapp as well as in Yapp itself.
53. We do not consider the medical evidence is of particular significance or assistance on the assessment of foreseeability in applying the test of reasonable foreseeability by reference to the "reasonable man". On the basis set out above, based on Attia and its consideration in Yapp, the assessment is ultimately one for the Court not one for medical experts. Even using the available medical evidence in this case as a cross-check, the opinions of the experts do

not appear to have been particularly clear or consistent. During the appeal hearing both parties sought to rely selectively on what each of the experts had said at various points. The Royal Court at [109] quoted an answer given by Professor Fahy (the Appellant's psychiatric expert) during cross examination which it regarded as significant: "If there is a coordinated attack that is planned in order to undermine his reputation and professional integrity and to oust him, then yes, that could be viewed as a foreseeable cause of psychological harm."

54. The Royal Court suggested that Professor Fahy had sought to "row back" from this statement but it was "not persuaded by those attempts" and considered that this answer was "an accurate assessment and consistent with the evidence of Dr O'Flynn" (the Respondent's psychiatric expert): paragraph 110. We have reviewed the totality of the transcripts of both psychiatric experts' evidence as well as their written evidence. In the questioning of the experts there does not always appear to have been clarity or consistency in appreciating the distinction between psychological effects and psychiatric injury, which is not helpful in evaluating the answers. Indeed, the Respondent's pleaded case repeatedly inaccurately refers to the foreseeable risk of "psychological harm", rather than psychiatric injury: see for example the allegations at paragraph 23 of his Order of Justice. This confusion feeds into parts of the Royal Court's judgment.
55. It is important to appreciate that what was required to be foreseen was psychiatric injury; that is a recognised (sometimes referred to as 'diagnosable') psychiatric injury or disorder. Psychological harm, which may be distress, anxiety, or other effects, does not of itself constitute psychiatric injury. There is discussion in *Hatton* of the distinction between psychiatric illness and other psychological impacts such as occupational stress: paragraphs 4 to 10. So, for example, in the second proposition in *Hatton* the requirement for "injury to health (as distinct from occupational stress)" was identified, and in the third proposition the reference is to "mental disorder". Similarly, Yapp proposition 1 refers to foreseeability of "a psychiatric injury", to which question awareness of a prior psychological vulnerability of the employee will be relevant. It therefore does not seem to us to follow that Professor Fahy sought to retreat from the answer regarded as being significant by the Royal Court in his subsequent answers in which he disputed the foreseeability of psychiatric injury. Rather, Professor Fahy in his oral evidence properly sought to distinguish the concepts, for example in response to a question from the Commissioner which was directed to whether the conduct to which the Respondent had been subject "leads to psychological harm being foreseeable" [Transcript Day 13, p.149 "I don't think that in itself makes psychological harm, in the clinical sense of the word, foreseeable . I think upset, stress and, you know, a proportionate emotional reaction is foreseeable , but that -- I would differentiate that quite clearly from a psychiatric condition. Many people get ousted from positions and boards and so on. Most do not seek psychiatric treatment. They process that through their experience and the robustness of their personality and using their problem-solving skills , and it's certainly not inevitable that it would cause psychiatric harm. Otherwise, our clinics would be full of executives with that -- difficult experiences like that. I'm not belittling the significance , but I think, again, stress and psychiatric illness are different conditions."

56. Once it is recognised that psychological harm does not equate to psychiatric injury the answer which the Royal Court highlighted, as quoted at paragraph 53 above, does not bear the weight that was put on it in supporting the conclusion that psychiatric injury was foreseeable: see also the formulation by the Royal Court of the issue at [184] and its application at [634], both referring to the foreseeability of psychological harm and its view that foreseeability of such harm was supported by the medical evidence. (f) The relevance of ‘bad faith’
57. In its review of the evidence leading to its factual findings the Royal Court included findings as to the actions of Ms Carnegie, Ms Williams and Ms Champion were “improper, commercially unacceptable and unconscionable” which they held accordingly meant that they were acting in bad faith. That conduct was held to have continued before and after the Respondent had gone off sick in May 2019: [616]-[617]. The Respondent had been permitted by the Royal Court to amend his claim to include allegations of bad faith against the RemCo trio, but was not permitted to pursue a tort of ‘intentional harm’ based on *Wilkinson v. Downton* [1897] 2 QB 57, as considered and clarified in the more recent decision of *O (A Child) v Rhodes* at [2015] UKSC 32 at paragraphs 73 to 74: see the Royal Court’s judgment at [66]-[77].
58. The Appellant criticises the Royal Court for making the findings it did at [616]-[617], contending that it “infected the Court’s consideration of the claim as a whole”, including in relation to breach of duty, foreseeability, and the application of *Johnson*. We do not accept this criticism is well-founded. In relation to the findings on foreseeability it is not apparent that the Royal Court invoked its findings on the RemCo members’ bad faith, but in any event we reject the Appellant’s contention that the question of bad faith “has no relevance to the issue of foreseeability” (Appellant’s contentions at paragraph 213) as being significantly overstated. In assessing foreseeability the Court was required to consider prospectively whether it was reasonably foreseeable that this plaintiff would suffer psychiatric injury. What was not known to the Respondent could not be directly relevant to that question, but nonetheless the actions of those acting in bad faith may be more likely to be sufficiently egregious to fall within the exceptional category recognised in *Yapp*. There was extensive consideration of messaging between the RemCo members, and others, that only became known to the Respondent on disclosure in the course of the legal proceedings. The Royal Court was entitled to consider all that material, as it did, providing it was properly recognised the limits of the relevance of that material to the prospective test of foreseeability in relation to matters that were not known to the Respondent at the time. Although we have differed from the Royal Court in relation to their view on foreseeability, we do not consider that their decision can be criticised on the basis that there was any inappropriate application of the findings of bad faith. Indeed, we note that the Appellant’s criticism is made only faintly, by reference to the terms of the Royal Court’s judgment at [632] that “While there is nothing wrong in principle with directors seeking to hold a dominant figure to account, what occurred in this case was a deliberate campaign to remove Mr MacLeod, led by Ms Carnegie and supported by other members of RemCo.” In the

Appellant's written submissions this is not suggested to be erroneously "strengthening its views on foreseeability" any more than "by possible implication". In any event, we reject this ground of appeal as an independent criticism of the Royal Court's approach to foreseeability.

D. The relationship with the Tribunal jurisdiction

59. Finally, we address an issue which goes to the quantum of damages which were awarded by the Royal Court. In view of the conclusion we have reached on foreseeability, quantum does not fall to be determined on this appeal. However the issue we now address was fully argued before us, and it raises a difficult and novel point, so it is right that we say something about it. (a) An outline of the issue
60. The problem we now address goes back to the seminal House of Lords decision in *Addis v The Telephone Company* [1909] AC 488. That case decided that where an employer had the right to terminate a contract of employment, but exercised it wrongly, by failing to give the employee the benefit of the full contractual notice period, the employee had no cause of action beyond that for the financial loss suffered as a result of being given short notice. He could not claim for consequential losses, such as for distress or loss of reputation.
61. Since *Addis* was decided, the law of tort as it relates to personal injuries has evolved beyond recognition. Also, the law now recognises that an employer owes an implied contractual duty to maintain a relationship of trust and confidence with its employee (see *Mahmud Bank of Credit and Commerce International* [1998] AC 20) (the "duty of good faith"). Nowadays it is accepted that an employer owes a duty of care in contract and in tort not to injure an employee, and that duty extends to psychiatric injury as well as physical injury. At the same time, the legislature has also stepped in to give a statutory right of compensation in circumstances where a dismissal is "unfair" within the statutory definition of that term. The first such legislation in England and Wales was the Industrial Relations Act 1971. The right to compensation for unfair dismissal is now found in the Employment Rights Act 1996. However, in conferring a right to compensation for unfair dismissal, Parliament imposed a limit on the amount of compensation which could be claimed. That limitation within the statutory scheme raises the question as to how to compute damages where an employee is dismissed in circumstances which gives rise to consequential losses beyond that recoverable under *Addis*. Should the common law of tort or contract be developed so as to, as it were, outflank *Addis*, and give compensation for personal injury caused by the manner of an employee's dismissal? Or should the Courts accept that the extent to which compensation should be recoverable as a result of the manner of the dismissal is now governed by solely by the employment protection legislation, so that if compensation is not recoverable under that legislation, or is capped in its amount, the Courts should refrain from developing the law so as to give compensation in circumstances outside, or in an amount which goes beyond, what Parliament has deemed appropriate?
62. In two cases (*Johnson v Unisys Ltd*

[2003] 1 AC 518 and *Eastwood v Magnox Electric* [2005] 1 AC 503) the House of Lords decided that the latter approach is to be preferred. That approach has also been followed by the Royal Court in this jurisdiction in *McDonald v Parish of St Helier*

[2005] JRC 074, in the light of the terms of the Employment (Jersey) Law

2003. Neither party to this appeal submitted that McDonald was wrong to follow Johnson and Eastwood, or that the Courts in Jersey should take a different view on the policy of the Jersey employment protection legislation to that taken by the Courts of England and Wales in the case of the similar, but by no means identical, legislation applying in that jurisdiction. The issue which was argued on this appeal was how the so-called “Johnson exception” should be applied on the facts of this case. (b) The case law

63. Johnson concerned a claim by a former employee who was summarily dismissed. He subsequently brought a successful claim for unfair dismissal. He then sued his former employer for damages for wrongful dismissal (pleading causes of action in contract and in tort) claiming that the manner in which he had been dismissed had caused him to have a mental breakdown, and that the manner of his dismissal had breached the duty of good faith. At first instance his claim was struck out, so before the House of Lords issue was decided on the basis of employee’s pleaded case. That case included an allegation that his mental breakdown was a foreseeable consequence of the way in which he had been treated. The appeal therefore proceeded on that footing.
64. Lord Hoffmann begins his analysis by considering whether the duty of good faith might be extended to cover the circumstances of dismissal, thus giving a cause of action to an employee who is dismissed. He concludes, in paragraph 44, that it would possible (notwithstanding *Addis*) to take this step, but he goes on to observe (in paragraph 47) that it would not necessarily be wise to do so (even if the Courts were free to do so having regard to legislative restraint). He gives his reason for this in paragraphs 47 to 49. He concludes (paragraph 50) that (absent legislative restraint) the question would be finely balanced.
65. Lord Hoffmann then addressed the implications of the unfair dismissal legislation for the development of new common law remedies for wrongful dismissal. Having set out the terms of the relevant legislation, Lord Hoffmann said this: “55. In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal. His most substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such loss is a consequence of the dismissal which may form the subject matter of a compensatory award.” Then at paragraphs 56 and 57 he concluded as follows: “56. Part X of the Employment Rights Act 1996 therefore gives a remedy for exactly the conduct of which Mr Johnson complains, But Parliament had restricted that remedy to a maximum of €11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit.

57. My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step.”
66. Finally, for present purposes he pointed out: “59. The same reason is in my opinion fatal to the claim based upon a duty of care. It is of course true that a duty of care can exist independently of the contractual relationship. But the grounds upon which I think it would be wrong to impose an implied contractual duty would make it equally wrong to achieve the same result by the imposition of a duty of care.”
67. Lord Millett agreed with Lord Hoffmann, but added some reasoning of his own in support of the Lord Hoffmann’s conclusion. Lord Bingham agreed with Lord Hoffmann and Lord Millett. Lord Nicholls, in a short judgment came, succinctly to the same conclusion: “2. ... Having heard full argument on the point, I am persuaded that a common law right embracing the manner in which an employee is dismissed cannot satisfactorily coexist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not the ordinary courts of law. ...”
68. Lord Steyn dissented.
69. Some three years later, the implications of Johnson fell to be considered by the House of Lords in *Eastwood v Magnox Electric plc* [2005] 1 AC 503. This case concerned two appeals, one by Mr Eastwood, who was employed by Magnox and the other by Mr McCabe, who was employed by Cornwall County Council. In each case the employee claimed that they had suffered stress related illness following a campaign of harassment by their employer, which culminated in their dismissal (we have already made brief reference to the pleaded facts of Mr Eastwood’s appeal in our discussion of Yapp in paragraph 43 above). In each case the claim was struck out at first instance as falling foul of the Johnson exception. Differently constituted Courts of Appeal dismissed Mr Eastwood’s appeal, but allowed Mr McCabe’s appeal.
70. Both employees were successful in the House of Lords. The reason their claims were not caught by the Johnson exception was that on their pleaded cases they had both acquired causes of action against their employer before they had been dismissed. Lord Nicholls addressed the question of when the Johnson exclusion does, and does not, apply in the following terms, which merit being quoted in full: “27 Identifying the boundary of the “Johnson exclusion area”, as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee’s remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that

cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal. 28 In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the Johnson exclusion area. 29 Exceptionally this is not so. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those now before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre- dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of his subsequent dismissal he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over."

71. Lord Nicholls then goes on to examine some of the undesirable consequences of the distinction which he draws in the above paragraphs. These include the fact that an employer may be better off dismissing a vulnerable employee rather than suspending them and carrying out a proper investigation. The latter course carries with it the risk of a substantial, uncapped, damages claim based on psychiatric injury stemming from the suspension process, whereas the former course ensures that all the loss is restricted by the Johnson exclusion. There is also the difficulty, in cases where a cause of action for psychiatric injury arises as a result of the employer's conduct before dismissal, of determining which heads of loss arise from the pre-dismissal conduct, and which from the dismissal itself. On that question, Lord Nicholls said this: "31. ... the existence of this boundary line means that in some cases a continuing course of conduct, typically a disciplinary process followed by dismissal, may have to be chopped artificially into separate pieces. In cases of constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the Johnson exclusion area, the loss flowing from the dismissal itself is within that area. In some cases this legalistic distinction may give rise to difficult questions of causation in cases such as those now before the House, where financial loss is claimed as the consequence of psychiatric illness said to have been brought on by the employer's conduct before the employee was dismissed. Judges and tribunals, faced perhaps with conflicting medical evidence, may have to decide whether the fact of dismissal was really the last straw which proved too much for the employee, or whether the onset of the illness occurred even before he was dismissed." These difficulties are clearly present in the case now before the Court.

72. Lord Hoffmann Lord Rodger and Lord Browne all agreed with the speech of Lord Nicholls. Lord Steyn, who had dissented in Johnson, also agreed with the result of the appeals, but devoted his speech to an extensive critique of the difficulties and anomalous consequences caused by Johnson. He also pointed out that parts of the reasoning in Johnson were based on a false premise. As Lord Steyn explained in paragraphs 38 and 42 of his speech, the statutory unfair dismissal regime did not extend to giving compensation for non-pecuniary loss, or for personal injuries. He suggested that parts of Lord Hoffmann's, and Lord Nicholls', reasoning (see eg paragraph 56 of Lord Hoffmann's speech quoted in paragraph 64 above), where they suggest that Mr Johnson could pursue his common law claim for personal injuries within a claim for unfair dismissal claim, was wrong. In the light of this, Lord Steyn suggested that the true ratio of Johnson must be that the making of legislation to compensate for unfair dismissal must be taken as complete code governing the employee's right to compensation, with the consequence that causes of action which are not compensable within the ambit of an unfair dismissal claim are not compensable at all.
73. Both Lord Nicholls (at paragraph 34) and Lord Steyn (at paragraph 51) called for Parliamentary consideration of what they both considered to be an unsatisfactory state of affairs. No such consideration had been given by the time that the Johnson exception next came before the Supreme Court in the cases of *Edwards v Royal Hospital NHS Foundation Trust* [2012] 2 AC 22. The case concerned the question whether the breach of an express term governing the disciplinary procedure to be adopted was within the Johnson exception, where breach of the term led to a dismissal. That issue is not relevant to this appeal. The case is notable for the difficulty which the Court had in applying the Johnson exception to the facts – in one of two conjoined appeals the seven members of the Court split 4 to 3 in favour of applying the exception to the claim.
74. We then turn to the only Jersey case cited to us which addresses the Johnson exception. *McDonald v Parish of St Helier* [2005] JRC 074, [2005] JLR 212 was decided by the Royal Court (Deputy Bailiff Michael Birt (as he then was) sitting with Jurats Allo and Newcombe) in 2005. At that point the Employment (Jersey) Law 2003 (which we consider in more detail below) had been enacted but not brought into force. The Plaintiff's case was that he was dismissed in breach of the implied duty of good faith, and he sought damages on that basis. He argued that the common law (in England) and the corresponding customary law in Jersey, should be extended to recognise such a cause of action (notwithstanding *Addis*). There was discussion of the dicta in the speeches in Johnson and Eastwood on what the answer to this question would have been, had the existence of the Johnson exception not made the question academic. The Plaintiff sought to distinguish Johnson on the ground that the Jersey unfair dismissal legislation was not in force. This meant, it was argued, that the Johnson exception did not yet apply in Jersey. As the Court recorded at [39] of its judgment, the Plaintiff did not argue that Johnson should not be followed in Jersey, and his Advocate was inclined to accept that it was correctly decided.

75. The Court decided that the Johnson exception should be applied to defeat the Plaintiff's claim, even though the relevant legislation was not in force (thus leaving the unfortunate Plaintiff with the worst of both worlds). Whether that was the correct decision is irrelevant for present purposes. We note that the Court did not reach a concluded view on what customary law would have provided if the Johnson exception had not applied, and that the proposition that Johnson should be treated as applicable to the Jersey unfair dismissal legislation was conceded in principle, and not decided by the Court.
- (c) The approach of the Royal Court
76. The Royal Court considered the law on the Johnson exception in paragraphs [172] to [206]. The Judgment quotes extensively from the English authorities. Reference was also made to the McDonald case, which the Court observed (at [184]) was binding on it, unless it considered it plainly wrong. Neither side sought to contend that, so it was common ground that the Johnson exception was potentially applicable. Paragraph [184] also summarises the parties' contentions on that issue. The Respondent argued that the whole of his injury was sustained before his dismissal. That meant, following Eastwood, that the whole of his loss resulting from his relevant injury was outside the Johnson exception. We note that that is consistent with his pleaded case, in that the actual dismissal is not pleaded as one of the breaches of duty on which his cause of action is founded. The Appellant argued that the evidence showed that the Respondent had made a full recovery by the point at which he was dismissed, so all of his subsequent loss of earning capacity was caused by the dismissal, with the consequence that all of this loss was covered by the Johnson exception.
77. As noted in paragraph 4 above, the Respondent made a claim before the Tribunal for unfair dismissal and discrimination, which was compromised by the payment of a sum "in full and final settlement of all and any claims falling within the jurisdiction of the Tribunal". The Respondent considered that the sum paid under the compromise should merely be set off against the totality of his claim for damages, to avoid the risk of double recovery. The Appellant submitted that the compromise sum represented the totality of the claim for compensation to which the Respondent was entitled for loss suffered after the dismissal, having regard to the operation of the Johnson exception. Those positions were also adopted on this appeal.
78. The Royal Court considered the merits of the Appellant's contention that the dismissal alone was the cause of the Respondent's losses following the dismissal in paragraphs [664] to [678]. They concluded that it was not the case that the Respondent had made a full recovery by the time he was dismissed. The Jurats concluded that his recovery was dependent on a successful return to work. That of course was denied to the Respondent when he was dismissed (paragraph [677]).

79. It is not necessary for present purposes to replicate the Royal Court's careful consideration of the evidence, as the issue does not require a decision. Suffice to say that had it been necessary to do so, we would have upheld the Court's conclusion, which seems to us to be clearly correct.
80. In paragraphs [679] to [682] the Court considered the impact on the Respondent of his dismissal. The Court's conclusion, following on from the conclusion just referred to, appears at [682], where the Court states: "The conclusion the Jurats have reached having listened carefully to all the evidence of Professor Fahy and Dr O'Flynn is that the dismissal of Mr MacLeod caused a "relapse". This follows on from the Jurats' finding that while Mr MacLeod had improved, he was not fully recovered. At the point of his dismissal, he was therefore still suffering from the adjustment disorder which led to him being signed off at the end of May 2019."
81. The Royal Court then considered the application of the Johnson case law in paragraphs [683] to [694]. The Court accepted the Respondent's argument that the Respondent's claim fell wholly within Eastwood, because the injury had occurred by reason of the employer's conduct prior to the act of dismissal. It rejected the Appellant's argument that because the acts committed against the Respondent culminated in dismissal the entire loss was part and parcel of the dismissal. The Court summarised its understanding of the law in the following terms, at [691]: "What the present case is about ... is a pre-termination breach of duty. In our judgment, it should not matter whether the injury suffered by an employee due to a breach of duty by an employer is physical or psychiatric. The employer should not be able to escape liability for the damage caused by that injury because they choose to dismiss the employee. We accept in relation to psychiatric injuries that the injury has to be foreseeable but otherwise the fact that an employer chooses to dismiss an employee who has suffered an injury caused by that employer should not in either case operate as a bar to a claim. Accordingly, this part of the [Appellant's] case fails. Were that not to be the position, it would encourage employers to dismiss employees whom they had caused psychiatric injury to in breach of duty in order to avoid liability for causing such injury or to limit the amount of damages that are recoverable. We do not consider that the dividing line as recognised by Eastwood should be drawn in such a way."
82. That is, with respect, reflective of a correct approach to the law so far as it goes. But the Court goes on to assess damages on the basis that the whole of the Respondent's loss stems from the injury inflicted on the Respondent before the dismissal. On the basis of the facts found by the Court, we do not think that is necessarily the correct approach. As Lord Nicholls observed in paragraph 31 of his speech in Eastwood (quoted in paragraph 71 above) because of the distinction drawn in Eastwood between injury caused prior to dismissal, and injury caused by the dismissal, a continuing course of employer conduct may have to be "chopped artificially into separate pieces". He gives the example of a case of constructive dismissal where "a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance

of these breaches as a repudiation of the contract.” We consider a distinction should be drawn on the facts of this case, between the loss flowing from the injury caused by the Appellant’s pre-dismissal conduct, and any loss flowing from the injury caused by the dismissal itself. We say this because the facts found show that the dismissal was not merely the crystallisation of a significant element of the Respondents’ loss (because it brought to an end his capacity to earn remuneration from his employment with the Appellant) but it also caused a deterioration of his mental state (a “relapse” as the Court termed it) which itself may have impacted on his future earning capacity. Before the dismissal the evidence shows that the Respondent was sufficiently recovered to return to work – the view being that with appropriate support he could have resumed his well remunerated and responsible job. After dismissal the Court assessed his loss on the basis that he would never have any significant earning capacity for the rest of his life. This suggests to us that the relapse triggered by the dismissal may have had a significant impact on the loss which he has suffered. Put another way, there may have been concurrent causes for his loss of earning capacity after the dismissal, namely the injury stemming from his pre-dismissal treatment and the relapse in his condition caused by the manner of the dismissal itself.

83. We say “may have” in the previous paragraph because the findings of fact made in the judgment do not clearly identify the impact on the Respondent’s future earning capacity of the relapse caused by the dismissal. In paragraph [687] the Court adverts to Lord Nicholls’ observations to which we have just referred, but they do not draw out all of the implications of what he said. The Court draws from paragraph 31 of *Eastwood* the proposition that the choice is between treating the dismissal as the last straw (in which case all the loss stems from the dismissal) and finding that the onset of the injury pre-dated the dismissal (in which case all of the loss stems from that onset). But Lord Nicholls was considering a situation, the possibility of which is clearly inherent in the reasoning of the House of Lords in *Eastwood*, that the employer’s pre-dismissal conduct and the dismissal itself both cause injury. Failure to consider that possibility meant that the Royal Court did not make any clear findings of fact on that issue. Naturally that meant that they did not then address the question of whether to apportion the post-dismissal loss between the two potential causes of the Respondent’s injury.
84. Had the quantum of damages been a live issue, we would have remitted the appeal to the Royal Court to determine first, the extent, if at all, to which injury was caused to the Respondent by the act of dismissal, and second the appropriate apportionment of the Respondent’s loss as between the two causes. A call for an apportionment exercise was, in effect, the Appellant’s fall-back position on quantum, in the event that its primary position – namely that all of the post-dismissal loss be attributed to the dismissal – was not accepted. We think that approach was well founded if, indeed, the dismissal did cause some injury by itself. As the Court in *Hatton* observed at [43] “... Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable his wrongdoing, unless the harm is truly indivisible.”

85. The Appellant referred to BAE Systems (Operations) Ltd v Konczak [2017] EWCA 1188 at paragraph 7 for the approach which should be taken to that exercise: " ... the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm." We are under no illusions that this might have proved a challenging exercise on the facts of this case. (c) The compromise agreement
86. We have reached our conclusion on what would have been the correct approach to the Johnson exception on the facts of this case without reference to the terms of the compromise agreement. This is because the compromise agreement only debars Mr MacLeod from pursuing claims based on this dismissal which are within the jurisdiction of the Tribunal. But, as we have explained, the Johnson exception applies to all claims for compensation based on the manner of the dismissal, whether or not within the jurisdiction of the Tribunal. For that reason we think the precise ambit of the compromise agreement is not relevant when considering the impact of the Johnson exception on the Respondent's claim. (d) Concluding remarks on quantum
87. In conclusion on this part of the judgment, we make two observations. The first is to point out, again, that whether the Johnson exception is part of the law of Jersey was not argued before us, and that question remains open in this Court. Whether it was the intention of the legislature to exclude remedies for personal injury arising out of a dismissal has in the end to be a matter of construction of the legislation in question. The Jersey legislation is differently worded to that in England and Wales, and it has its own legislative history and related extra-statutory material. While the broad arguments of policy which impelled the Courts of England and Wales to adopt the Johnson exception are equally resonant in Jersey, in the end whether the employment protection legislation in Jersey was intended to supplant a dismissed employee's right to sue for psychiatric injury resulting from the manner of his or her dismissal has to be decided on the basis of legislative intent derived from the Jersey legislation.
88. The second point is to suggest, respectfully, that, the next time Jersey's employment protection legislation is reviewed, consideration be given to addressing explicitly the question of whether that legislation should prohibit claims for psychiatric injury resulting from dismissal. As the experience in England & Wales shows, there is much to be said on both sides of that question. In the end, this is a question of policy which, we would suggest, the legislature is better suited to resolving than the Courts. E. Conclusion
89. For reasons set out in Part C of this judgment we allow the appeal on the ground that, on the basis of the facts that they found, the Royal Court wrongly determined that the Respondent's psychiatric injury was foreseeable. This conclusion renders academic the approach of the

Royal Court to the assessment of quantum, in particular the extent to which recovery of damages was barred by the exclusion identified in Johnson. Had it been necessary to do so, we would have remitted that part of the case to the Royal Court to make findings as to the role of the dismissal in the causation of the Respondent's psychiatric injury, and (if applicable) any apportionment as between the injury caused by the dismissal and that caused by an assumed earlier breach of duty. We would dismiss the other grounds of appeal, including all the challenges to the Royal Court's findings of primary fact. F. Postscript

90. We do not leave this judgment without adverse comment upon the form and contents of the Notice of Appeal and the prolix written contentions filed by the Appellant which, understandably, were responded to in kind by the Respondent. The Notice of Appeal was 16 pages long. The Appellant's written contentions were made in 355 paragraphs covering 150 pages. The Respondent's Skeleton Argument comprised 405 paragraphs and three annexes covering 140 pages.
91. Paragraph 2 (1) and (2) of the Court of Appeal (Civil) Rules 1964, as amended, provide that:
“(1) An appeal to the Court shall be by way of re-hearing and shall be brought by notice of appeal in the form set out in the Schedule hereto.
(2) Notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below; and every such notice shall specify the grounds of the appeal and the precise form of the order which the appellant proposes to ask the Court to make.” [emphasis added]
92. The Notice of Appeal accords with the form set out in the Schedule but does more than ‘specify’ the grounds of appeal. Rather, the Appellant has transgressed into written submissions about the merits of the appeal. In addition, at least one of the sub grounds of appeal criticising the Royal Court for referring to an authority that had not been cited by either party, (albeit that it was cited at some length by an authority that was), is entirely inconsequential and frankly misconceived.
93. Further, whilst acknowledging the complexity of the issues of foreseeability and quantum of damages raised by the appeal, we nevertheless consider the length of the Appellant's written contentions to be lacking in discipline and in clear breach of paragraph 2.4 of Consolidated Practice Direction CA 05/01: “2.4 The contentions to be lodged and delivered in criminal and civil appeals, ... should be written as brief statements of the relevant points, and should not in any way usurp any part of the function of oral argument in court. They are an aide-mémoire for convenience of reference and understanding before and during the hearing.”
94. The Court was not assisted in its time-consuming pre-reading by such lengthy, and at times repetitive and florid written submissions. As indicated above, the Respondent's response is equally lengthy but may be the more readily excused since it was apparently considered, and reasonably so, to be necessary to respond to each point, arguably not least in order to counter any tactical advantage the Appellant sought to obtain.

95. In this regard we note, in paragraph 2.6 of the Consolidated Practice Direction: “2.6 If this Practice Direction is not complied with, the Court of Appeal may consider making a special order in relation to any unnecessary costs which have been occasioned by such non-compliance either against a party to the appeal or against the Advocate who is responsible.” Authorities Employment (Jersey) Law 2003. Discrimination (Jersey) Law 2013. MacLeod v The Channel Islands Cooperative Society Limited [2025] JRC 321. Volpi v Volpi [2022] EWCA Civ 464. Pender v Punter Southall Group Limited [2026] JCA 039. Yapp v Foreign and Commonwealth Office [2014] EWCA Civ 1512. Hatton v Sutherland [2002] EWCA Civ 76. Barber v Somerset County Council [2004] 1 WLR 1089. Yapp v Foreign and Commonwealth Office [2013] EWHC 1098 (QB) Attia v British Gas Corporation [1988] QB 304. Croft v Broadstairs & St Peter’s Town Council [2003] EWCA Civ 676. Gogay v Hertfordshire County Council [2000] IRLR 703. Wilkinson v. Downton [1897] 2 QB 57. O (A Child) v Rhodes [2015] UKSC 32. Addis v Gramophone Company, Limited [1909] AC 488. Mahmud v Bank of Credit and Commerce International [1998] AC 20. Johnson v Unisys Limited [2003] 1 AC 518. Eastwood v Magnox Electric plc [2005] 1 AC 503. McDonald v Parish of St Helier [2005] JRC 074. Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2012] 2 AC 22. McDonald v Parish of St Helier [2005] JLR 212. BAE Systems (Operations) Limited v Konczak [2017] EWCA 1188. Court of Appeal (Civil) Rules 1964. Consolidated Practice Direction CA 05/01.

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