**Neutral Citation Number [2021] EWHC 1173 (Ch)**

CR 2016 008560

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST (ChD)**

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

Date: 10/05/2021

**Before** :

**ICC JUDGE BARBER**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**JOANNA LEMOS**

**Claimant**

**- and –**

**(1) CHURCH BAY TRUST COMPANY LIMITED**
**(2) RODERICK FORREST**
**(3) KALLIOPI LEMOS**

**Defendants**

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**Ms Elizabeth Weaver** (instructed by Gowling WLG (UK) LLP) for the **Applicants**
**Mr Stephen Robins** (instructed by Holman Fenwick Willan LLP) for the **Claimant**
**Mr Thomas Elias** (instructed by Withers LLP) for the **Third Defendant**
**The First and Second Defendants** did not appear and were not represented

**Hearing dates: 4 and 8 March 2021**

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# Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.00 a.m on 10 May 2021

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**ICC Judge Barber**

1. On 9 March 2021, I ordered that Michael Leeds and Kevin Hellard (the 'JTBs'), the joint trustees in bankruptcy of Mr Christos Pandelis Lemos ('Mr Lemos'), be joined as co-claimants to proceedings brought under s423 Insolvency Act 1986 ('IA 1986') by the Claimant, Ms Joanna Lemos. I also directed that from the date of their joinder until further order, the JTBs should have sole conduct of the s.423 claim. I did so on the footing that I would set out my reasons in a written judgment at a later date. This judgment sets out my reasons for ordering the joinder of the JTBs and directing that they should have sole conduct of the claim.

## Background

2. The Claimant ('Joanna') is the sister of Mr Lemos. The s.423 claim arises from earlier proceedings between Joanna and Mr Lemos. Joanna invested approximately US$18 million with Mr Lemos, which he failed to repay. Joanna commenced proceedings against Mr Lemos in Jersey at the end of 2014.

3. On 16 January 2015, Joanna obtained judgment in default against Mr Lemos in a sum of approximately US$18 million ('the Jersey Judgment'). This was registered on 13 February 2015 in the Queen's Bench Division of the High Court.

4. On 19 December 2014, Joanna was granted a worldwide freezing order by Popplewell J against Mr Lemos. In addition, Joanna was granted an asset restraint order ('the ARO') against the First and Second Defendants ('the Offshore Trustees') in respect of a substantial and valuable house known as 27 and 27A Bracknell Gardens, Hampstead, London ('the Property'), which has been the matrimonial home of Mr Lemos and his wife, the Third Defendant ('Mrs Lemos'), since 1981.

5. I pause here to explain the significance of the Property. Prior to 1994, the Property was owned by a Liberian corporation called Panagia Diafylatousa Corporation ('PDC'). On 24 June 1981, the stock of PDC was transferred to Mr Lemos. PDC acquired 27 Bracknell Gardens in 1981. It acquired 27A Bracknell Gardens in 1992. By a deed executed on 22 June 1994, Mr Lemos declared a trust of his 100% shareholding in PDC in favour of Mrs Lemos ('the Trust') and purported to record that he had always held that shareholding on trust for Mrs Lemos. The (then) trustee of the Trust recorded that the PDC shareholding had been transferred to it to be held as an asset of the Trust. PDC was subsequently placed into liquidation and the Property was transferred into the names of the Offshore Trustees as (by then) the current trustees of the Trust.

6. Returning to the chronology: the worldwide freezing order against Mr Lemos granted on 19 December 2014 and the ARO obtained against the Offshore Trustees in respect of the Property on the same day were continued by order of King J on 13 January 2015.

7. Mr Lemos petitioned for his own bankruptcy on 11 March 2015 and was adjudicated bankrupt. On 1 April 2015, the JTBs were appointed as his trustees in bankruptcy.

8. The Offshore Trustees applied to discharge the ARO, on the basis that the Property was held on trust for the debtor's wife (the Third Defendant) and was therefore not an asset against which Joanna could enforce the Jersey Judgment.

9. At a hearing before Cooke J, Joanna argued that there was good reason to suppose that she would be able to enforce the Jersey Judgment against the Property (a) on the basis of a common intention constructive trust; or (b) by way of a claim under s.423 IA 1986 to set aside any disposition by Mr Lemos of his shares in the company which owned the Property.

10. Cooke J rejected Joanna's arguments but agreed to keep the ARO in place pending the outcome of Joanna's application for permission to appeal.

11. The appeal was heard in November 2016. Mr Lemos was a party to the appeal but did not attend and was not represented. At the hearing, the Court of Appeal (Longmore and Kitchin LJJ) admitted new evidence and heard full argument from leading counsel acting for Joanna and for the Offshore Trustees on the proposed s.423 claim. The new evidence admitted included evidence of an interview of Mr Lemos conducted by the JTBs (referred to in the Court of Appeal's judgment at [20] as 'cogent') and documents obtained by the JTBs from Withers, the solicitors who had acted for Mr and Mrs Lemos and who had drafted the Trust. Mr and Mrs Lemos did not raise with the Court of Appeal any claim to privilege in respect of the material considered by it (judgment at [19]). As put by Longmore LJ at [19] (Kitchin LJ concurring): 'Any privilege would be that of Mr Lemos or Mrs Lemos which they could have invoked but have not'.

12. The Court of Appeal accepted the arguments put forward by Joanna in relation to the proposed s.423 claim and allowed Joanna's appeal. Longmore LJ (Kitchin LJ concurring) considered that it was 'well arguable' that Mr Lemos had an asset (his shareholding in PDC) which he disposed of in 1994 for the purpose of putting it beyond the reach of a future creditor (judgment at [27]).

13. The Court of Appeal concluded that the ARO should continue, albeit not indefinitely, in circumstances where no proceedings under s.423 IA 1986 had yet commenced. Noting that, by November 2016, the ARO had been in place for nearly 2 years, Longmore LJ continued:

> 'If a section 423 application is to be made (and the relevant persons to make it are the trustees in bankruptcy, anyone to whom they assign validly the cause of action, or the appellant, if she obtains the permission of the court under section 424(1)(a) of the Insolvency Act 1986) it must be made promptly….
>
> I would therefore allow this appeal and maintain the freezing injunction currently in force for a period of four weeks from hand down of this judgment. If within that time section 423 proceedings are instituted, the injunction will continue until the disposal of those proceedings by judgment or agreement and thereafter until satisfaction of the judgment currently possessed

> by Joanna Lemos. If proceedings are not begun within those four weeks, the injunction will be discharged.'

14. The subsequent Court of Appeal order required a s.423 claim to be issued by 4pm on 28 December 2016, failing which the ARO in respect of the Property would cease to apply.

15. As noted by Longmore LJ, standing to bring a claim under s.423 IA 1986 is governed by s.424(1) IA 1986, which provides that, where the debtor has been made bankrupt, the claim under s.423 may be brought by the official receiver or the trustee in bankruptcy 'or (with the leave of the court) by a victim of the transaction'.

16. As at December 2016, although the JTBs were investigating the possibility of bringing a s.423 claim in respect of the Property, they were not in funds to commence such proceedings by the deadline of 4pm on 28 December 2016. Mr Lemos was not being cooperative (he had failed to disclose previous professional advisers, for example, and had refused to hand over his laptop voluntarily), with the result that his discharge from bankruptcy was suspended by a year. As at December 2016, there were no funds in Mr Lemos' estate to fund s.423 proceedings and the JTBs did not know whether they would be able to agree suitable funding arrangements with third party funders. There was concern that if the ARO was discharged, the Property would be put beyond the reach of Mr Lemos' creditors. It was therefore agreed between Joanna and the JTBs that (subject to leave of the court) Joanna would commence s.423 proceedings before 4pm on 28 December 2016, in order to ensure that the ARO in respect of the Property did not fall away, thereby preserving the status quo for the benefit of Mr Lemos' creditors as a whole.

17. The basis upon which the JTBs agreed to Joanna's application to the court for leave under s.424 IA 1986 was set out in a letter dated 15 December 2016 signed by the JTBs and Joanna. This provided, inter alia, by clause 3:

> 'Joanna Lemos agrees that in the event that the [JTBs] bring proceedings in their own name … pursuant to s423 of the Insolvency Act 1986 … and upon the [JTBs] giving 14 days written notice to Joanna Lemos:
>
> (a) she will (if requested to do so) consent to the substitution of the [JTBs] as claimant and/or applicant in place of her in respect of any proceedings in which she is advancing a claim under s.423;
>
> (b) she will (if requested to do so) consent to the [JTBs]' joinder as co-claimants or co-applicants or to the consolidation of the two actions;
>
> (c) she will (if requested to do so) discontinue any claim or application that she has issued under s.423'.

18. The letter of 15 December 2016 acknowledged that any recoveries by Joanna in the s.423 claim would be for the benefit of the creditors in the bankruptcy (as is in any event provided for in s.424(2) IA 1986). It also provided that Joanna would bear the

costs of the claim in the first instance and that any unrecovered costs would not bear the status of 'bankruptcy expenses' but could only be proved for in the bankruptcy.

19. Joanna's application for leave to bring s.423 proceedings was heard by Mr Murray Rosen QC (sitting as a Deputy Judge of the Chancery Division) on 20 December 2016. Whilst the hearing appears to have been relatively short and the application unopposed, it is clear from contemporaneous documentation in evidence before me that the learned Deputy was informed of the arrangements agreed between the JTBs and Joanna, as set out in the letter of 15 December 2016, before granting Joanna permission to bring s.423 proceedings. The agreed arrangements (and the circumstances which had given rise to the same) were summarised in the evidence in support of the permission application (comprising the witness statement of Mr Strong dated 16 December 2016), which exhibited (among other things) the judgment of the Court of Appeal and the letter of 15 December 2016. The agreed arrangements (and their context) were also addressed in the skeleton argument filed in support of Joanna's permission application, which included the letter of 15 December 2016 in a short list of recommended reading. The letter of 15 December 2016 was also expressly referred to in the recitals to the Deputy Judge's order as follows:

> 'AND UPON READING a letter from the Respondents' solicitors to the Applicant's solicitors dated 15 December 2016 (countersigned by the Applicant's solicitors on 16 December 2016 to indicate her agreement thereto)'

20. Overall, it is clear that Murray Rosen QC was content to grant permission to Joanna, knowing of the arrangements agreed between Joanna and the JTBs as set out in the letter of 15 December 2016 and the reasons for the same. Whilst the order granting permission was unconditional, its simplicity reflected the context in which it was made. It was a four-paragraph order. Permission was dealt with in one sentence.

21. The s.423 proceedings were issued on 21 December 2016. On 7 February 2017, a copy of the letter dated 15 December 2016 was provided to TLT LLP, the solicitors who were acting for the Defendants at the time. The Defendants have therefore been aware since 2017 of the arrangements agreed between Joanna and the JTBs with regard to the s.423 claim.

22. The Offshore Trustees served a defence dated 23 February 2017 which did not advance a positive case and stated that the Offshore Trustees intended to seek the court's directions as to how they should respond. The debtor's wife, Mrs Lemos, was joined as Third Defendant by an order dated 16 March 2017 which stated that the Offshore Trustees had decided to adopt a neutral position in relation to the Proceedings. The Third Defendant served her defence dated 12 April 2017.

23. Following the Court of Appeal decision in Shlosberg v Avonwick Holdings Limited, the JTBs applied for directions as to the use that could be made of certain potentially privileged documents that they had obtained from Withers ('the Withers documents') and an order for delivery up of other documents. An Order was made on that application by HHJ Hodge QC on 17 July 2017. He made declarations (inter alia) that

the JTBs were not entitled to make use of such of the Withers documents as were subject to privilege in such a way as to waive that privilege.

24. In the meantime, the existing parties to the s.423 claim had agreed a Consent Order, approved in June 2017, staying proceedings to await the outcome of the JTBs' application to HHJ Hodge. Following the decision of HHJ Hodge, the existing parties agreed a further Consent Order, dated 24 August 2017, which extended time for Joanna to serve her Reply to Mrs Lemos' Defence to 4pm on 12 September 2017. The Consent Order of 24 August 2017 went on to provide that further case management directions were to be given 'upon the application of the parties following service of the Reply'.

25. Joanna served her Reply on 11 September 2017. Notwithstanding the terms of the Consent Order of 24 August 2017, however, none of the existing parties to the s.423 claim applied for further case management directions following service of the Reply. Between September 2017 and spring 2018, there were settlement discussions between Joanna and Mrs Lemos. These settlement discussions concluded unsuccessfully in the spring of 2018. Since then, none of the existing parties has taken any further step in the proceedings.

26. Meanwhile, from August 2017 onwards, the JTBs have spent considerable time attempting to put satisfactory funding and insurance arrangements in place with a view to taking over conduct of the s.423 claim themselves. As explained in Mr Leeds' first witness statement, this proved to be a more difficult and protracted process than expected. By way of example, the first ATE insurer selected had to leave the market for a period at an advanced stage of negotiations, which meant that alternative ATE insurers had to be approached and the whole process of due diligence undertaken again. The second ATE provider selected was then unable to agree terms of funding with the original institutional funder selected, which meant that the JTBs had to look for an alternative ATE provider or funder. Other challenges encountered are set out in the evidence; in the interests of brevity I shall not list them all. In the event, it was not until December 2019 that the ATE cover was put in place and not until February 2020 that funding arrangements (involving Joanna and one institutional funder) were finalised. Once these were in place, the JTBs instructed their legal team to conduct a detailed review of the 23 boxes of hard copy documents held and undertook an in depth search for potentially relevant electronic documents. The pleadings were also reviewed and proposed amendments formulated. As confirmed at paragraph 28 of Mr Leeds' first witness statement, the document search and review exercise has been logistically more time-consuming since March 2020 owing to the advent of the Covid-19 pandemic. Following that exercise, in November/December 2020 the JTBs invited the Third Defendant to consent to their joinder. The Third Respondent declined to consent and accordingly the present application was issued on 29 January 2021.

**The parties' positions: overview**

27. The JTBs seek joinder as additional Claimants pursuant to CPR 19.2(2)(a) and/or (b). They maintain that, as the trustees in bankruptcy of Mr Lemos, they have a duty to get in the assets of Mr Lemos' estate for the benefit of all his creditors. Any recoveries made in the s.423 claim will be an asset of Mr Lemos' estate. They argue that they are

the obvious people to take the s.423 claim forward and that this was envisaged from the outset by the agreement reached with Joanna by letter of 15 December 2016. They say that, whilst it has taken longer than expected to arrange funding and insurance, they are now ready, willing and able to advance the s.423 claim through to conclusion by trial or settlement.

28. They say that they could bring their own proceedings without permission and require Joanna to discontinue hers, but seek joinder instead, in order to avoid any unnecessary duplication of work, thereby saving time and costs. They contend that joining them as co-claimants is consistent with the overriding objective.

29. They seek to be added as co-claimants, rather than to replace Joanna entirely, in order to minimise scope for potential complications which might otherwise arise with the ARO (which was obtained by Joanna), the cross-undertaking in damages (given by Joanna) and the costs in the proceedings to date which, depending on the ultimate outcome, could be the subject of an application against Joanna or in her favour.

30. Joanna supports the JTBs' joinder application. She also supports their approach on the issue of whether they should be added as co-claimants or replace her. She is content to hand over conduct of the claim to the JTBs, but wishes to remain a party to avoid any inadvertent consequences, such as those highlighted in paragraph 29 above. As put by Mr Robins on her behalf, 'the simplest route is to join the trustees in addition to, rather than in place of, Joanna. It is the cleanest way of getting to the real issues.' Joanna is content to be formally represented by the same solicitor and counsel team as the JTBs and for a direction to be given that the JTBs should have sole conduct of the proceedings.

31. The Offshore Trustees (the First and Second Defendants), who are not actively defending the s.423 claim, adopt a neutral position on the joinder application.

32. The Third Defendant opposes the joinder application but does not oppose the amendments proposed by the JTBs in the event that the Court is minded to order their joinder. The Third Defendant maintains that joinder should not be ordered as (1) the JTBs do not fall within the requirements for joinder under CPR 19.2(2) and (2) as a matter of discretion, the application should be refused as (i) it will impose an unfair additional costs threat on the Third Defendant (ii) is likely to result in the claim requiring more court time (iii) will adversely affect the creditors of Mr Lemos' estate on whose behalf the existing claim is brought and (iv) delay.

**Governing Principles**

33. CPR 19.2 provides inter alia as follows:

> 19.2(2) The court may order a person to be added as a new party if –
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the

> proceedings, and it is desirable to add the new party so that the court can resolve that issue.
>
> 19.2(3) The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.
>
> 19.2(4) The court may order a new party to be substituted for an existing one if –
>
> (a) the existing party's interest or liability has passed to the new party; and
>
> (b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings.'

**Submissions**

34. On behalf of the JTBs, Ms Weaver submitted that CPR 19.2 gives the court a wide general power to join parties where it is desirable to do so to further the overriding objective: Hounslow London Borough Council v Cumar [2021] EWCA Civ 1426 at [12]:

> 'In United Film Distribution Limited and Anor v Chhabria and Ors [2001] EWCA Civ 416 Blackburne J, with whom Lord Justices Aldous and Laws agreed, stated at paragraph 38 that the courts power to add or substitute a party is wide. In Davies and Ors v Department of Trade and Industry [2007] 1 WLR 3232 Waller LJ, giving the judgment of the court, said at paragraph 12:
>
> "Part 19.2 seems to provide a very wide power to enable parties who may be affected by a finding in any proceedings to be joined. That the power was intended to be wide is supported by the paragraph of the Practice Direction quoted by the judge in a passage of his judgment set out below [Practice Direction 19A: Addition and Substitution of Parties].The matter remains within the discretion of the court…"

35. Ms Weaver further referred me to Welsh Ministers v Price [2018] 1 WLR 738, in which Sir Terence Etherton MR stated (at [60]) that in considering whether it is desirable to add a new party under CPR 19.2(2),

> 'two lodestars are the policy objectives of enabling parties to be heard if their rights may be affected by a decision in the case and the Overriding Objective in CPR Part 1'

36. Ms Weaver submitted that the breadth of CPR 19.2(2)(a) was amply demonstrated by PDVSA Services v Clyde & Co [2020] EWHC 2322, in which Snowden J, when considering the circumstances in which a non-party (in that case the NCA) may be ordered to be joined as a defendant to proceedings, expressed the obiter view (at [34]) that CPR 19.2(2)(a) was broad enough to allow for the joinder of a person who has no rights that might be affected by the court's decision but whose presence before the court is desirable in the broader interests of justice and the overriding objective to enable the court to resolve the matters in dispute between the existing parties.

37. Ms Weaver submitted that the rights of the JTBs, as trustees in bankruptcy of Mr Lemos' estate, will plainly be affected by the outcome of the s.423 proceedings. She argued that:

(1) as the trustees in bankruptcy of Mr Lemos, they have a duty to get in the assets of his estate for the benefit of his creditors;

(2) any recovery made in the proceedings will be an asset of Mr Lemos' estate which the JTBs will have to deal with as part of their administration of his estate;

(3) they are the obvious people to prosecute the s.423 claim and are now able and willing to do so.

38. Ms Weaver also submitted that the joinder of the JTBs would assist the court in resolving the issues in the proceedings. The JTBs had conducted interviews with Mr Lemos and had carried out investigations into his affairs which the Court of Appeal had already acknowledged to be important elements of the s.423 claim.

39. Ms Weaver argued that the JTBs could bring their own proceedings without permission and require Joanna to discontinue hers, but seek joinder instead, in order to avoid any unnecessary duplication of work, thereby saving time and costs. She submitted that joining them as co-claimants is consistent with the overriding objective.

40. On behalf of the Third Defendant, Mr Elias opposed the Joinder Application. He referred me to Molavi v Hibbert [2020] EWHC 121 (Ch), in which HHJ Kimbell QC (sitting as a High Court judge) inter alia:

(1) emphasised that there is no inherent or general discretion to add a new party to existing proceedings (at [47]); and

(2) held that an order for joinder would only be made if it would further the overriding objective in the concrete circumstances of the case (at [50]).

41. Mr Elias maintained that permission should not be granted as:

(1) the JTBs do not pass the threshold for joinder under CPR 19.2(2) and

(2) as a matter of discretion the application should be refused, on the grounds that:

(a) it would impose 'an unfair additional costs threat' on the Third Defendant;

(b) it 'would be likely to result in the claim requiring more court time';

(c) it would 'adversely affect' the creditors of Mr Lemos' estate on whose behalf the existing claim was brought; and

(d) on grounds of delay.

42. On (1) (the question whether the JTBs pass the threshold test in CPR 19.2(2)(a)), Mr Elias proposed a narrow formulation of the threshold test. Relying upon Re Pablo Star [2017] EWCA Civ 1768 (at [47]-[48]), Mr Elias argued that the conditions of CPR 19.2(2)(a) to be satisfied were that:

(i) the new party can assist the court to resolve all the matters in dispute in the proceedings (which Sir Terence Etherton MR clarified, at [51], to mean 'in issue'); and that

(ii) it is desirable to add the new party to achieve that end (at [48]).

43. Developing that argument, Mr Elias then posed the threshold test for the court as: (1) can the JTBs assist the Court to resolve the matters in issue? and (2) is their joinder 'desirable'?

44. Mr Elias maintained that the JTBs did not meet the threshold test. He submitted as follows:

(1) The JTBs have not suggested that they have any claim that Joanna does not have;

(2) The JTBs have no personal, direct knowledge of any of the matters in dispute. They have no evidence to bring to bear other than what is derived from documents;

(3) The JTBs are on no better footing than Joanna in terms of their ability to bring the claim;

(4) It has been confirmed that, if joinder is permitted, the JTBs and Joanna will share representation. It followed that this was not a situation where the addition of a new party will bring any separate representation to advance a slightly different point of view ;

(5) Whoever brings the claim, the JTBs are entitled to all the fruits of the claim. As the major creditor in the bankruptcy, Joanna has an equally strong interest with the JTBs in making recoveries on the claim.

45. Mr Elias further submitted that the mere fact that the JTBs have an economic interest in the outcome of the claim (albeit a professional rather than a personal interest) is not enough in itself to justify joinder (even in a situation where such party is not seeking costs): Re LB Holdings Intermediate 2 Ltd (In Administration) [2018] EWHC 2017 at [22].

**Discussion**

46. I am not persuaded that in Re Pablo Star, Sir Terence Etherton MR intended to re-write CPR 19.2 (2) (a) in the manner suggested by Mr Elias. Sir Terence was dealing with an appeal and in that context addressed each of the two reasons which the judge at first instance had concluded justified the joinder of the Welsh Ministers under CPR

19.2(2)(a). In summary these were, first, that the court would be *assisted* by the Welsh Ministers on the issue whether the court had been seriously misled in granting the Restoration Order ([30], [32]- [33], [49], [58]); and second, that the Welsh Ministers were *directly affected* by the Restoration Order ([58]).

47. The guidance given by Sir Terence at [47] and [48] of his judgment must be read in that context.

48. At [52] Sir Terence went on to cite with approval Tuckey LJ in Blenheim at p574, stating:

> 'As Tuckey LJ said in Blenheim, at p574, the provisions of what are now CPR r 19.2(2) "are drawn in wide general terms to ensure that parties whose rights may be affected by a particular decision have a right to be heard".

49. Echoing the quoted passage, Sir Terence continued (at [60]):

> 'In considering whether or not it is desirable to add a new party pursuant to CPR 19.2(2) two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective in CPR Pt 1.'

50. On the facts of Pablo Star, the Welsh Ministers sought joinder to an application to restore a company to the register, in order to bring before the court a complaint (a) that the court had been misled in granting the order for restoration and (b) that the undertakings on which the restoration order had been granted had been breached. At first instance the court had granted joinder. An appeal against that decision had been allowed. The further appeal of the Welsh Ministers was dismissed.

51. Dealing with CPR 19.2(2)(a), Sir Terence confirmed (at [53]) that the judge at first instance was correct to conclude that the Welsh Ministers could assist the Court but (at [54]) was incorrect to conclude that their joinder was 'desirable'. Whilst, in an appropriate case, a third party could be joined to proceedings to bring before the court a complaint that the court had been misled or that there had been a breach of undertakings, he reasoned, ([77] and [91]), this was not an appropriate case, as (1) if the matter about which the court had been misled had been properly disclosed at the time that the restoration order was sought, the court would still have made the restoration order [81]; (2) the appropriate remedy for breach of an undertaking is committal for contempt, not a setting aside of the underlying order ([82] [83]); and (3) whilst, in an extreme case of misconduct, a breach of an undertaking may warrant the setting aside of the underlying order, this was not an extreme case of misconduct ([83]). In short, 'close consideration of the complaints about Mr Price's conduct shows that the Welsh Ministers, if joined, would not have any real prospect of succeeding in persuading the court that the Restoration Order … should be set aside' ([79]). It was for this reason that it was not 'desirable' for the Welsh Ministers to be joined under CPR 19.2(2)(a): ([88]).

52. Other cases have not approached the threshold test under CPR 19.2(a) as requiring active 'assistance', in the manner suggested by Mr Elias. In Re LB Holdings Intermediate 2 Ltd (In Administration) [2018] EWHC 2017 (Ch), for example, Mann J (at [10]) was content to treat both Limited and Deutsche Bank as falling within CPR 19.2(2)(a) 'in terms of their respective interests', adding:

> 'The economic interest that each of them has would be capable of justifying their joinder even if those economic interests are indirect (see Davies v DTI [2007] 1 WLR 3232 at paragraphs 12 and 13, and Nottingham City Council v Bottomley [2010] EWCA Civ 756). It is not conclusive against joinder that there is another party who might be capable of advancing the same arguments – PNPF Trust Co Limited v Taylor [2009] EWHC 1693 (Ch). Thus both applicants can establish the interest which they need in order to get their respective feet on the first rung of the ladder'.

53. It is clear from the foregoing passage that Mann J was satisfied that both Limited and Deutsche Bank met the jurisdictional threshold for joinder under CPR 19.2 (2)(a); in Mann J's words, both could 'establish the interest' which they needed 'in order to get their respective feet on the first rung of the ladder.' The key issue in LB Holdings was whether the court should, as a matter of discretion, order their joinder. As put by Mann J at [11]:

> 'The more significant question comes under the discretion imported by "may" in the rule. It is for each of them to justify their joinder by showing that they can, or might with sufficient certainty, be able to bring something to the party without at the same time imposing any unnecessary, unfair or disproportionate burden is on the other parties or the proceedings. The burden is on the applicants (see the White Book at paragraph 19.4.2)'.

**Conclusions on threshold test for CPR 19.2(a)**

54. In my judgment the JTBs clear the jurisdictional threshold for joinder under CPR 19.2(2)(a).

55. Whilst I accept that at present, the proceedings are, as Mr Elias put it, 'properly constituted' in the formal sense, the threshold test is not limited to what is necessary to ensure that proceedings are properly constituted. As noted by Ms Weaver, in the Lehman case, the claim had been properly constituted, and yet still Deutsche was joined. The language of CPR 19.2(2)(a) is that of 'desirability' not 'necessity'.

56. On the facts of this case, it is in my judgment plainly desirable to add the JTBs as new parties so that the court can resolve all the matters in dispute in the proceedings. The threshold test is met.

57. The legislature has recognised that in cases where the debtor (for the purposes of s.423(5)) is bankrupt, the official receiver or the trustee in bankruptcy are the most appropriate persons to bring s.423 proceedings. This is reflected in s.424(1) IA 1986, which requires all other persons wishing to bring s.423 proceedings to seek the leave of the court.

58. The JTBs have a clear and direct economic interest in the outcome of the proceedings. As the trustees in bankruptcy of Mr Lemos, they have a duty to get in the assets of Mr Lemos' estate for the benefit of his creditors as a whole. Any recovery made in the proceedings will be an asset of Mr Lemos' estate which the JTBs will have to deal with as part of their administration of his estate. They are the obvious people to prosecute the s.423 claim and are now able and willing to do so.

59. Whilst, for reasons already explored, I am not persuaded that it is necessary, in order to clear the jurisdictional threshold of CPR 19.2(2)(a), to demonstrate that the party seeking joinder can actively assist the court, on the facts of this case, I am satisfied that the JTBs *can* actively assist the court. It was they who conducted an interview with the debtor clearly considered by the Court of Appeal to be significant evidence in support of the s.423 claim. To the extent that the accuracy of records of that interview is disputed, the JTBs are better placed to deal with such disputes. In addition, the JTBs have dealt with the debtor over a prolonged period as his trustees and have carried out extensive investigations into his dealings, which enables them to provide evidence of his modus operandi generally and first-hand evidence on the obstructive approach which he adopted to their investigations. As acknowledged by the Court of Appeal, the manner in which the debtor conducted himself during the course of such investigations is of potential probative significance when the issue of 'purpose' (within the context of s.423) falls to be considered.

60. Whilst I accept that the JTBs could in theory assist the court on matters such as those outlined in paragraph 59 above as mere witnesses, when considering the circumstances of this case overall, it is plainly desirable for them to be joined as parties. As parties, the JTBs would be required to engage fully with the filing of written evidence and with the giving of disclosure, ensuring that all relevant evidence and documentation is before the court, and obviating any need for non-party disclosure applications.

61. The JTBs will also bring another perspective to the proceedings. As independent officeholders acting in the interests of all creditors, the approach which they adopt to the claim will differ from that of an individual victim seeking to enforce a judgment via s.423 proceedings, even if, under s.424(2), any s.423 claim is 'treated' as made on behalf of every victim of the transaction sought to be impugned.

62. The JTBs are 'arms-length' rather than family. As matters stand, there is in my judgment a fragility to the manner in which the proceedings are constituted. Whilst better than nothing, there is now a far more desirable option available. The fragility arises from the fact that the s.423 claim is currently being pursued by a single victim who is the sister of the debtor and the sister-in-law of the Third Defendant. As matters stand, Joanna could settle the claim with the offshore trustees and her sister-in-law on uncommercial terms and that settlement would bind the trustees. This would clearly

not be in the interests of the creditors as a whole, but there is nothing in the order of Mr Rosen QC to prevent it.

63. I accept that the court considered matters in 2016 and decided that Joanna was a proper person to bring the claim. In granting permission, however, the court was not deciding between Joanna and the JTBs; the application was unopposed and was brought on the express footing, made known to the court, that if able to arrange appropriate funding, the JTBs would apply to take over the claim or start their own and require Joanna to discontinue hers.

64. I also accept that Joanna's initial actions in expending upwards of £500,000 in pursuing judgment, a freezing order and an ARO against her brother and others and thereafter seeking permission to bring the s.423 claim do not, of themselves suggest that a family rapprochement is particularly likely. Nonetheless, as matters stand, it remains a theoretical risk and, as such, is one of the numerous factors which the court should take into account.

65. In this regard it is, in my judgment, pertinent to note that, after an unsuccessful attempt to settle the proceedings in late 2017/early 2018, Joanna has taken no active steps in the proceedings for three years. This benefits the debtor and the Third Defendant, who are in their seventies and occupy the Property as their home, but is clearly an unsatisfactory state of affairs for the creditors as a whole. Mr Elias submitted that the only reason for the delay was that Joanna was waiting for the JTBs to finalise insurance and funding arrangements. I reject that submission. There was no persuasive evidence before me that Joanna has deliberately deferred taking any further steps in the proceedings in order to wait for the JTBs. Moreover, the evidence filed on behalf of the JTBs, which in this regard was not disputed by the Third Defendant, confirmed that the JTBs had not asked Joanna to delay progressing the proceedings whilst they arranged funding. Whatever Joanna's reasons may be for taking no steps in the proceedings for the past three years, her inaction has not been at the request, still less the insistence, of the JTBs.

66. As independent office-holders, it is the JTBs' duty to press on with collecting in the assets of the debtor's estate. They have to take into account the interests of all creditors, not simply those of Joanna. Whilst Joanna, who is said to be of significant wealth, may be content to take her time over any recovery, safe in the knowledge that the ARO is in place, other creditors, who I am told total approximately £5 million in value, will no doubt wish to see this claim progress beyond close of pleadings and at a better pace. The JTBs, as independent office-holders under a duty to act in the interests of all creditors and to get in the estate, have greater motivation timeously to reach a commercial settlement and, absent settlement, expeditiously to pursue the claim through to judgment and enforcement.

67. Against that backdrop, with funding now in place, I am satisfied that the JTBs are likely to bring a renewed vigour to the proceedings and a different perspective. It is clear from the written evidence that the JTBs have worked extremely hard to put a funding and insurance package in place and since that time have required their legal team to undertake a thorough interrogation of the underlying documentation with a view to pressing on with the claim and seeing it through to judgment or settlement. This level of activity, undertaken ahead of knowing the outcome of any joinder

application, shows clear commitment to the case and is in marked contrast to Joanna's failure to take a single step in the proceedings for the past three years. The JTBs' actions and their evidence confirm that they are ready, willing and able to take the case forward.

68. Addressing the specific points raised by Mr Elias and referred to at paragraph 44 of this judgment in turn:

(1) *that the JTBs have not suggested that they have any claim that Joanna does not have*

As made clear by Mann J in Re LB Holdings Intermediate 2 Ltd (In Administration) [2018] EWHC 2017 (Ch) at [10],

> 'It is not conclusive against joinder that there is another party who might be capable of advancing the same arguments – PNPF Trust Co Limited v Taylor [2009] EWHC 1693 (Ch).'

(2) *that the JTBs have no personal, direct knowledge of any of the matters in dispute. They have no evidence to bring to bear other than what is derived from documents*

This is incorrect: see paragraphs 59 and 60 above.

(3) *that the JTBs are on no better footing than Joanna in terms of their ability to bring the claim*

I do not accept this submission: see paragraphs 59 and 60 above. Having carried out extensive investigations into the debtor's affairs and the underlying documentation, the JTBs, as office-holders from a well-resourced firm, are in my judgment in a much better position than Joanna, as an individual, to pursue the claim efficiently and with expedition, even allowing for the fact that Joanna has had the benefit of very able legal representation throughout. In this regard it should be recalled that it was the JTBs' work that turned Joanna's fortunes around in the Court of Appeal; they provided the fresh evidence admitted on appeal. The JTBs also have the advantage of ATE insurance, unlike Joanna. This will protect the estate if the claim is unsuccessful.

(4) *that it has been confirmed that, if joinder is permitted, the JTBs and Joanna will share representation. It followed that this was not a situation where the addition of a new party will bring any separate representation to advance a slightly different point of view*

In my judgment, for reasons already explored, the JTBs will bring a different perspective and renewed vigour to the proceedings. See paragraphs 61 to 67 above.

(5) *that whoever brings the claim, the JTBs are entitled to all the fruits of the claim. As the major creditor in the bankruptcy, Joanna has an equally strong interest with the JTBs in making recoveries on the claim*

Unlike Joanna, the JTBs are under a duty to get in the estate. Moreover, for reasons already explored, the timing of recoveries is likely to matter more to the JTBs than it does to Joanna. See paragraphs 61 to 67 above.

69. Naturally I remind myself of the 'two lodestars' identified by Etherton MR in Re Pablo Star at [60] when considering whether it is desirable to add a new party pursuant to CPR 19.2(2). In my judgment the policy objective of enabling parties to be heard if their rights may be affected by a decision is engaged in this case. Moreover, in my judgment it will further the overriding objective to join the JTBs as co-claimants. In considering the overriding objective, I take into account the matters addressed at paragraphs 57 to 68 of this judgment. I also take into account the following factors.

70. At the date of the hearing before me it was, in my judgment, open to the JTBs to require Joanna to discontinue her claim and to commence their own proceedings under s.423 instead. At the time of the hearing, the limitation period had not expired and under s.424 they did not require the court's permission to bring such proceedings. Joinder of the JTBs to these proceedings, rather than discontinuance and fresh proceedings, will avoid unnecessary duplication of work and save time and costs. In addition, (1) it will avoid satellite litigation on the impact of discontinuance on such matters as the ARO, the cross-undertaking in damages and costs; and (2) it is likely to discourage argument on the status of Joanna's permission to bring proceedings; a point currently taken in the Third Defendant's pleaded case. These are all relevant matters to take into account under CPR 1.1(2)(e) (ensuring that the proceedings are allotted an appropriate share of the court's resources, whilst taking into account the need to allot resources to other cases).

71. Mr Elias submitted that it would be an abuse of process for the JTBs to require Joanna to discontinue her claim and to commence their own proceedings. I reject that submission.

72. I acknowledge the guidance given in Muir Hunter on Personal Insolvency at 3-2959, which provides:

> 'Under this subsection, [s424(2)], any application for an order under s.423 is to be treated as made on behalf of every victim of the transaction. It follows, first that only one application under s.423 can be made in respect of any transaction; and, secondly, that the relief sought by the applicant must be to the benefit of all the victims of the transaction'.

73. In this case, however, there is no suggestion that the Third Defendant would be 'vexed twice' in two separate sets of proceedings. For the JTBs to require Joanna to discontinue her claim and to start their own proceedings would not involve re-litigation as there has been no ruling on the merits. The Third Defendant could not claim to be harassed by subsequent proceedings as the claim has not yet been determined. In this regard I respectfully agree with the observations of Simon LJ in the case of Michael Wilson and Partners Ltd v Sinclair and others [2017] EWCA Civ 3 at [48], where he said:

> 'It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris'.

74. Moreover even if I am wrong and there is, as Mr Elias contends, an argument to be had on whether the commencement of fresh proceedings would be abusive in the circumstances of this case, it is clearly a better use of court resources to order joinder. Joinder avoids the risk of satellite litigation on the issue of whether any fresh proceedings would be abusive; again, a factor to take into account when considering CPR 1.1(2)(e) (ensuring that the proceedings are allotted an appropriate share of the court's resources, whilst taking into account the need to allot resources to other cases: CPR 1.1(2)(e)).

75. Mr Elias went on to argue that the joinder of the JTBs would be unfair on the Third Defendant, as it would enable the JTBs to take advantage of a pre-April 2016 CFA, under which they could, if successful at trial, recover an uplift in their fees from the Third Defendant. He argued that permitting such an additional liability to be imposed would be neither conducive to saving expense, nor to ensuring that the parties are on an equal footing.

76. On instruction, however, Ms Weaver confirmed that the CFA would apply even if the JTBs started fresh proceedings. She also submitted that reliance on historic CFAs has not been outlawed, that the CFA will only apply prospectively to costs incurred by the JTBs following joinder and that the impact of the CFA will be subject to the controls of detailed assessment.

77. Given that the CFA would cover any fresh proceedings started, the Third Defendant is not in any worse position, in that sense, if the joinder order is made. I would add that, even if Mr Elias is right and the JTBs could not start fresh proceedings, the CFA would only be one of many factors to be considered. The CFA will only apply prospectively and only if the Third Defendant loses. In my judgment, any detriment caused to the Third Defendant by the CFA in the event that she loses the case is outweighed by the overall desirability and benefits of joinder.

78. Mr Elias also submitted that the joinder of the JTBs would be likely to add to the cost and expense of the litigation, arguing:

    (a) that the joinder application itself had increased costs;

    (b) that joinder would trigger the need for a further application in relation to the Withers documents;

    c) that the JTBs and their lawyers claim to have conducted nearly a year's worth of work on the s.423 claim prior to their joinder, at a time when carriage of the claim was formally with Joanna and her solicitors.

79. With regard to (a), as rightly noted by Ms Weaver, the costs of the joinder application would have been negligible had the Third Defendant consented to it when asked. It

was the opposition of the Third Defendant to the application that generated the need for a hearing spanning two days.

80. With regard to (b), I take into account the fact that HHJ Hodge has declared that the JTBs are not entitled to make use of such of the Withers documents as are subject to privilege in such a way as to waive that privilege. In this case, however,

(1) the JTBs are not proposing to introduce into the pleadings reference to any Withers documents not already in the public domain, having been referred to in the Court of Appeal and already specifically addressed in the pleadings, including the Third Defendant's defence; and

(2) when pressed, Mr Elias could not confirm that his client would not raise the issue of privilege even if Joanna remained sole claimant. There is therefore a possibility that the privilege argument will be run regardless of whether the JTBs are joined. This reduces the value of Mr Elias' argument on the issue of satellite litigation.

81. Mr Elias sought to argue that there would nonetheless be additional expense as, in the wake of HHJ Hodge's order, the JTBs would if joined need to apply back to court for directions as to whether they are able to rely on the Withers documents referred to in the pleadings. He argued that this would be an additional expense which could be avoided if joinder was refused. Given the wording of the declarations made by HHJ Hodge, however, the JTBs do not consider any such application to be required; they say that the documents relied upon in the pleadings are already in the public domain, having been referred to in the Court of Appeal: and that the Third Defendant must have waived any privilege she might otherwise have enjoyed by referring to such documents in her own defence.

82. Mr Elias argued that there was still the issue of Mr Lemos' privilege in the documents to consider. Mr Lemos, however, is not a party to these proceedings and Mr Elias does not act for him. Moreover, Mr Lemos was a party to the appeal heard by the Court of Appeal at which the Withers documents were considered and, as noted by Longmore LJ [judgment at [19]), did not invoke privilege.

83. In these circumstances it is hard to see how HHJ Hodge's declarations could bite, or trigger any need for the JTBs to apply back to court for further directions, on those of the Withers documents to which reference has already been made in the Court of Appeal and in the pleadings. Even if I am wrong, however, and the JTBs should later decide to make such an application, in my judgment any detriment arising in consequence of the additional expense of such an application is in my judgment outweighed by the overall desirability and benefits of joining the JTBs to these proceedings.

84. Mr Elias further submitted that if joinder was ordered, it should only be ordered on condition that references to certain Withers documents are excised from the pleadings and that the JTBs be required to apply for permission to use those documents. I reject that submission. There was no application before the court for excision from the pleadings of reference to given documents. I agree with Ms Weaver that it was not appropriate for Mr Elias to seek such relief by the back door. The joinder order will not of itself shut out the Third Defendant from running any arguments about privilege

that she may wish to run. If the Third Defendant wishes to take any point on privilege, however, she should issue an appropriate application at her own risk as to costs.

85. With regard to c), it is in my judgment highly unlikely that the JTBs will be able to recover against the Third Defendant costs which they incurred in connection with the case prior to their joinder. Even if I am wrong on that point, however, any issue as to whether and if so to what extent such costs can be recovered will be a matter to be dealt with on detailed assessment. There is no reason to think that the Third Defendant will be charged twice, or that any costs not reasonably incurred will be recoverable against the Third Defendant.

86. Mr Elias also argued that the involvement of the JTBs, their solicitors on a CFA, the ATE funder and the institutional and private funders, would be 'likely to make the claim much harder to settle, with the resultant increase in costs and need for court time'. In this regard he contended that:

(a) the ATE funder has a veto over settlement;

(b) whilst neither the CFA provider nor the institutional funder are said to have a veto, they are still likely to be consulted and have a view;

(c) the JTBs and Joanna may not agree;

(d) in any event, the claim is likely to be harder to settle because much larger sums are likely to be required to satisfy the funders as well as bring in a benefit for the creditors in Mr Lemos' bankruptcy.

87. With regard to (a), it was common ground that the ATE funder had a veto. By his second witness statement, Mr Leeds confirmed that having had significant experience of cases involving ATE insurers, the veto does not in his experience cause a problem; as commercial entities, ATE insurers tend to take a commercial view. The Third Defendant adduced no evidence to the contrary. On the evidence before me, whilst the existence of the veto is undoubtedly a factor to take into account, I do not consider the veto to pose a significant obstacle to the parties achieving settlement on commercial terms.

88. With regard to (b), in my judgment the CFA provider and institutional funder, as commercial entities, are likely to take a commercial view as well. In any event they cannot prevent a settlement.

89. With regard to c), Joanna has confirmed that if joinder is permitted, she is content for the JTBs to have sole conduct of the proceedings; they will be in charge.

90. With regard to (a) to (d), overall, I accept that the involvement of a number of parties may render settlement negotiations more complex. That is a factor to take into account. I do not, however, consider that it will stand in the way of a settlement on commercial terms. Moreover, when considering ease of settlement, a further highly pertinent factor to take into account is that the existing parties have had ample opportunity to settle the case already and have failed to do so. There has been no movement in the proceedings since 2018; a lengthy inertia for which the Third Defendant must take some responsibility as well as Joanna. It is only very recently, in

the context of this application, that the Third Defendant's solicitors have said that they will write to Joanna with a view to exploring settlement again; viewed in context, the timing of this gesture appears to be somewhat reactive. In contrast, the JTBs are under a duty to the creditors to act expeditiously. Their institutional funders, too, will abhor any 'drift' and will wish to achieve a timeous commercial outcome.

91. Mr Elias also argued that the joinder of the JTBs would be likely to result in a reduction of any sums available for the benefit of Mr Lemos' creditors. He argued that, if the claim succeeds, the ATE premium and the litigation funders will need to be paid; and that whether the claim succeeds or not, the JTBs would charge all their time costs dealing with the proceedings as an expense of the bankruptcy. At present, he argued, Joanna has agreed to fund the claim, and she is only able to prove in the bankruptcy for any unrecovered costs. Whilst Joanna has consented to the application, she was contractually required to do so under the terms of the litigation agreement of 15 December 2016. It followed that her consent could not be seen as representative of the creditors' interest generally. In this regard, Mr Leeds had stated that claims had been received for over £5 million from other creditors in the bankruptcy.

92. Notwithstanding Ms Weaver's arguments to the contrary, I am prepared to accept that the impact of joinder on the sums available for creditors of the estate is a factor to take into account; in my judgment, it is relevant when considering CPR1.1(2)(b) and (c). In this context, however, the creditors' own views and those of the office-holders are relevant. The consent and support of Joanna, as by far the largest creditor in the bankruptcy, cannot be discounted in the manner suggested by Mr Elias. Whilst, under the terms of the 2016 agreement, she is contractually required to consent to joinder, that does not undermine the importance of her consent: that she agreed to such terms in the 2016 agreement in the first place is a clear indication of her own views on the matter, as majority creditor. I was taken to nothing to suggest that any of the remaining creditors had any concerns about the JTBs being joined to the proceedings either. Moreover it is, as Ms Weaver contends, implicit in this application that the JTBs, as independent office-holders tasked with getting in the estate, consider their joinder to these proceedings to be in the interests of the creditors as a whole.

93. I accept that the JTBs' legal costs, to the extent that they are not recovered from the Defendants, will rank as an expense in the bankruptcy, whilst Joanna would only be able to prove as an unsecured creditor for any unrecovered costs. That is a factor to take into account, although it will not affect the Defendants. The time costs which will be incurred by the JTBs in connection with the proceedings are a further factor to take into account, although I note that the JTBs would inevitably be incurring time costs in connection with the proceedings even if they were not joined; as witnesses and in providing Joanna with information and documentation relevant to the same.

94. Whilst these factors must be taken into account, however, in my judgment they are significantly outweighed by the overall desirability and benefits of joinder.

95. In this context, CPR 1.1(2)(d) falls to be considered: ensuring that the case is dealt with expeditiously and fairly. The existing parties have taken no steps in the proceedings since 2018. In contrast, the JTBs are under a duty to get in the estate. As office-holders from a well-resourced firm, they are now in a much better position than

Joanna, as an individual, to pursue the claim efficiently and with expedition; see paragraphs 65-67 above.

96. The Court of Appeal has described the s.423 claim as 'well arguable'. If the proceedings are successful, a substantial asset will be recovered for the benefit of the bankruptcy estate. Given the lack of progress in the proceedings over the last three years, some creditors of the estate might be forgiven for viewing the real comparison as between something and nothing. It may be more expensive for the creditors to have the claim pursued by the JTBs, but it will get the job done.

97. Mr Elias went on to submit that the 'extraordinary delay' on the part of the JTBs militated against joinder, arguing as follows:

(1) The application had been made more than four years after the claim was first issued by Joanna. This should not give the court any assurance that the JTBs would move the claim forward with any vigour.

(2) The delay was 'even less excusable' against the background of the comments by, and the order of, the Court of Appeal, in which it was clearly envisaged that the claim should be prosecuted with expedition in light of the fact that the ARO had already been in place the almost 2 years, and was to continue until at least trial;

(3) Given the pause in Joanna's proceedings since early 2018, and the fact that Joanna was now one of the JTBs' funders, the court should infer that Joanna has deliberately put her claim on hold while waiting for the JTBs to put their house in order;

(4) If the intended intervention of the JTBs has resulted in a delay in progressing the claim of nearly 3 years, their joinder 'should be refused to discourage other officeholders from delaying claims likewise'.

98. With regard to (1), in my judgment the JTBs have set out in their written evidence a satisfactory explanation of the time it has taken for them to be in a position to seek joinder. The existing parties are not prejudiced by the delay as there has been no movement since close of pleadings in any event and, subject to some fairly minor amendments which are not opposed, the JTBs are content to adopt Joanna's existing pleadings.

99. With regard to (2), whilst the Court of Appeal was concerned to ensure that proceedings were issued without delay, they did not address or require expedited prosecution of the claim once issued: see the passage of the Court of Appeal's judgment quoted at paragraph 13 of this judgment. I would add that the JTBs were neither parties to the appeal nor responsible for the delay to date in prosecuting the s.423 claim.

100. With regard to (3) and (4), I repeat my conclusions as set out at paragraphs 65 to 67 above. The existing parties must take responsibility for the delay in any progress in the proceedings since 2018. It has been open to the Third Defendant at any time to make an application for directions in the proceedings with a view to moving matters forward. She has not done so and there is a complete absence of chasing correspondence. The only proper inference is that the Third Defendant has been quite

content to acquiesce in the delay to date. In context, her active opposition to the joinder application is telling.

101. Mr Elias further relied upon the JTBs' original consent to Joanna bringing the claim. That consent, however, was given on express terms which have already been considered. He also relied upon the confirmation given by the court in 2016 that Joanna was an appropriate person to bring the claim. That too has already been addressed.

**Discretion**

102. Mr Elias went on to submit that even if the threshold requirements of CPR 19.2(2)(a) were met, the joinder application should be refused on discretionary grounds. In this regard he relied on the arguments already addressed in this judgment when considering the overriding objective: see paragraphs 69 to 101 above. I repeat my conclusions on the individual points raised. I confirm that I have also taken all such arguments into account when considering whether to exercise my discretion in favour of joinder.

103. For the sake of completeness, I would add that I do not consider that the joinder of the JTBs will impose an unfair or disproportionate burden on the other parties to the proceedings. Joanna has agreed to the JTBs having sole conduct of the claim and there will be only one set of costs. Any detriment to the Third Defendant is outweighed by the overall desirability of joining the JTBs.

**Conclusions**

104. Having considered with some care the arguments raised by Mr Elias, for the reasons explored in this judgment:

(1) I am satisfied that the JTBs clear the jurisdictional threshold for joinder under CPR 19.2(2)(a); and

(2) I am satisfied that in the exercise of my discretion, I should order that the JTBs be joined as co-claimants in these proceedings.

105. In the light of my conclusions, it is unnecessary for me to address the alternative arguments run on CPR 19.2(2)(b).

106. I shall hear from Counsel on any consequential matters on the handing down of judgment.

**ICC Judge Barber**

**10 May 2021**