Case No: BL-2019-001698

Neutral Citation Number: [2020] EWHC 3042 (Ch)
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: 13/11/2020

Before: **Charles Morrison**
(sitting as a Deputy Judge of the High Court)

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Between:

(1) BOSTON TRUST COMPANY LIMITED
(2) BOSTON FIDUCIARY MANAGEMENT LIMITED
(in their capacities as trustees of the 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

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Anna Dilnot (instructed by **Osborne Clarke LLP**) for the **Claimants**
Stuart Adair (instructed by **Brachers LLP** for the **1st – 3rd Defendants**)
Timothy Carlisle (instructed by **Woodroffes Solicitors**) for the **5th Defendant**
Ulick Staunton (instructed by **Thompson Snell and Passmore LLP**) for the **6th Defendant**

Hearing date: 4 November 2020
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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on 13 November 2020.

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Charles Morrison (sitting as a Deputy Judge of the High Court):

Introduction

1. This is a matter which, as I will explain in some detail shortly, has already this year occupied the time of this court on a number of occasions but which comes before me now on the Claimants' (the Cs') application for the costs of those earlier proceedings and also for an indemnity from the first to third Defendants (the Companies) in regard to the costs to be incurred in the action.

2. The Cs are the trustees of an Isle of Man discretionary trust, the Erutuf Trust, and also the shareholders in the fourth Defendant (**Tellisford**). Tellisford is an indirect parent company of the first to third Defendants, whom I was told operate a group of companies well known in the field of conservation and heritage stone masonry.

3. The proceedings are brought by the Cs by way of what is known as a derivative action. This is because the claims lie in the hands of the Companies however it is the Cs that want to prosecute them, albeit for the benefit of the Companies. This action is brought at common law rather than under the relevant procedure for derivative actions laid down by the Companies Act 2006, for the reason that this is a multiple derivative action, that is to say, the Cs are not shareholders in the companies said to have the causes of action at their hands but rather they are (albeit through a number of intermediate holding companies) members of the company (i.e. Tellisford) that is itself a shareholder in those subsidiaries (the Companies). The proceedings aim at reinstating misappropriated assets to the Companies. The Cs allege that the fifth Defendant (**Mr**

Verhoef), a director and indirect majority shareholder of the Companies, was responsible for the wrongdoing, acting to some extent in concert with the seventh to tenth Defendants.

4. The progress of derivative actions is subject to the superintendence of the court (see CPR 19.9). So it was that pursuant to the prescribed procedure the matter came before Mr Stephen Houseman QC, sitting as a Deputy Judge of the High Court, in April and May of this year when he heard and decided the second stage "permission to proceed" application. Broadly speaking, by way of his first May judgment, the Deputy Judge decided that there were good grounds for permission to be granted; and by way of his second May judgment, following the May hearing, he took the view that the permission could be granted on a conditional basis.

5. The permission granted under CPR 19.9(4) was conditional only, because, as will become clear in this judgment, the Deputy Judge found that the Cs did not have the requisite standing to bring the derivative claim but that the position was capable of remedy. Indeed, this remedy was seen as both proximate and probable. As the Deputy Judge himself appreciated however, his decision had a novelty to it that suggested scrutiny by an appellate tribunal was desirable. I was told that Mr Verhoef's appeal in respect of the permission decision is now listed to be heard in the Court of Appeal in April 2021.

6. At paragraph 101 of his second May judgment the Deputy Judge said this:

> "*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.*"

7. Adding only that the difficulty in respect of standing has now been resolved as the Deputy Judge expected, and that the suggestion of amending the draft Claim Form (which in accordance with the CPR 19 procedure has still not been served) was not, doubtless for good procedural reason, pressed before me, it is against the background I have explained that I am now asked to decide the question of who should bear the costs of the proceedings before Mr Houseman QC; and also whether it is right that the Companies should bear the costs of the Cs as they proceed with the task of bringing the derivative claim to trial and determination by the court.

The Facts

8. Although the facts are set out in some detail in the two judgments of Mr Houseman QC to which I have already referred, it is necessary for the purposes of this judgment for me to give a short account of what lies behind the Cs' allegations. The proceedings concern the Szerelmey group of companies (**Szerelmey Group**). The Szerelmey Group (engaged as I have already noted, in the business of stone restoration and repair)

is the joint enterprise of Mr Verhoef and Mr Earl Krause (the settlor of the Erutuf Trust) who have it seems been in business together since the 1960s.

9. It seems that as they neared retirement and issues of succession arose, the longstanding relationship between Mr Krause and Mr Verhoef broke down. It is alleged, amongst other claims, that Mr Verhoef excluded Mr Krause from the Szerelmey Group business by preventing him from receiving necessary information and by taking profits to which he was not entitled.

10. The ownership structure in respect of the Companies was described by Mr Houseman QC in his 7 May judgment at paragraphs 12/13 as follows:

> "*Mr Verhoef and his family are beneficiaries under a New Zealand trust represented by VOC Trustee Limited ("**VOC**"). Through that trust arrangement and his ownership of an English company called Warthog Investments Limited ("**WIL**"), Mr Verhoef and his family effectively hold a majority of the voting rights in each of the Operating Companies. For convenience, I refer to this compendiously as the "**VOC/Verhoef**" shareholding or stake.*
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> *The ultimate ownership proportion in respect of the Operating Companies is roughly 1:2 in favour of Mr Verhoef, namely: 33.33% (Erutuf/Krause) / 66.67% (VOC/Verhoef) in respect of the First Defendant ("**Szerelmey**") and Second Defendant ("**Szerelmey GB**"); and 26.20% (Erutuf/Krause) / 58.22% (VOC/Verhoef) in respect of the Third Defendant ("**Szerelmey Restoration**").*"

11. It was common ground before Mr Houseman QC, and it remains so, that as between ultimate principal stakeholders, Mr Verhoef is the majority owner of the Companies and has been at all material times.

12. In these proceedings, the Cs allege that Mr Verhoef has used the control he has over the Companies to procure, in breach of duty and for no or no adequate consideration, the transfer of certain monies and assets of the Companies to companies which he owns and controls which lie outside the Szerelmey Group. The case that is made is succinctly summarised by Mr Houseman QC at paragraphs 40-57 of his 7 May Judgment.

13. The essence of the claims made are that:

    (a) substantial and unjustified consultancy fees totalling at least £1.2m have been paid to nominee companies of Mr Verhoef's (the ninth and tenth defendants in these proceedings) pursuant to sham invoices;

    (b) ownership of Szerelmey's operational assets, trademarks and client lists have been sold to and leased back from the seventh defendant, with the primary aim of avoiding future claims from creditors;

    (c) the profitable labour contracting part of the Szerelmey Group's business, has been transferred, absent any consideration, to another Mr Verhoef controlled company, that is to say the sixth defendant; and

(d) substantial unsecured loans have been advanced by the first defendant to companies controlled by Mr Verhoef otherwise than on a commercial basis and with uncertain prospects for repayment.

Procedural history

14. Because it is relevant to the argument over costs which I am asked to decide, it is necessary for me to recite in some further detail the history of the proceedings. The first stage permission to continue the derivative claims was granted *ex parte* by Charles Hollander QC, sitting as a Deputy Judge of the High Court, on 25 September 2019. The Cs also applied for a freezing order and proprietary injunction against Mr Verhoef, but that relief was refused. Whilst noting the fact of this hearing, no costs are sought in respect of the costs solely relating to the freezing order and proprietary injunction application.

15. The second stage application for permission was as I have already outlined, dealt with by Mr Stephen Houseman QC at a hearing in April (mistakenly referred to as March on the face of the judgment dated 7 May 2020); and again at a further hearing in May, which led to his second judgment dated 26 May 2020. In opposing the grant of permission, the Defendants raised the point, as they had done in prior correspondence passing between solicitors, that the Cs were not registered shareholders in Tellisford. It was pointed out that Tellisford's register of members referred to the 'Erutuf Trust IOM' rather than to the Cs as its trustees. The Cs thereupon took the decision to apply for rectification.

16. At the April hearing, the Companies, Mr Verhoef and the sixth defendant strongly resisted the Cs' application for permission, served extensive evidence designed to show that the Cs did not have a *prima facie* case on the merits, and further contended that not only did the Cs not have standing, but they were not even properly appointed trustees.

17. The *prima facie* case argument having gone against them as I have already indicated, at a further hearing on 21 May 2020, Mr Verhoef, the Companies and the sixth defendant also opposed the grant of conditional permission on the basis that the Court lacked jurisdiction in view of the Cs' lack of standing. The Court decided that it did have jurisdiction and, given that the Cs' application to rectify Tellisford's register pursuant to s.125 Companies Act 2006 had a good prospect of success, it was appropriate to grant permission conditional upon the Cs being registered as shareholders. The Court indicated the Cs should have a reasonable period of time in which to obtain rectification, and with that in mind ordered that this hearing take place on the first available date after 12 October 2020.

18. In the meantime and on the basis of executed stock transfer forms, the Cs requested that the board of Tellisford register them as shareholders. Mr Verhoef and his wife declined.

19. On 23 July 2020, the Cs obtained ***retrospective rectification*** of Tellisford's register of members.

20. Until permission to continue the derivative claim had become unconditional, the Cs were not entitled to serve the claim form. Although the condition was fulfilled on 11 August 2020 when the register was updated pursuant to the order, the Cs then had to obtain an extension of time for service of the claim form which was granted by Master Kaye on 16 September 2020. The Cs have since refrained from serving the proceedings pending the outcome of discussions between the parties.

21. The Companies had proposed that the proceedings be stayed until after determination of Mr Verhoef's appeal. The Cs object to that suggestion.

22. As a result of the matters that I have set out above:

    (a) the Cs are registered shareholders of Tellisford;

    (b) the Court has ordered that the register of Tellisford be rectified so as to record the Cs as shareholders since **3 June 2016**, the consequence being that the Cs were shareholders at the time the proceedings were commenced; and

    (c) permission for the Cs to continue with the derivative claims has become unconditional.

Indemnity - Position of the Claimants

23. It is perhaps convenient if I address first the question of the claim for an indemnity from the assets of the Companies in respect of costs of the Cs to be incurred in these proceedings. This type of prospective indemnity order for costs is often referred to as a "pre-emptive indemnity" covering as it does costs to be incurred, in contrast to an order for costs made upon the conclusion of an action by the trial judge in respect of costs already incurred.

24. Before me, the Cs have described their application as seeking a 'pay as you go' order by which it is meant that their ongoing costs should to be met by the Companies as these proceedings progress, rather than being paid out following trial. The Cs suggest that such an order be limited either to a maximum amount (£480,000 including VAT is proposed), or a particular stage of the proceedings (exchange of witness statements is suggested), beyond which the Cs would have to seek further approval.

25. Not only do the Cs seek an order in respect of their own costs, they also ask that the indemnity order extend to cover any costs that they might be ordered to pay. The application being opposed by Mr Verhoef and the Companies, (the sixth defendant taking a position only on the costs incurred to date, and the seventh to tenth defendants taking no part) I will now turn to the relevant law.

Legal principles

26. The Court of Appeal explained the jurisdiction to grant a pre-emptive indemnity in minority shareholder derivative claims, the availability of which being now confirmed by CPR 19.9E, in the well-known decision of *Wallersteiner v Moir (No 2)* [1975] QB 373. It may be correct to say as Mr Adair who appeared before me for the Companies points out, that the facts of that case revealed a set of circumstances that were wholly

deserving of intervention by the court, but it is nonetheless important to have in mind the principles upon which the Court relied. At page 391 of the leading judgment, Lord Denning MR said this:

> "*Now that the principle is recognised, it has important consequences which have hitherto not been perceived. The first is that the minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of the agency. This indemnity does not arise out of a contract express or implied, but it arises on the plainest principles of equity. It is analogous to the indemnity to which a trustee is entitled from his cestui que trust who is sui juris: see Hardoon v. Belilios [1901] A.C. 118 and In, re Richardson, Ex parte Governors of St. Thomas' Hospital [1911] 2 K.B. 705. Seeing that, if the action succeeds, the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf. If the action succeeds, the wrongdoing director will be ordered to pay the costs: but if they are not recovered from him, they should be paid by the company. And all the additional costs (over and above party and party costs) should be taxed on a common fund basis and paid by the company: see Simpson and Miller v. British Industries Trust Ltd. (1923) 39 T.L.R. 286. The solicitor will have a charge on the money recovered through his instrumentality: see section 73 of the Solicitors Act 1974.*
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> *But what if the action fails? Assuming that the minority shareholder had reasonable grounds for bringing the action - that it was a reasonable and prudent course to take in the interests of the company - he should not himself be liable to pay the costs of the other side, but the company itself should be liable, because he was acting for it and not for himself. In addition, he should himself be indemnified by the company in respect of his own costs even if the action fails. It is a well known maxim of the law that he who would take the benefit of a venture if it succeeds ought also to bear the burden if it fai1s. Qui sentit commodum sentire debet et onus. This indemnity should extend to his own costs taxed on a common fund basis.*"

27. At page 403 of the judgment Buckley LJ. added the following:

> "*It seems to me that in a minority shareholder's action, properly and reasonably brought and prosecuted, it would normally be right that the company should be ordered to pay the plaintiff's costs so far as he does not recover them from any other party. In all the instances mentioned the right of the party seeking indemnity to be indemnified must depend on whether he has acted reasonably in bringing or defending the action, as the case may be: see, for example, as regards a trustee, In re Beddoe, Downes v. Cottam [1893] 1 Ch. 557. It is true that this right of a trustee, as well as that of an agent, has been treated as founded in contract. It would, I think be difficult to imply a contract of indemnity between a company and one of its members. Nevertheless, where a shareholder has in good faith and on reasonable grounds sued as plaintiff in a minority shareholder's action the benefit of*

which, if successful, will accrue to the company and only indirectly to the plaintiff as a member of the company, and which it would have been reasonable for an independent board of directors to bring in the company's name, it would, I think, clearly be a proper exercise of judicial discretion to order the company to pay the plaintiff's costs. This would extend to the plaintiff's costs down to judgment, if it would have been reasonable for an independent board exercising the standard of care which a prudent business man would exercise in his own affairs to continue the action to judgment. If, however, an independent board exercising that standard of care would have dis- continued the action at an earlier stage, it is probable that the plaintiff should only be awarded his costs against the company down to that stage.

There is a well estab1ished practice in Chancery for a trustee who has it in mind to bring or defend an action in respect of his trust estate to apply to the court for directions: see In re Beddoe, Downes v. Cottam [1893] 1 Ch. 557. If and so far as he is authorised to proceed in the action, the trustee's right to be indemnified in respect of his costs out of the trust property is secure. If he proceeds without the authority of an order of the court, he does so at his own risk as to costs. It seems to me that a similar practice could well be adopted in a minority shareholder's action."

28. The principle at the heart of derivative actions was, picking up the theme developed by Buckley LJ, explained in this way by Mr Michael Wheeler QC sitting as a judge of this court in *Jaybird Group v Greenwood [1986] BCLC 319:*

> "*The principle which underlies this decision is reasonably simple and, I think, is clear. I will first enunciate it in the terms which counsel for the Plaintiff used in his opening, and the principle is this: would an honest, independent and impartial board of Withers in the circumstances disclosed in the evidence before this court consider that it was in the interest of the company to pursue down to discovery and inspection claims which Jaybird were pursuing as a minority shareholder in Withers? If the answer to this question is yes, then counsel for the plaintiff said the court should give the relief sought down to the close of discovery and inspection*"

29. In argument before me, much reliance was placed by Counsel for the Companies on the decision of the Vice Chancellor in *Halle v Trax* [2000] BCC 1020, where the Court declined to grant an indemnity in circumstances where there was in substance no difference between the derivative claim and a partnership dispute (the parties being 50/50 shareholders with neither being in the minority), and it would be unfair for the defendant, in the event the proceedings were unsuccessful, to bear the costs of them from his share in the company.

30. In a later decision, *Iesini v Westrip Holdings Ltd* [2009] EWHC 2526 (Ch), a case involving an application to the court under section 261 of the Companies Act 2006 for permission to continue a derivative claim on behalf of a company, where claims were

made to reverse alleged asset stripping and for declarations about the company's ownership of certain assets, Lewison J. (as he then was) at [123] said this:

> "*The relevant alternative remedy in the present case is an unfair prejudice petition under section 994. From the point of view of the company itself a petition under section 994 is far preferable, principally because it will only be a nominal party and will not incur legal costs; whereas in the ordinary way if a derivative action is brought for its benefit it will be liable to indemnify the claimant against his costs, even if the claim is unsuccessful: Wallersteiner v Moir (No 2). At this point I should mention briefly the decision of Walton J in Smith v Croft [1986] 1 WLR 580. Mr Todd relied on it for the proposition that a claimant must demonstrate a genuine need for an indemnity before the court will order one. However, that is not what Walton J said. In Smith v Croft Walton J was concerned with two appeals from the Master. The first appeal was from an order made ex parte ordering the company to indemnify the claimant against costs. The appeal against that order was allowed, and Walton J decided that there was so little substance in the claim that no indemnity was appropriate. The second appeal was against an order permitting the claimants to tax their bills at intervals, without waiting for the outcome of the action. It was in the context of the second appeal only (i.e. whether there should be an interim payment on account of costs) that Walton J said:*
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> > *"Early payment — i.e. before the conclusion of the trial — does indeed impose an additional liability. That may become necessary: if, for example, the plaintiff is a person who literally has no resources of his own, then it may well be that an order for interim payment should be made in order to ensure that the action proceeds at all. Without the supplementary order, the original order may stand in danger of being stultified. It therefore appears to me that in order to hold the balance as fairly as may be in the circumstances between plaintiffs and defendants, it will be incumbent on the plaintiffs applying for such an order to show that it is genuinely needed, i.e. that they do not have sufficient resources to finance the action in the meantime. If they have, I see no reason at all why this extra burden should be placed upon the company."*
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> *Thus in my judgment Mr Michael Wheeler QC was right in Jaybird Group Ltd v Greenwood [1986] BCLC 319, 327 to say that an indemnity as to costs in a derivative claim is not limited to impecunious claimants. The justification for the indemnity is that the claimant brings his claim for the benefit of the company (and ex hypothesi under the new law the court has allowed it to proceed). Once the court has reached the conclusion that the claim ought to proceed for the benefit of the company, it ought normally to order the company to indemnify the claimant against his costs.*"

31. A similar approach was followed in *Wishart v Castlecroft Securities Ltd* [2009] CSIH 65; [2010] B.C.C. 161, a decision of the Inner House of the Court of Session in relation to derivative claims brought under the Companies Act 2006. It was held that

the court in Scotland had jurisdiction to grant the claimant an indemnity in relation to his costs (called "expenses" in Scotland). Lord Reed, giving the judgment of the court, referred to previous English decisions which expressed the view that the power to make a pre-emptive order granting an indemnity should be exercised with considerable care but concluded his judgment at [**71**] in this way:

> "*As we have explained, the rationale of indemnification in respect of the expenses of litigation, as between trustees and the trust estate, or other fiduciaries and those on whose behalf they are acting, is that the party who has incurred the expense has not been acting for his own benefit but for the benefit of the estate or person in question. A minority shareholder who brings derivative proceedings on behalf of the company is ordinarily entitled to indemnification because the same rationale applies. We can understand that, on the facts of cases such as Mumbray or Halle, the view may be taken that derivative proceedings are inappropriate, on the basis that the shareholder is in substance acting for his own benefit rather than for the benefit of the company and should therefore pursue an alternative remedy. Where however the court has decided that a shareholder should be allowed to bring proceedings in the interests of the company and on its behalf, it appears to us to follow that the shareholder is in principle entitled to be indemnified by the company in respect of his expenses and liabilities (subject to the qualifications which we have previously mentioned), and that his personal interest in the outcome, as a shareholder, is not a good reason for denying him that indemnity.*"

32. The Inner House of the Court of Session also considered an argument turning on the decision of the Vice Chancellor in *Halle v Trax*. At [**69**] of this judgment Lord Reed observed:

> "*In that regard, the argument which was presented to us (but not to the Lord Ordinary) was that it was inequitable that a shareholder who owned 40 per cent of the share capital of a small company should be allowed to bring proceedings against the other principal shareholder (who, with his wife, owned the remaining 60 per cent) at the expense of the company: even if the petitioner was unsuccessful in the derivative proceedings, Mr Black and his wife would effectively pay 60 per cent of the petitioner's expenses. We note that a similar argument was rejected in Jaybird Group Ltd v Greenwood. Reliance was however placed on Halle v Trax BW Ltd [2000] B.C.C. 1,020, where Sir Richard Scott V.-C. dismissed an appeal against a decision refusing to grant a costs indemnity. The Vice-Chancellor did so in the light of the unusual facts of that case, noting (at page 1,023) that the critical feature of the case was the relationship in the company of its two shareholders, each of whom owned 50 per cent of the shares, and one of whom wished to bring a derivative claim alleging wrongdoing by the other. As the Vice-Chancellor observed, the claimant was not a minority shareholder and the alleged wrongdoer was not in control of the company: the action was treated as being essentially a dispute between two partners. The respondents also founded on an obiter dictum in the case of Mumbray v Lapper [2005] EWHC 1152 (Ch); [2005] B.C.C. 990,*

where the facts were similar to those of the Halle case. It was acknowledged that the facts of the present case were of a less extreme character."

33. Having reviewed the authorities including those to which I have made reference, in *Bhullar v Bhullar* [2016] BCC 134, Morgan J held that there had to be a high degree of assurance that an indemnity would be the proper order to make following a trial. This decision was itself considered in one of the most recent decisions in this area of law, that being *Tonstate Group Ltd v Wojakovski* [2019] BCC 990, in which the Court declined to grant a costs indemnity where the company was to be wound down (such that it had no ongoing business and the value of the company was represented by the value of its assets) and it was wrong to burden any part of the defendant's interest with the costs were the claim to fail. In his judgment at [**11**] Zacaroli J said this:

> "*The second case is Bhullar v Bhullar [2015] EWHC 1943 (Ch); [2016] B.C.C. 134. This was an action by a minority shareholder as a double derivative common law claim. Morgan J reviewed all the authorities including Wallersteiner v Moir, Iesini, Wishart and Halle v Trax. His conclusion is accurately summarised at [5] of the headnote ([2016] 1 B.C.L.C. 106):*
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> > *"The claimant was granted permission to continue the derivative claim in relation to the payments made to Torex, but not in relation to the transfer of the property. However, he was not entitled to a pre-emptive order granting him an indemnity as to costs. The court's power to make such an order was established by Wallersteiner v Moir (No.2) [1975] 1 All E.R. 849; [1975] Q.B. 373 but the later authorities showed that the court should exercise considerable care when deciding whether to order a pre-emptive indemnity. The court should have a high degree of assurance that such an indemnity would be the proper order to make following a trial on the merits of the claim. In the present case, it could not. Furthermore, the derivative proceedings were a stepping stone towards a negotiation for a formal split between the parties or s.994 of the Companies Act 2006 proceedings. The costs position in relation to the derivative proceedings should be the same as the costs position in relation to s.994 proceedings generally, when both the claimant and the first defendant would be on risk as to costs. The claimant should not have a pre-emptive indemnity which gave him a considerable advantage at the possible expense of the first defendant."*

34. On the facts of *Bhullar*, a pre-emptive indemnity was refused on the basis that it was common ground that unfair prejudice proceedings would follow and the derivative action would determine certain points between the shareholders, following which they would negotiate or litigate a formal split (the latter under s.994 CA 2006). In an important passage of his judgment [at **15**], Zacaroli J said this:

> "*In other words, the companies here have no substantive continuing purpose other than to be wound down for the benefit of their shareholders. In these circumstances, while it is true that the claims are for the benefit of the companies, the dividing line between benefit to the companies and benefit to Mr Matyas as a shareholder is far less obvious that it might be in other cases. I*

consider the approach to be followed is that identified in Halle v Trax and Bhullar v Bhullar: can I be confident that the court would at the end of the proceedings – and whatever the outcome – burden the companies and thus, to the extent that he is a 50 per cent shareholder, Mr Wojakovski with the costs of pursuing them? As to this, if Mr Wojakovski were to succeed, I find it virtually impossible to conceive the court would consider burdening any part of his interest in the companies with the costs of pursuing the claims against him. It would, to adopt the language of the Vice-chancellor in Halle v Trax, be quite wrong."

35. Thus the derivative action was viewed as a "stepping stone" towards the formal split/s.994 proceedings. The Court considered that the costs position in relation to both sets of proceedings should be the same, and that the shareholders should be treated equally as to costs risk.

Discussion

36. On my assessment of the authorities, where the Cs have been given permission to bring proceedings in the interests of certain companies and on their behalf, they should in principle be entitled to be indemnified by those companies in respect of their costs. This proposition seems to be clear from the decision in *Wishart* and also the findings of Lewison J in *Iesini*. I am particularly attracted to the approach of the Deputy Judge in *Jaybird* which I consider to be the correct starting point. At page 325 of his judgment the learned Deputy Judge, again adopting the theory lying behind *Wallersteiner*, said:

"*Nevertheless where a shareholder has in good faith and on reasonable grounds sued as plaintiff in a minority shareholder's action, the benefit of which, if successful will accrue to the company and only indirectly to the Plaintiff as a member of the company, and which it would have been reasonable for an independent board of directors to bring in the company's name, it would, I think, clearly be the proper exercise of judicial discretion to order the company to the pay the Plaintiff's costs.*

37. In the present case the action is brought on behalf of the Companies. Giving his view on the strength of those claims in his 7 May judgment Mr Houseman QC at [**123/124**], said this:

"*In my judgment, Boston have comfortably shown that all four heads of claim possess sufficient substance for present purposes. Such claims may not ultimately be worth the pleaded figures; but issues as to quantum are for trial.*

The twin central allegations that Mr Verhoef dishonestly procured the Operating Companies to enter into the Impugned Transactions and that he thereby benefitted through his ownership and control of the Recipient Companies are sufficiently borne out by the available contemporaneous material."

38. And at [**130**]:

"*Irrespective of the position in relation to each of the Impugned Transactions, the inference of background control or unofficial dominion on the part of Mr*

Verhoef has a solid evidential basis and gains momentum when the position is looked at in the round in its proper chronological context. I have no reason to believe that the examples of contemporary material relied upon by Boston to support such inference are mere evidential ephemera, although it is possible that the defendants may demonstrate at trial that this is the case. As matters stand Mr Verhoef has a case to answer."

39. At [**133**] the Deputy Judge added this:

> "*The thrust of the defendants' case on threshold merits was that Mr Krause is hallucinating wrongdoing where none exists. No point was taken as to the reasons for Mr Hollander QC's refusal to grant a freezing injunction at the outset of this action in September 2019. Despite the indignant tone of the defendants' evidence and analysis, there is a conspicuous absence of probative contemporary material to answer the claims or dislodge the organic inference of impropriety arising from the structural and chronological matrix.*"

40. And finally at [**135**]

> "*Approaching this on a claim-by-claim basis, as I have done, I am amply satisfied that Boston have discharged their interlocutory burden in respect of all four heads of claim. I understand that Boston may seek to amend their pleaded case, should this action proceed, to increase certain heads of loss and augment the basis of their challenge to the legitimacy or propriety of certain transactions including the grant of works guarantees during 2015-2016 which are related to the loans made to London Stone as part of the Loans Claim.*"

41. Having regard to these findings, which it must be noted, resulted from a fully argued hearing, I am entirely satisfied that in principle, this is a case where the indemnity asked for ought to be ordered.

42. I next ask myself whether there are nevertheless factors evident which mean that I ought not to exercise my discretion in favour of making the order. Mr Adair for the Companies urged a number of matters upon me including the Vice Chancellor's decision in *Halle*. In Mr Adair's view the instant case was little different to the one decided by the Vice Chancellor and he sought to persuade me to take a similar approach. It does not seem to me however to be such a case. As Lord Reed observed, in *Halle* the claimant was not a minority shareholder and the alleged wrongdoer was not in control of the company: the action was treated as being essentially a dispute between two partners. Quite the contrary seems to be the position in this case. The Cs are minority shareholders and the nature of the claims made go far beyond what might be characterised as a partner dispute. Even a cursory glance at the 7 May judgment of the Deputy Judge reveals that the issues in the matter before me go far beyond what the Vice Chancellor described at page 43 of his judgment as being "*a straightforward action by a partner against his co-partner complaining of breaches by the defendant partner of duties he owed to the joint venture and his joint venture partner"*. Nor for

these reasons do I consider this to be a case of the type encountered by Zacaroli J in *Tonstate.*

43. In another line of attack, Mr Adair sought to persuade me that an indemnity order of the type prayed for is only available to those who can show that they need it: as Mr Moir "at the end of his tether" and "having expended all of his financial resources" (per Lord Denning MR) did. Reliance was placed on the decision of Walton J in *Smith v Croft (No.1)* [1986] 1 WLR 580. In the absence of evidence from the Cs as to their impecuniosity or perhaps alternatively, their genuine need for assistance, none can be offered by way of an indemnity.

44. In my judgment the answer to counsel's submission is provided by the cogent reasoning of Lewison J (as he then was) in *Ieseni* and I have set out the relevant passage earlier in this judgment. It is not at all necessary for an applicant to put before the court evidence of means, or lack of them, in order to justify the grant of an indemnity order. On the clearest authority binding upon me at any rate, it is not, as it was argued before me, a condition precedent to a successful application.

45. Mr Adair quite properly drew my attention to the note to the current *White Book* at 19.9E, where in regard to an application for an indemnity in addition to citing *Wallersteiner,* reference is also made to *Smith v Croft.* The note suggests that an indemnity will only lie if the applicants demonstrate that it is genuinely needed. With the greatest of respect to the learned editors of the text, that does not seem to me to be the current state of the law, certainly if the note is to be the foundation of submissions based upon an absence of evidence of impecuniosity, placing reliance upon the views of Walton J in *Smith v Croft*.

46. Moving on to another line of argument, Mr Adair invited my attention to Lord Reed's review of *McDonald v Horn* [1995] ICR 685, in *Wishart*, where at [**56**] Lord Reed considered the Court of Appeal's judgment and cited this passage:

> "*Hoffmann L.J. also observed (at 700):*
>
> > *''The power to make a Wallersteiner v Moir order in a pension fund case should in my view be exercised with considerable care. The judgment of Walton J in Smith v Croft [1986] 1 WLR 580 contains a useful reminder of the dangers of too easily making orders which allow minority shareholders to litigate at the cost of the company . . .*
> >
> > *The need for caution in making such orders does not however mean that the judge or master should undertake a close examination of the merits of the dispute. The question is whether the plaintiffs have shown a sufficient case for further investigation.''*
>
> *His Lordship approved an approach whereby, rather than granting a blanket indemnity to cover the whole of the future litigation, the court made an indemnity order covering only a particular stage of the litigation, on the basis that the matter would be reviewed at the end of that stage.*"

47. Reliance was placed upon this reasoning and also that of Morgan J. in *Bhullar v Bhullar*, where at [**67**] the learned Judge observed:

> "*The later authorities show that the court should exercise considerable care when deciding whether to order a pre-emptive indemnity. The court should have a high degree of assurance that such an indemnity would be the proper order to make following a trial on the merits of the claim.*"

48. Given the views that I have set out in respect of the decisions in *Wishart* and *Iesini* (and the various earlier decisions considered by them), I certainly agree that the making of indemnity orders should be approached with considerable care but it might not be that on the assessment of the claim made at stage two in the manner envisaged by the rules and avoiding as it has been remarked a "mini trial", that what is assured is anything other than the comfort that was expressed by the Deputy Judge in his 7 May judgment in the instant case.

Conclusions

49. As will already have become evident from my discussion of the issues and the law, the view I have arrived at is that this is a proper case in which to order a pre-emptive indemnity. I do not believe that it is necessary for the Cs to show their need for the order on a "lack of funds basis"; I am not persuaded that this is a straightforward partner dispute; and I am satisfied that this is a proper case in which to order an indemnity having regard to the strength of the claims that are to be made on behalf of the Companies.

50. I accept, as I must that if Mr Verhoef prevails, the Companies of which he is a majority owner will bear those costs. I do not see any inherent unfairness in this as the proper principle to apply is that explained by Lord Denning MR in *Wallersteiner* when he posed the question at page 392 of his judgment "*what if the action fails?*". The answer is that the company on whose behalf the action was brought must pay. The claimant was acting for it and not (as was the case with Mr Moir) for himself.

51. I ought to mention one further argument that was raised in opposition to the making of the order: it was said that the costs to be incurred are disproportionate to the likely benefit. The costs estimate now before the court sees the future costs of the proceedings to be approximately £400,000 excl. VAT. To this figure must be added the costs to date which are put at £376,491.10.

52. There are of course a number of claims made on behalf of the Companies certain of which seek the restoration of assets and also of the labour broking business. I am not at this stage able to place a value on those claims although Mr Bartlett's evidence (para 35 of his 27 October Witness Statement) suggests £280,000 as being the loss in respect of the Labour business. In terms of financial benefit, the pleaded value of the claims is £2,791,666. I am told that whilst permission to amend will be needed, additional claims are to be made and the value of the specific claim will rise substantially because of sums due in respect of guarantee claims and other amounts wrongfully paid out to certain of the defendants controlled by Mr Verhoef. At all events, as matters currently stand, I am not persuaded that the order should not be made because the costs to be incurred would be disproportionate. The claims are important to the business of the

Companies and would, in my judgement, meet the test articulated by Mr Michael Wheeler QC in *Jaybird* as being claims that an independent board would consider that it was in the interests of the company to pursue.

53. As to the practical outcome, what I have in mind is an order for an indemnity down to the stage of exchange of witness statements (with in any event, a review at the Pre-Trial Review stage) so that at that juncture the matter can be reviewed afresh by the court. This indemnity includes the costs already incurred by the Cs, which to my mind fall square within the indemnity that I have found they are entitled to. I will also order an indemnity in respect of an adverse costs order (past and prospective), on terms to be agreed with counsel.

Costs to date

54. I have also been invited to make an order now in favour of the Cs in terms that their costs incurred to date (excluding the costs relating to the *ex parte* application for freezing and proprietary relief; and also the costs of the first stage permission application) be summarily assessed on the indemnity basis and paid by the Companies within 21 days. As regards the costs of the second-stage permission application, including the hearings in April and May 2020, the Cs say that they should have their costs because, in substance, they won. The objective of the defendants was the dismissal of the permission application and in that endeavour they failed.

55. Albeit that the permission granted was conditional, and that as they must accept the standing issue went against them, the Cs see this as only a technical defeat. Why there was the (futile) resistance (especially on the part of the Companies) to the standing argument when rectification must have seemed inevitable cannot be fathomed by the Cs.

56. As they expected, the Cs in due course obtained not only rectification but retrospective rectification, the effect of which is that they always had standing to bring and were justified in bringing, the derivative claims. The only reason that the costs were substantially incurred was because of the refusal of the defendants to acknowledge then that which has come to pass. Indeed it is submitted that the entire May hearing was taken up arguing the conditional permission.

57. As was explained at the beginning of this judgment, Mr Verhoef is awaiting a hearing of his appeal against the decision of the Deputy Judge to grant conditional permission to proceed with the action. Whilst I can see that events have moved on and that the standing argument today has taken on a very different complexion to that which it had in May of this year, what I cannot predict is the outcome of the argument before the Court of Appeal. What I can say on the other hand with some degree of certainty is that it will have a bearing on the appropriate order to make in respect of the costs incurred to date. Whoever ultimately comes to decide the question of responsibility for the costs incurred thus far, they will inevitably be influenced by the outcome of the proceedings in the Court of Appeal.

58. In terms I am here following the same logic as Mr Houseman QC who as can be seen from the passage from his 26 May judgment that I cited at the outset of this judgment, felt that some split result seemed to him to be just and reasonable even if the Cs

obtained standing to bring the derivative claims forward. How that result is split, if it is to be, might well be affected by the position taken by the Court of Appeal. At any rate the prospect of that being the case is sufficiently high for me to say that it would be unwise for me to arrive at a final decision now on the question of who must bear the costs incurred to date and in what proportions.

59. Accordingly, the Cs' application for an indemnity succeeds however the application for an order that the defendants meet certain of the Cs' costs incurred in these proceedings to date on an inter partes basis, is adjourned until after the conclusion of Mr Verhoef's appeal to the Court of Appeal: I will, insofar as it is necessary, make the order that the costs of the first stage of the permission application be costs in the case.

60. I will hear counsel on the form of the order and any other consequential matters although it is to be hoped that an agreed draft can be submitted to the court.