Neutral Citation Number: [2020] EWHC 1352 (Ch)

Case No: BL-2019-001698

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 26 May 2020

Before:

Mr Stephen Houseman QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

(1) BOSTON TRUST COMPANY LIMITED
(2) BOSTON FIDUCIARY MANAGEMENT LIMITED
(in their capacities as trustees of Erutuf Trust)
(suing on behalf of Erutuf Trust and all other shareholders in Tellisford Limited other than VOC Trustee Limited) — **Claimants**

- and -

(1) SZERELMEY LIMITED
(2) SZERELMEY (GB) LIMITED
(3) SZERELMEY RESTORATION LIMITED
(4) TELLISFORD LIMITED
(5) GORDON VERHOEF
(6) SZERELMEY (UK) LIMITED
(7) LONDON STONE LIMITED
(8) HERITAGE HOUSE (YORK) LIMITED
(9) TUSK HOLDINGS LIMITED
(10) HARE AND RANSOME JOINERY LTD — **Defendants**

- -
- -

Ms Anna Dilnot (instructed by **Osborne Clarke LLP**) for the Claimants
Mr Stuart Adair (instructed by **Brachers LLP**) for the First to Third Defendants
Mr Timothy Carlisle (instructed by **Woodroffes Solicitors**) for the Fifth Defendant
Mr Ulick Staunton (instructed by **Thomson Snell & Passmore LLP**) for the Sixth Defendant

Hearing date: 21 May 2020
Draft judgment provided on 22 May 2020
- -

APPROVED JUDGMENT

Stephen Houseman QC (sitting as a Deputy Judge of the High Court):

INTRODUCTION

1. The issue for determination at the present hearing is whether in certain circumstances the court has power - and, if so, when and whether it should exercise such power - to grant conditional permission to pursue a multiple derivative action at common law or stay such proceedings.

2. Those circumstances are two-fold: first, where the court has concluded that the claimant lacks standing, but would otherwise have granted (unconditional) permission under CPR 19.9(4) in favour of pursuit of the derivative action; and, secondly, where the claimant is actively pursuing a separate legal process to rectify the relevant share register which, if successful, would regularise or perfect its ownership and thereby confer standing for present purposes. I refer to this set of circumstances for descriptive purposes as "**inchoate standing**".

3. No authority was identified which deals with this point. The parties' rival contentions were based on analogies drawn from various procedural contexts. It was acknowledged by the parties and the court during argument that my determination of this issue might require appellate scrutiny.

RELEVANT BACKGROUND

Permission Application

4. The Claimants ("**Boston**") commenced these proceedings on 1 October 2019 pursuant to so-called 'first stage' permission granted *ex parte* by Mr Charles Hollander QC sitting as a Deputy Judge of the High Court. Thereafter these proceedings remained in abeyance in accordance with CPR 19.9(4) pending the grant of so-called 'second stage' permission thereunder.

5. I heard Boston's application for 'second stage' permission to continue these proceedings as a common law derivative claim ("**Permission Application**") over two days on Wednesday 22 and Thursday 23 April 2020. That hearing was conducted remotely in accordance with current protocol. I refer to it below as the "**April Hearing**".

6. I produced a Draft Judgment the following week which was communicated through official channels to the parties' legal representatives on Monday 4 May 2020. I remotely issued an Approved Judgment on Thursday 7 May 2020 which was re-issued later the same day with an additional typographical correction: [2020] EWHC 1136 (Ch) ("**7 May Judgment**").

7. For convenience, and unless appears otherwise, I adopt the definitions and abbreviations appearing in the 7 May Judgment. References to numbered paragraphs are those in that judgment unless the context suggests otherwise.

8. One week or so prior to the April Hearing, Boston commenced a separate action seeking rectification of the register of members of Tellisford ("**Tellisford Register**") in recognition of fragilities in their position on the threshold issue of standing to pursue this derivative claim at common law. I referred to that separate claim - namely, the Rectification Claim - at paragraphs 11, 39, 103, 115, 117, 120 & 164 of the 7 May Judgement.

9. Prior to and at the outset of the April Hearing, Boston elected (a) not to seek any adjournment or case management stay of the Permission Application by reference to the Rectification Claim or otherwise and (b) not to seek permission to amend their (draft) POC despite having provided draft amended particulars to the represented defendants' solicitors a week or so before the April Hearing. I refer to this as "**Boston's Election**" as it features in the analysis below.

10. In accordance with the regime of prescribed abeyance in CPR 19.9(4), the claim form and POC have not yet been served. The POC, as defined in paragraph 41 of the 7 May Judgment, are - technically speaking - still only draft particulars at this stage. References in the 7 May Judgment (e.g. paragraphs 39, 42 & 135) to Boston seeking to amend the POC should be understood accordingly.

11. The only statement of case that could be amended is the claim form itself. Since that has not been served it can be amended without permission pursuant to CPR 17.1(1). The only words in the claim form that have bearing for present purposes are the two sentences comprising the opening paragraph: "*The claims are brought by the Claimants in their capacity as trustees of the Erutuf Trust. The Erutuf Trust is a shareholder of the Fourth Defendant, which is the ultimate parent company of the First to Third Defendants.*"

12. If this derivative action proceeds pursuant to the order made by this court, permission would be required to extend the validity of the claim form (CPR 7.6) in so far as not implicitly conferred by the grant of (conditional) permission pursuant to CPR 19.9(4) itself. Particulars of Claim would then need to be served with or following service of the claim form in the usual way. The Particulars of Claim as served need not be identical to the POC.

13. As regards the substantive outcome of the Permission Application, in summary:

    (i) I concluded that Boston, despite demonstrating that they are the trustees of Erutuf, lack standing to pursue this derivative action at common law in current circumstances; whilst recognising the possibility that this

position may change if they were to prevail to a relevant extent in the Rectification Claim: see paragraphs 105 to 121 (addressing Issue 1).

(ii) I further concluded that, subject to the threshold standing issue, Boston would and should have permission to pursue this derivative action on behalf of the Operating Companies as against Mr Verhoef and the Recipient Companies. I found that all other conditions for pursuit of a derivative claim in respect of the Alleged Wrongdoing were satisfied to the relevant standard of proof/satisfaction: see paragraphs 123 to 163 (addressing Issues 2 to 12 on the assumed premise identified in paragraph 122).

(iii) I deferred any consideration of Boston's ancillary application for a costs indemnity ("**Costs Indemnity Application**"): see paragraphs 5, 76 & 161(iii).

(iv) I invited the parties' submissions as to an appropriate form of order to reflect the substantive outcome (paragraph 165). In this context, I observed (at paragraphs 163 and 164) that there was ostensible merit in ordering conditional permission or a temporary stay in a case such as this, particularly in light of the inchoate position as to standing. These observations implicitly assumed without deciding there was jurisdiction to grant conditional permission or a stay in light of my conclusion as to Boston's current lack of standing.

14. The represented parties are as follows: Boston (Claimants); Operating Companies (First to Third Defendants); Mr Verhoef (Fifth Defendant); and Szerelmey UK (Sixth Defendant). They were directed to file short skeleton arguments on consequential matters, guillotined at eight pages apiece, together with a single composite draft order recording their respective positions where not agreed. The four skeleton arguments together cite a total of seventeen reported and unreported cases (plus practitioner texts) but without overlap in citation save for one case. None of them mentions CPR 19.9(4).

15. That said, I have been greatly assisted by the clear and succinct submissions on the matters arising at this further hearing, both in writing and orally. As in the April Hearing, the represented defendants (to whom I refer below simply as the defendants) coordinated their oral submissions to avoid undue duplication and optimise use of court time and remote resources.

16. I communicated the result to the parties' counsel by email on the evening after the present hearing, promising my reasons the following day. This judgment accordingly contains my reasons for making the order consequent upon remote issuance of the 7 May Judgment. These reasons are given in the context of and

by reference to the contents of that earlier reserved judgment. Factual background is not repeated.

Rectification Claim

17. The pertinent context for present purposes concerns the status and viability of the Rectification Claim.

18. The Rectification Claim is brought pursuant to section 125 of the 2006 Act. This requires (amongst other things) that a "*person aggrieved*" can demonstrate that "*the name of any person is, without sufficient cause, entered in or omitted from a company's register of members*". If so satisfied, the court has power under s.125(3) to determine questions as to title to shares. It is common ground that the court has a broad discretionary power under s.125 which includes ordering retrospective rectification where appropriate.

19. As noted in paragraph 11 of the 7 May Judgment, the Tellisford Register records that 95 (i.e. 50%) of its A shares ("**A Shares**") are held by "*Erutuf Trust IOM*". This is not a legal entity. It must follow from this starting point that the Tellisford Register requires rectification so as to record at least one legal entity as owner of the relevant shares. I have found that Boston are the trustees of Erutuf (see paragraphs 116 to 120). In that capacity, Boston pursue the Rectification Claim so that they are recorded as legal owners of the A Shares.

20. Pausing there, I note that the registers of members of relevant holding companies within the Non-Tellisford Structure (namely, Marmoran and Szerelmey UK Holdings) also record respective proportions of shares being owned by "*Erutuf Trust IOM*" as described in paragraphs 19 to 23 & 138-139 of the 7 May Judgment. This fact did not inhibit the defendants in running their 'swings and roundabouts' argument in the April Hearing, although such analysis avowedly presupposed - for the sake of argument - that Boston had established standing by showing that they owned Tellisford shares notwithstanding that all relevant registers refer only to "*Erutuf Trust IOM*".

21. In addition to the A Shares, Boston contend that they are entitled to be registered as legal owners of five (i.e. 50%) of the B shares in Tellisford transferred to them by Mr Maughan ("**B Shares**"). The relevant stock transfer form is described in paragraphs 14 & 107 of the 7 May Judgment as being dated 9 October 2019, but it was actually executed by Mr Maughan on 9 October 2018. (Although this typographical error was not spotted at the time, the reference to "2019" in both those paragraphs should be read as "2018".)[1] Accordingly, I refer to it as the "**October 2018 B Shares Transfer Form**".

[1] By similar oversight the title page of the 7 May Judgment states that the hearing took place on 22-23 March 2020 rather than 22-23 April 2020.

22. As matters stand, there is no claim for relief made by Boston in the Rectification Claim in respect of the B Shares. Boston have indicated that they may seek permission to amend the Rectification Claim accordingly.

23. In support of their position as to prospects of success in the Rectification Claim, and consistent with their position summarised in paragraph 108 of the 7 May Judgment, Boston provided the court at this hearing with three stock transfer forms "*only for information*". Two relate to the A Shares, one relates to the B Shares (together, "**Stock Transfer Forms**"). In summary:

    (i) A stock transfer form dated 18 May 2020 by which FT Limited (formerly Isle of Man Financial Trust Limited) acting by its liquidator ("**Original Trustee**") purports to transfer the A Shares to Mr Andrew Douglas Ash and Mr Alexander Fleming McNee (together, "**Replacement Trustees**") of the same address as the Original Trustee.

    (ii) A stock transfer form dated 19 May 2020 by which the Replacement Trustees purport to transfer the A Shares to Boston, identifying each corporate entity by name, company number and common address.

    (iii) The October 2018 B Shares Transfer Form amended to identify the two corporate entities comprising "*The Trustees of the Erutuf Trust*", namely the First Claimant and the Second Claimant, and re-executed by Mr Maughan on 18 May 2020. I refer to this as the "**May 2020 B Shares Transfer Form**".

24. Giving context to (i) and (ii) above (together, "**May 2020 A Shares Transfer Forms**"), I found in paragraphs 116 to 120 of the 7 May Judgment that the Erutuf trusteeship passed from the Original Trustee to the Replacement Trustees pursuant to the 2013 Deed and consequently passed from the Replacement Trustees to Boston pursuant to the 2016 Deed, alternatively the 2018 Deed. Boston invoke certain terms of those three deeds of appointment, retirement and indemnity in support of the Rectification Claim.

25. The defendants objected to the admissibility of the Stock Transfer Forms on the basis that evidence closed in respect of the Permission Application at the end of the April Hearing and this court found that Boston currently lack standing in the 7 May Judgment. They said that it was too late for Boston to seek to augment their evidence in respect of the Permission Application.

26. With the parties' agreement, I determined the admissibility of the Stock Transfer Forms prior to commencement of this hearing. I ruled that they were admissible on the question of whether this court should exercise any jurisdiction it may have to grant conditional permission to Boston to pursue this derivative

action or stay these proceedings, without prejudice to the existence of such jurisdiction (which is challenged by the defendants - see below).

27. I do not repeat the reasons given for that ruling on admissibility. I was told and I am entitled to assume that Boston will seek to rely on the Stock Transfer Forms in support of the Rectification Claim (as amended, as the case may be) as foreshadowed in their submission to me on the Permission Application as reflected in paragraphs 108 & 120 of the 7 May Judgment. The latter paragraph refers to "*the state of formal transfer instrumentation and supporting evidence pertaining at the relevant time*". It expressly contemplated that Boston would seek to augment and repair the formal basis for establishing ownership through the trusteeship succession process as part of the Rectification Claim.

28. As addressed below, the defendants contest the merits of the Rectification Claim as part of their contention that this court cannot or should not grant conditional permission or stay these proceedings by reference to the Rectification Claim. By their own logic, the defendants acknowledge that the Stock Transfer Forms are potentially relevant to the issue now before this court. These new materials post-date the 7 May Judgment. They do not relate to any of the substantive issues determined on the Permission Application as set out in my prior judgment. They are, on any view, potentially relevant to the outcome of the present hearing, but do not impact any of the findings made (against Boston) in the 7 May Judgment.

29. As noted above, the Tellisford Register is ripe for rectification given that "*Erutuf Trust IOM*" is not a legal entity. Tellisford itself has a legitimate interest - engaging its so-called fiduciary responsibility (see paragraph 60 below) - in seeing such rectification effected so as to clarify its own ownership position without delay. So too, it might be said, does Mr Verhoef both in his capacity as a director and in so far as his interests are represented by VOC as registered owner of the other 95 A shares in Tellisford.

30. As explained in the 7 May Judgment, and leaving aside technicalities as to registration of ownership, Tellisford is owned equally by Erutuf/Krause and VOC/Verhoef with equal board representation. Two of its four directors, namely Mr Krause and his son, Anton, have expressed their agreement to Tellisford resolving to rectify its own register of members to record Boston as legal owners of the A Shares in place of "*Erutuf Trust IOM*". Boston's solicitors have written to Tellisford seeking its agreement to pass such a resolution. No answer has been received from Tellisford or Mr Verhoef.

31. The Rectification Claim has not been set down for final determination by the Companies Court. A short directions hearing is due to take place in the near future. No evidence has been served in opposition by the Operating Companies

or Mr Verhoef despite their position (addressed below) that Boston is not entitled to any relief in the Rectification Claim.

SCOPE OF JURISDICTION UNDER CPR 19.9(4)

32. The threshold question is whether this court has jurisdiction to grant conditional permission (or a stay of these proceedings) in light of the conclusion as to Boston's current lack of standing.

33. The relevant power to grant permission at common law is found or preserved in CPR 19.9 (see CPR 19.9(1)(a): "*or otherwise*"). CPR 19.9(2) requires that a derivative claim must be started by a claim form. CPR 19.9(3) requires that the relevant entity (in this case, the Operating Companies) for whose benefit a remedy is sought must be joined as defendants.

34. CPR 19.9(4) states that after issue of a claim form the claimant must not take any further step in the proceedings "*without the permission of the court*" save for identified exceptions which are not material in the present case. By reason of CPR 19.9(4) the derivative action once issued (with 'first stage' permission) is placed into procedural stasis subject only to further permission of the court. The court becomes the gatekeeper of such proceedings, consistent with the philosophy of policing the strict exceptions to the rule in *Foss v Harbottle*.

35. The real focus of the present hearing is the nature of the court's power under CPR 19.9(4) and its interplay with the court's general case management powers found in CPR Part 3.

36. That said, there was discussion also of CPR 19.9C(2) and how it fitted in with CPR 19.9(4). CPR 19.9D(b) appears at first blush to apply CPR 19.9C to a common law derivative claim in so far it is "*any other case*" (i.e. other than a statutory derivative claim) which "*arises in the course of other proceedings*". CPR 19.9C is entitled "*Derivative claims - other bodies and trade unions*" which is not obviously suggestive of its application to a common law derivative claim concerning a company. It seems to me, on proper analysis, that CPR 19.9C is not applicable to such a common law derivative claim. First and foremost, because CPR 19.9C concerns other bodies corporate and trade unions, rather than companies; secondly, because CPR 19.9C presupposes that only a "*member*" of such organisations has standing (in contrast with the common law test for standing addressed in paragraphs 65 to 71 of the 7 May Judgment); and, thirdly, because a common law derivative claim does not arise in the course of "*other*" proceedings within the meaning of CPR 19.9D.

37. Nevertheless it is noted that CPR 19.9C(2) requires that a "*member who starts, or seeks to take over, the claim must apply to the court for permission to continue the claim*". This contemplates a change of claimant in a derivative

action where circumstances evolve after commencement of proceedings, so long as the permission of the court is obtained. It suggests that where the court is asked to give permission to continue a derivative claim it should operate by reference to the circumstances pertaining at the relevant time, rather than looking back to the position when proceedings were commenced.

38. CPR 19.9(4) is silent about such matters. It simply prohibits any further steps in proceedings "*without the permission of the court*". It contains no circumscription of the court's power to grant or withhold such permission. It says nothing about the point in time at which the court is required to assess the factors or circumstances impacting its exercise of discretion. In the absence of any linguistic contra-indication the starting point must be that the court's power under CPR 19.9(4) is exercisable in the circumstances pertaining at the time such permission is sought or granted. That is consistent with CPR 19.9C(2) so far as may be relevant to the proper construction of CPR 19.9(4).

39. The defendants contend that the court has no jurisdiction and must dismiss the Permission Application in light of my finding as to Boston's current lack of standing. Boston dispute that analysis, referring to the court's broad case management powers under CPR Part 3, including the power to stay proceedings in whole or in part (CPR 3.1(2)(f)) and/or make any order conditional (CPR 3.1(3)): see e.g. *Huscroft v P&O Ferries Ltd.* [2011] 1 WLR 939.

40. Whilst Boston contend that these proceedings are at a procedural junction, the defendants contend that they have already hit the buffers inside the terminus. If the defendants are correct in this threshold analysis, I have no choice other than to dismiss the Permission Application and therefore (and thereby) dismiss these proceedings as a whole.

41. Counsel for the Operating Companies accepted, in light of *Re Quickdome Limited* (1988) 4 B.C.C. 296, that a claimant whose first derivative action is dismissed for lack of standing may be entitled to bring a second action relating to the same wrongdoing after acquiring standing and without being barred by *Henderson v Henderson*. In the *Quickdome* case, Mervyn Davies J struck out an unfair prejudice petition on the basis of the petitioner's lack of title/standing, citing Brightman J (as he then was) in *Re J.N.2 Limited* [1978] 1 WLR 183 at p.188C: "*the court is not driving a litigant from the judgment seat, or doing any injustice to him … merely requiring him to establish his right to present a petition before he is permitted to take a step…*" All that said, the defendants are not to be held to have given up any contingent right to contend that a subsequent claim by Boston would be an abuse of process. The answer to this hypothetical question is necessarily uncertain. Such uncertainty is itself not without potential significance when it comes to any balancing exercise within the court's discretion under CPR 19.9(4) subject to this threshold jurisdictional point.

42. No authority has been identified which deals with a situation involving inchoate standing, i.e. where but for absence of current standing to bring a derivative claim, and in circumstances where the claimant is seeking relief by separate legal process which (it says) will rectify or regularise its standing, permission would have been granted pursuant to CPR 19.9(4) to serve and pursue the derivative proceedings.

43. Nor has any authority been cited which shows or suggests that the court's power to attach conditions to any order it makes (CPR 3.1(3)) is not applicable to its exercise of discretion under CPR 19.9(4). There is no obvious reason why it should not so apply. As a matter of jurisdiction the court must have power to grant conditional permission to pursue a derivative claim, for example, security for costs or undertakings provided by the claimant as the price for permission.

44. Further, if the court has power to stay a derivative action after granting permission (as occurred, for example, in *Bhullar v Bhullar* [2015] EWHC 1943 (Ch); [2016] B.C.C. 134 in order to allow mediation between the parties: see [76]) then it makes sense to achieve the equivalent practical outcome by way of conditional permission in the first place. These are different procedural techniques to achieve equivalent practical results.

45. Another procedural technique might be to decline to make any order on the Permission Application so as to await the outcome of the Rectification Claim. Boston correctly did not suggest this procedural course in light of their own election made at the April Hearing, to which I return below. The theoretical availability of such fall-back procedural approach nevertheless exposes the fallacy in the defendants' contention that as a matter of jurisdiction this court has no choice about what to do at this stage other than dismiss the Permission Application.

46. It is axiomatic that the rule in *Foss v Harbottle* is strictly enforced such that the permitted exceptions are policed closely: see paragraph 75 of the 7 May Judgment. It is less obvious to me how this juridical underpinning could be said to cut down the procedural power now enshrined in CPR 19.9(4) by, for example, disapplying the ancillary facility to impose conditions upon the grant of permission or impose a stay on a derivative action it has otherwise permitted to proceed. This important juridical rationale finds sufficient expression in the substantive requirements that must be met to obtain (unconditional) permission to pursue a derivative action, including sufficient standing. It has much less if any bearing upon the court's discretion when considering the terms on which to grant permission so as to manage proceedings of which it is seised.

47. The thrust of the defendants' jurisdictional objection is that because Boston need permission in order to pursue these proceedings, and because Boston currently lack standing to get that permission, it follows that "there are no

proceedings on foot" or "there is nothing to stay" and, therefore, there can be no jurisdiction to make any order in respect of such (non-existent or expired) proceedings. In this situation the court has no power to do anything other than give formal effect to their dismissal by ordering that the Permission Application stands dismissed. That is the raw point.

48. This analysis ignores the fact that proceedings are on foot. They were issued on 1 October 2019 in accordance with CPR 19.9(2) and pursuant to the 'first stage' permission described above. These proceedings remain extant. The fact that they have not yet been served, in accordance with CPR 19.9(4) and pending the grant of 'second stage' permission, does not alter the fact that such proceedings exist until dismissed or determined. It is perhaps for this reason that the submission was diluted or equivocated in places to say that "there are effectively no proceedings on foot" (quoting the skeleton argument for the Operating Companies, with my emphasis added).

49. The inescapable truth is that there are proceedings on foot which the court can and must control in accordance with its acknowledged discretion when disposing of the Permission Application. To describe the claim form or permission application notice as "just a piece of paper" (to quote counsel for Mr Verhoef) with no independent legal lifeforce is, with respect, incorrect.

50. The defendants refer to *Re Starlight Developers Ltd.* [2007] EWHC 1660 (Ch); [2007] B.C.C. 929 on the question of jurisdiction. Having concluded that the petitioner had no title to sue, Briggs J (as he then was) ordered a stay of the petition to afford him an opportunity to obtain retrospective rectification of the relevant share register. At [22] the eminent chancery judge acknowledged that he had a discretion whether to stay or dismiss the petition: "*A stay involves making no order on the petition which would be without jurisdiction due to the petitioner's present lack of standing*". It does not follow from that observation in the context of a petition commenced as of right that a court exercising its power under CPR 19.9(4) in derivative proceedings lacks jurisdiction to grant conditional permission.

51. The normal position in civil proceedings, including a petition for unfair prejudice, is that they are started as of right and may be pursued unless summarily dismissed or struck out or stayed by the court. That is the context for Briggs J's reference to "*without jurisdiction due to the petitioner's present lack of standing*" as quoted above. In contrast, a derivative claim is regulated by special procedures governed by the court's discretionary power to grant permission. The derivative claimant has no cause of action himself. He has a procedural right, i.e. a conditional right to use a prescribed procedural mechanism, to vindicate the substantive rights of the company or companies in which he has a sufficient interest for such purposes. The position is different. The role of the court is different. There is no concept of title to sue as such,

because the claimant does not own the substantive claim. He needs standing to prosecute his procedural right or operate the procedural mechanism of a derivative action. This is an important point of distinction.

52. Counsel for the Operating Companies pressed another analogy during the hearing. He contended that the current position is akin to where a claimant seeks the court's permission pursuant to CPR 6.36/6.37 to serve proceedings upon a foreign (i.e. non-EU domiciled) defendant out of the jurisdiction. In such a case, the court must be satisfied as to threshold merits, satisfaction to a good arguable case of one or more jurisdictional gateways in 6BPD para.3.1 and that the case is a proper one for service out of the jurisdiction. This final requirement is the discretionary element of the test, invoking the common law concept of *forum conveniens* through the words "*proper place*" in CPR 6.37(3). It was suggested that the jurisdictional gateway is equivalent to the standing requirement in the present context: if it is not satisfied, the discretionary stage is never engaged. On this basis and by analogy, it was submitted that the court lacks jurisdiction to exercise any discretion because the standing 'gateway' has not been satisfied.

53. The present situation is materially different from one involving permission under CPR 6.36/6.37. In that scenario, the court is not seised of any proceedings between the claimant(s) and the defendant(s) prior to grant of permission and, absent a successful challenge under CPR Part 11, subsequent submission to the substantive jurisdiction through acknowledgement of service. (Indeed, it is often said that the court only has technical or provisional jurisdiction after granting permission in the first instance, with substantive jurisdiction only being established after subsequent submission.) In the present context the court is seised of proceedings between Boston and the defendants, albeit derivative proceedings as described above. The only question is whether it should now grant conditional permission as regards their conduct pursuant to CPR 19.9(4).

54. The defendants' submission presupposes that the broad "wrap around" discretion conferred upon the court in this specific procedural context (see paragraphs 91 & 102 of the 7 May Judgment) is incapable of being conditioned where the claimant's standing is inchoate. This effectively disapplies CPR 3.1(3): there is no remedial discretion, just a binary choice between all or nothing. In this context, that means only one course - dismissal.

55. In light of this analysis, I reject the contention that this court lacks jurisdiction to grant conditional permission pending the outcome of the Rectification Claim or other process by which Boston may establish title/standing. The premise for the jurisdictional objection is misconceived. There is no basis for the disapplication of CPR 3.1(3) in this specific context. The real question is whether and how the court should exercise its wide discretion in disposing of the Permission Application.

56. Whilst I am not convinced that this outcome creates a material difference between the approach to common law derivative claims (CPR 19.9(4)) and ordinary statutory derivative claims (ss.260-263 of the 2006 Act; CPR 19.9A-19.9F), in so far as it does that may be said to be a product of the drafting of the relevant procedural rules and underlying differences between the two regimes as touched upon in the 7 May Judgment. I was not shown any specific procedural provision governing statutory derivative claims that was said to qualify the broad power contained in CPR 19.9(4).

57. As regards the power to grant a temporary stay of these proceedings, as distinct from deferring disposal of the Permission Application itself, this does not arise in light of my conclusion above as to the existence of jurisdiction to grant conditional permission under CPR 19.9(4). It is common ground that I have no power/jurisdiction to grant *unconditional* permission given the current lack of standing. The question of any *consequent* case management, i.e. pursuant to the grant of permission, cannot therefore arise. The option of a temporary stay is, therefore, a red herring on closer analysis.

58. The defendants' alternative position, by analogy to the *Starlight* case, is that the court only has jurisdiction (i.e. "discretion") to grant conditional permission in so far as Boston can demonstrate at least a real prospect that the Tellisford Register will be rectified retrospectively from a date before the issue of proceedings on 1 October 2019. On proper analysis, that argument elides the existence/scope of jurisdiction with the circumstances in which it has been or may be exercised in a procedural context of the kind in question in the present case. I address it below.

EXERCISE OF DISCRETION UNDER CPR 19.9(4)

59. Boston seek conditional permission to pursue this derivative claim by reference to the determination of the Rectification Claim. Alternatively, they seek a temporary stay of these proceedings by reference to the same contingency. As noted in paragraph 57 above, there is no scope for ordering a stay of these proceedings because that would presuppose the grant of unconditional permission in the first instance - something this court has no power to do given the finding of lack of standing.

60. The easiest route to registration/rectification would be a resolution of the board of Tellisford itself; but that prospect appears remote given the deadlock summarised in paragraph 30 above. A company in the position of Tellisford performs what was described as a fiduciary function when resolving or refusing to seek rectification of its own share register. The court on a rectification claim pursuant to s.125 of the 2006 Act has a supervisory review jurisdiction in respect of such corporate fiduciary function rather than an original substantive

jurisdiction of its own. The precise nature of that jurisdiction is not material for present purposes.

61. There would need to be a further hearing in the event Boston succeed to a relevant extent in the Rectification Claim, i.e. in order to consider directions for trial of these proceedings and the Costs Indemnity Application. Given my decision to reserve costs (see paragraph 101 below) it makes sense to schedule a further hearing come what may.

62. Doing my best to distil the arguments before me, it seems that three issues arise in the present context. They form part of what is ultimately a broad discretion vested in the court pursuant to CPR 19.9(4). In summary:

(1) In order to obtain conditional permission must Boston show that there is at least a real prospect of rectifying the Tellisford Register retrospectively from a date prior to commencement of these proceedings on 1 October 2019?

(2) Does the Rectification Claim have a sufficient prospect of success to the extent required in light of (1) above?

(3) What is the effect, if any, of Boston's Election prior to and at the April Hearing?

63. I address these in turn below before giving my conclusion on the overarching question of how to exercise the discretion conferred by CPR 19.9(4).

(1) Retrospective Rectification

64. The defendants contend, by analogy to cases considering strike out of unfair prejudice petitions, that these proceedings are only salvable if Boston can show at least a real prospect of obtaining retrospective rectification of the Tellisford Register from a date prior to issuance of these proceedings. They cite the decision of Briggs J (as he then was) in *Re Starlight Developers* (above) and Mervyn Davies J in *Re Quickdome* (above).

65. Boston challenge such requirement and its analogical integrity. For their part, they invoke their own analogy by reference to cases in which permission to amend is granted to plead the acquisition of a right to sue by assignment after commencement of proceedings: see *Smith v Henniker-Major* [2002] B.C.C. 544 (Rimer J) and *Pickthall v Hill Dickinson LLP* [2009] PNLR 31 (Court of Appeal). They say their position is *a fortiori* because they don't need permission to amend the POC, which remain unserved and in draft form pursuant to CPR 19.9(4). (Nor, as observed above, do they need permission to amend their unserved claim form.) It follows, they say, that there is no requirement for retrospectivity: it suffices if a claimant in their position has a

real and proximate prospect of establishing ownership of the relevant shares, and therefore acquiring standing to bring the derivative claim, by or at such time as permission is granted or takes effect pursuant to CPR 19.9(4).

66. One qualification to Boston's analogy concerns the situation where a claimant commences an action without any honest belief in his capacity or title to do so, perhaps because of limitation problems, as illustrated by *Pickthall* itself. In that situation, where the proceedings are found to be an abuse of process, permission to amend to plead the post-commencement basis for title to sue will ordinarily and understandably be refused: see *Pickthall* at [27]. Nobody suggested that Boston commenced this action in circumstances amounting to an abuse of process. The defendants contend that the claim was improperly constituted due to lack of standing. A number of epithets have been deployed to describe these proceedings, but none of them amounts to saying that they are abusive.

67. There is pre-CPR authority for the court ordering a stay of a pending derivative action after the plaintiff ceased to be a registered shareholder in the relevant company following his bankruptcy: see *Birch v Sullivan* [1957] 1 WLR 1247. Harman J ordered a stay in that case in order to give the trustee in bankruptcy "*a reasonable opportunity … to put the position right*" if he was minded to adopt the action, i.e. to seek to be substituted as plaintiff (see p.1249). That does not cover the present situation in which Boston lack standing at the outset, but seek some form of procedural accommodation whilst they pursue a separate legal action to "*put the position right*" in terms of their ownership of the relevant shares. It nevertheless illustrates some degree of procedural tolerance when dealing with defects in standing in a common law derivative action.

68. Whilst the rival analogies are informative, none of them ultimately directs this court in ascertaining whether there is or should be some form of codified circumscription of the power under CPR 19.9(4) in a case where a claimant lacks standing but expects to acquire it in due course. I approach the matter on first principles and in light of the wording of CPR 19.9(4) itself.

69. The requirement for retrospective rectification that is spoken of in the context of striking out an unfair prejudice petition (e.g. *Re Starlight Developers*) has less resonance in the special context of a derivative action which, as explained above, is procedurally frozen under CPR 19.9(4) subject to permission granted by the court. There is no obvious reason why permission under CPR 19.9(4) must be premised on a claimant's assumed ability to obtain *retrospective* rectification of the relevant share register from a date prior to issuance of the derivative action. The derivative claim is held in abeyance and subject to governance by the court. The unserved claim form can be amended without permission. As indicated above, there is nothing in CPR 19.9(4) to suggest that the court cannot exercise its procedural power by reference to the circumstances

existing at the relevant time - for example, where the claimant obtains title/standing after commencement of the derivative proceedings.

70. It ought to be enough that the claimant has or obtains standing at the time permission is granted *or* takes effect. It follows, in my opinion, that conditional permission is available under CPR 19.9(4) so long as there is a sufficiently robust and proximate prospect of the claimant acquiring standing (e.g. through rectification of the relevant share register) whether or not he can show that such rectification will be retrospective. The existence of standing falls to be tested at the time unconditional permission is granted *or* at the time any conditional permission takes effect. That is consistent with the gatekeeping function of the court under CPR 19.9(4). It is also consistent with and gives expression to the juridical philosophy underpinning derivative actions by way of strict exception to the rule in *Foss v Harbottle*.

71. In so far as there may be an apparent tension between the requirement for retrospectivity in *Starlight Developers* and the absence of such requirement in *Pickthall*, as examined above, I am not required to resolve or reconcile it. Neither case concerns the court's power to grant permission to continue a derivative action. Both cases concern different procedural conundra arising in the context of regular civil proceedings commenced as of right. Principles applicable to striking out (*Starlight*) or amendments (*Pickthall*) have no direct bearing on the special procedural regime applicable to derivative actions, irrespective of whether they ultimately have any meaningful bearing on one another or other procedural contexts such as permission to serve proceedings out of the jurisdiction. As noted above, title to sue in the substantive sense is not the same as standing to pursue a derivative action even though such standing is often, if not necessarily, supplied by title to the relevant shares.

72. In order for the court to be satisfied that the proper course is grant of conditional permission, so as to give a claimant an opportunity to 'put the position right' in terms of standing, it seems that the court should be satisfied that there is a *prima facie* case (i.e. good prospect of success) that the claimant will establish standing within a tolerable timeframe so as not to prejudice the defendants to the derivative action. As to these requirements:

    (i) **Substantive Prognosis.** This burden of proof/satisfaction accords with what I called the "interlocutory burden" applicable to grant of permission: see paragraphs 60(ii) and 61 to 64 of the 7 May Judgment. The lower standard referred to by Briggs J (as he then was) in *Starlight* (above) is to be understood in its own different procedural context, namely striking out an unfair prejudice petition commenced as of right.

    (ii) **Temporal Prognosis.** This gives effect to what Harman J called "*a reasonable opportunity*" in *Birch v Sullivan* (see paragraph 67 above).

It is necessary to avoid an open-ended conditionality, otherwise the derivative action would potentially go stale or become oppressive whilst kept in the procedural air lock of CPR 19.9(4).

(iii) **Potential Prejudice.** In so far as distinct from (ii) above, an inquiry as to potential prejudice to the defendants forms part of or reflects the balancing exercise within the court's so-called "wrap around" discretion applicable to grant of permission: see paragraphs 60(iv), 91-92 and 102 of the 7 May Judgment.

73. I regard (i)-(iii) above as important requirements or considerations to be met and weighed by the court when asked to exercise its power in a case of inchoate standing to grant conditional permission under CPR 19.9(4). Taken together they represent a fair price for conditional permission, bearing in mind that Boston seek the court's indulgence in order to rectify a deficiency in their own entitlement to pursue this derivative action. It may well be the case that this falls to be reflected in an appropriate costs order at a future stage: see paragraph 101 below. Any residual prejudice to the defendants (e.g. unrecoverable costs or inconvenience) is a matter to be considered under (iii) above.

74. I approach **Issue (2)** below by reference to (i) above, bearing in mind that this forms part of the court's overall analysis (which includes (ii) and (iii) above) in determining whether and how to exercise its discretion under CPR 19.9(4).

(2) Rectification Claim: Threshold Prospects

75. The defendants contend that the Rectification Claim is hopeless. The irony of this position is that, if correct, conditional permission will amount to dismissal because the conditionality will not be satisfied. The defendants will then seek payment of their costs of the Permission Application and these derivative proceedings at the next hearing, together with interest on costs as appropriate, returning them in a financial sense to the position as if this court had dismissed the Permission Application at this juncture. As noted in paragraph 73 above, the risk of any shortfall in redress (e.g. unrecoverable costs or inconvenience) is priced into the discretionary balancing exercise under CPR 19.9(4).

76. The defendants say that Boston are not an "*aggrieved person*" within the meaning of section 125(1)(c); that even if they are they cannot show that they have been omitted from the Tellisford Register "*without sufficient cause*" under section 125(1)(a); that the court determining such claim should not resolve disputed title to the relevant shares under section 125(3); and, come what may, there is no basis for Boston obtaining retrospective rectification of such register from a date prior to commencement of this derivative action.

77. As I have found above, Boston need to establish to the interlocutory standard that they will succeed on the Rectification Claim to a relevant extent so as to establish standing to pursue this derivative claim. I am satisfied that Boston have discharged that interlocutory burden on the material available to the court and without in any way pre-judging the outcome of the Rectification Claim.

78. The starting point is that the Tellisford Register is ripe for rectification, as explained above. The only real question is whether Boston can establish themselves as owners of the relevant shares, including by reference to the Stock Transfer Forms, and (so far as relevant) from what date.

79. As trustees of "*Erutuf Trust IOM*" it is difficult to see how Boston are other than "*aggrieved persons*" for the purposes of pursuing a remedy under section 125. Given that the Tellisford Register should, on any view, be rectified to include the name(s) of at least one legal entity in place of "*Erutuf Trust IOM*", it follows that Boston (as trustees and, therefore, sufficiently arguably "*aggrieved persons*") have a sufficiently arguable case that their omission from the register is or was "*without sufficient cause*". Sufficient cause would arise, for example, where the deadlocked board of Tellisford was unable to sanction rectification of its own register to substitute at least one legal entity in place of "*Erutuf Trust IOM*" (see paragraphs 30 and 59 above).

80. As against this the defendants argue that Boston have (as yet) conspicuously failed to explain how or why the position came about in the first place. But that does not strike me as a fatal impediment to success of the Rectification Claim. Such claim will be determined on its merits by reference to the evidence before the court. There is, at present, no dispute. It is not clear whether any of the defendants will intervene or serve evidence in objection to the Rectification Claim. Their objections to its prospects in the present context appear to involve a number of technical arguments rather than the substance of that claim.

81. There was before me an issue between the parties as to the effect of and interplay between *In re Hoicrest Limited* [2000] 1 WLR 414 (Court of Appeal) and *Nilon Ltd. v Royal Westminster Investments SA* [2015] UKPC 2; [2015] B.C.C. 521 (Privy Council) as regards the court's proper function and role on a claim to rectify a share register. *Hoicrest* was a rectification claim under s.359 of the Companies Act 1985 (the predecessor to s.125 of the 2006 Act) whilst *Nilon* concerned the equivalent provision in the BVI companies legislation which mirrors s.125 of the 2006 Act. In the latter case, the Privy Council doubted the decision in *Hoicrest* and stated that the summary nature of the rectification jurisdiction makes it unsuitable where there is "*a substantial factual question in dispute*" (at [37]).

82. That may be so, but in the present context there is no dispute about title to the relevant Tellisford shares, at any rate not between any of the parties interested

in such title. There is no dispute between the Original Trustee (now in liquidation) and/or the Replacement Trustees and/or Boston qua current trustees of Erutuf as regards the A Shares. There is no equivalent dispute between Mr Maughan and Boston as regards the B Shares. The Stock Transfer Forms show the opposite: they demonstrate harmony between (former) owners of the respective parcels of shares. Further, it seems to be sufficiently arguable that the Stock Transfer Forms are compliant with the formal requirements of s.770 of the 2006 Act.

83. In these circumstances, I am satisfied that Boston have at least a good prospect of succeeding on the Rectification Claim. They need not show that they may do so retrospectively, but I am satisfied that pursuant to the broad discretionary remedial powers conferred upon the Companies Court under s.125 of the 2006 Act there is a sufficient prospect of obtaining such a retrospective order. Boston succeeded as trustees of Erutuf pursuant to the 2016 Deed, alternatively the 2018 Deed, i.e. prior to the commencement of these proceedings.

84. The fact that the May 2020 A Shares Transfer Forms are dated 18 and 19 May 2020 (respectively) does not mean that the court which determines the Rectification Claim could not grant retrospective rectification of the Tellisford Register in respect of the A Shares. Likewise, the fact that the May 2020 B Shares Transfer Form is dated 18 May 2020 does not preclude the grant of retrospective relief in respect of the B Shares (assuming that Boston have obtained permission to amend the Rectification Claim in the meantime in respect of such shares) in circumstances where this transfer instrument is a re-executed version of the May 2018 B Shares Transfer Form originally executed a year or so before commencement of these proceedings.

85. In the circumstances, I am satisfied that Boston have a sufficiently strong case on the Rectification Claim, including (so far as relevant) for retrospective rectification of the Tellisford Register.

(3) Boston's Election

86. The defendants say further that it is not open to Boston to have 'a second bite at the cherry' in light of the election they made prior to and at the April Hearing, as summarised in paragraph 9 above. The short answer to this is two-fold.

87. First, as regards Boston's election not to seek a stay or adjournment of the Permission Application, whilst this might be said to have been a risky course to adopt heading into the April Hearing, it does not preclude this court from exercising its discretion (as I have found to exist) to order conditional permission by reference to the outcome of the Rectification Claim. As noted in paragraph 45 above, and in light of their own prior election, Boston did not suggest that I should simply decline to make an order on the Permission

Application. The choice facing this court between conditional permission and dismissal is not fettered or precluded by Boston's procedural election prior to and at the April Hearing.

88. Secondly, as regards Boston's election not to seek permission to amend the POC prior to or at the April Hearing, this has no appreciable consequences in the present procedural context. As explained above, the claim form and POC have not been served, the POC remain in draft form, and no permission is required (or could be given) to make any amendments. Boston were entitled to fight the April Hearing on the basis of the totality of the evidence before the court (as noted in paragraph 62 of the 7 May Judgment). The separate questions arising at the present hearing, as summarised in paragraph 72 above, also fall to be addressed by reference to the totality of evidence at the current time, including (as I have explained above) the Stock Transfer Forms.

89. I have quoted in paragraph 11 above the first paragraph of the claim form. The first sentence is accurate and has been vindicated by my prior finding that Boston are the trustees of Erutuf. The second sentence suffers the same vice on its face as the Tellisford Register, by stating that Erutuf is a shareholder of Tellisford. It is not and never could be, because it is not a legal entity. When the second sentence is read in the context of the first sentence and with a measure of common sense, it amounts to saying that the trustees of Erutuf (i.e. Boston) are shareholders of Tellisford. Whilst that was not factually or legally accurate on the date of commencement of these proceedings, and has not yet become so, the existence of such statement in the claim form does not cut down the scope of the court's inquiry when asked to grant permission to pursue this derivative claim. This pleading point is a reflection of the current state of the Tellisford Register which, as I have explained above, is ripe for rectification.

90. In these circumstances, neither limb of Boston's Election impedes or informs this court in the exercise of its discretion under CPR 19.9(4).

Discretion: Overall Assessment

91. As to the consideration identified in paragraph 72(i) above, I am satisfied that Boston have at least a good arguable case that they will obtain rectification of the Tellisford Register to a relevant extent so as to establish standing for the purposes of this derivative action (see **Issue (2)** above). Whether or not that includes rectification which operates retrospectively from a date prior to 1 October 2019 does not matter in light of my conclusion on **Issue (1)** above, but I am satisfied that there is a sufficient prospect of that occurring in respect of (at least) the A Shares.

92. As to the consideration identified in paragraph 72(ii) above, I am satisfied on the available evidence and information provided to me through counsel that the

Rectification Claim ought to be determined within a tolerable timeframe that does not cause undue hardship or prejudice to any of the Defendants. I refer here to all ten of the named defendants to these proceedings, for the avoidance of doubt. It is their interests as defendants which matter for this analysis.

93. It occurred to me that a benchmark for these purposes may be the four month period of validity of the claim form (CPR 7.5(1)); but that is an arbitrary period in the present context, not least where the Permission Application only came on for hearing on 22 April 2020, i.e. over six and a half months after proceedings were issued on 1 October 2019. I note that a period of three months was given to Mr Birch's trustee in bankruptcy to 'put the position right' by Harman J in *Birch v Sullivan* (above) at p.1250.

94. I am not persuaded that it is appropriate to set time limits at this stage. It suffices that the Rectification Claim appears to be under active management and raises no factual disputes which might otherwise impede its progress and determination. I strongly encourage Boston to seek expedition of those proceedings before the Companies Court by reference to the conditional pendency of this derivative action and the need to prosecute these claims of serious wrongdoing without undue delay.

95. I am satisfied that it is just and appropriate in all the circumstances that Boston be granted conditional permission to pursue this derivative action on terms addressed at the end of this judgment. In so far as that involves balancing prejudice to Boston if not so permitted as against prejudice to the Defendants if Boston is so permitted (in accordance with the consideration identified in paragraph 72(iii) above) such balance clearly favours granting conditional permission.

96. Despite counsel's candid observation referred to in paragraph 41 above, there is no certainty that any fresh derivative action commenced by Boston after obtaining standing would not be met with a strike out application on the grounds of abuse of process. This is especially so given the adversarial temperament of these and related legal proceedings, including the criticisms made by the defendants of Boston's conduct of this action and the Rectification Claim (see paragraph 80 above). The grant of conditional permission in respect of this derivative action has the benefit of avoiding further costs and court time were Boston to bring a second derivative action down the line and face a strike out on the basis of abuse of process. No undertaking to eschew such objection, i.e. in the event of a second successive derivative action by Boston, was offered or hinted at on behalf of the defendants.

97. Although the same question as considered in Issue 6 of the 7 May Judgment does not, strictly speaking, arise afresh when asking myself whether it is just and appropriate to grant conditional permission in these circumstances, I have

looked again at the those six (sets of) factors addressed in paragraphs 92 & 160-162 for good measure. I am satisfied that it is appropriate in such circumstances to grant conditional permission in the present case.

98. I am also guided by the principles set out in *Huscroft v P&O Ferries* (above) and the commentary in the White Book at 3.1.14 in relation to the court's general power under CPR 3.1(3). The purpose of imposing the condition in the present context is abundantly clear. Such condition represents a proportionate and effective means of achieving that purpose, namely the fairest and most efficient mechanism for disputation of the Alleged Wrongdoing on a derivative basis notwithstanding the current lack of standing on the part of Boston.

DISPOSITION

99. In summary, and for the reasons explained above, I conclude that (1) this court has jurisdiction to grant conditional permission to Boston to pursue this derivative action at common law notwithstanding the finding that Boston currently lack standing and (2) it is just and appropriate in all the circumstances that such jurisdiction be exercised to grant conditional permission in the context of and by reference to the outcome of the Rectification Claim. I regard this as materially the lesser of two evils, given the counterfactual scenario alluded to in paragraph 96 above. The practical effect of my decision is that this derivative action will be kept in the procedural air lock of CPR 19.9(4) pending Boston's acquisition of standing - a contingency I have found to be sufficiently arguably probable and proximate.

100. The draft order provided to me for this hearing included provision for another hearing in October 2020 in the event that the Rectification Claim is dismissed in the meantime. It makes sense to list that hearing on a provisional basis, irrespective of whether the Rectification Claim is determined in the meantime, with a time estimate of two hours. (I refer to that further hearing as the "**October Hearing**" although it may be listed later or adjourned in the meantime to accommodate exigencies.) The October Hearing is sufficiently proximate in all the circumstances: see paragraphs 92 to 94 above.

101. In light of this conclusion, I adjourn the Costs Indemnity Application to the October Hearing. I reserve the costs of the Permission Application, including these consequential matters, to the judge who conducts the October Hearing - observing that some form of split result on costs appears to be just and reasonable even if Boston obtain standing to take this derivative claim forward. I also adjourn or reserve to the October Hearing the question of any (further) extension to the validity of the claim form (as may be amended in the meantime) pursuant to CPR 7.6, because I am not persuaded that it is appropriate to extend validity at this stage.

PERMISSION TO APPEAL

102. Finally, it is in my view appropriate that there be permission to appeal to the Court of Appeal in respect of the grant of conditional permission under CPR 19.9(4). Such permission to appeal is confined to the issues which were put before me and decided by me at this consequentials hearing, and does not extend to any of the matters covered in the 7 May Judgment. (It will be for the appellants to seek to expand the scope or basis of permission with the Court of Appeal, if so advised.)

103. The threshold question of jurisdiction to grant *conditional* permission in a case of inchoate standing brings into focus whether the court's power under CPR 19.9(4) requires it to refuse permission unless - as distinct from until - the claimant has standing to pursue the derivate claim. There is something to be said for further confining permission to appeal to this question of jurisdiction, addressed in paragraphs 32 to 56 above; but given the dangers of elision identified in paragraph 58 above, it makes more sense that permission to appeal covers both the *existence* and *exercise* of such jurisdiction. This is so notwithstanding that the latter involves a first instance exercise of broad discretionary case management powers.

104. The reasons for granting permission to appeal in these terms ought to be obvious to the reader of this judgment. There is no prior authority or recorded precedent for the grant of conditional permission to pursue a derivative claim in a case of inchoate standing - or, apparently, any other circumstances. The desirability of appellate scrutiny and exposition was acknowledged on all sides, as noted in paragraph 3 above.

105. I was warned by counsel for the Operating Companies that if I were to make such an order it would set a bad precedent and create confusion in an area of law where stakeholders are entitled to expect certainty around the issue of title/standing. I disagree. But I readily acknowledge the possibility that others may disagree with me or my reasoning.