Neutral Citation Number: [2021] EWHC 1258 (Ch)

Claim No. CR-2020-003578

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

In the Matter of Nexbell Limited (Co Reg 0922 1066)
In the Matter of the Companies Act 2006

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 17 May 2021

Before :
JAMES PICKERING QC
(sitting as a Deputy High Court Judge)

- -

Between :

SUJATA CHOHAN **Claimant**

- and –

(1) JAYENDRA JANARDAN VED
(2) NEXBELL LIMITED **Defendants**

- -
- -

Timothy Calland (instructed by **VMA Solicitors**) for the **Claimant**.
Hugh Sims QC and **Richard Ascroft** (instructed by **Kapoor & Co Solicitors**) for the **Defendants**.

Hearing date: 8 December 2020

- -

JUDGMENT APPROVED

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii at 10.30 am on 18 May 2021.

James Pickering QC:

Part I: Introduction

1. The matter before me relates to a company called Nexbell Ltd (" the Company "). The underlying protagonists are two married couples: Paresh and Sujata Chohan, and Jayendra and Suchita Ved. The shareholding in the Company is owned as to 50% by

Mrs Chohan and as to the other 50% by Mr and Mrs Ved. At all times material to the present dispute, the sole director of the Company was Mr Ved.

2. In August 2020, Mrs Chohan brought a derivative claim (in other words, a claim on behalf of the Company) against Mr Ved. By this application, she now seek permission to continue that derivative claim pursuant to section 261(1) of the Companies Act 2006 ("CA 2006") .

Part II: The Background

The background to the underlying dispute

3. The background to the underlying dispute can be summarised as follows:

(1) In October 2008, Mr Ved began occupying (under a licence agreement) part of the property known as 5 Theobald Court, Theobald Street, Elstree WD6 4RN (" the Property "). The Property comprised office space and he did so for the purpose of carrying on his accounting practice.

(2) In June 2015, Mr Chohan needed office space from which to carry on his legal practice. As a result, Mr Ved allowed Mr Chohan - who he had known since childhood - to occupy part of the space within the Property which he himself was occupying.

(3) In about July 2014, Mr Ved became aware that the owners of the freehold of the Property [1] wished to sell the freehold. Mr Ved was interested in buying it. He mentioned it to Mr Chohan who was also interested. In due course, they agreed to set up a special purpose vehicle, which they would own equally, in order to buy the Property.

(4) Pursuant to the above, on 16 September 2014, the Company was incorporated. Initially, Mr Ved was the sole registered director. He also became the sole registered shareholder albeit subject to an understanding or agreement that 50% of the shareholding would be held for the benefit of Mr and/or Mrs Chohan.

(5) On 31 October 2015, the freehold owners granted Mr Ved a lease of the Property for a term of just under 5 years to 28 September 2020 (" the Original Lease "). The initial rent was £45,000 but rising to £48,000 and then £51,000 over the course of the term. Importantly, security of tenure under Part II of the Landlord and Tenant Act 1954 ("LTA 1954") was expressly excluded.

(6) Shortly after, on 12 November 2015, the Company bought the Property for £825,000. From this time, therefore, the Company became Mr Ved's landlord under the Original Lease.

(7) On 14 November 2015, Mr and Mrs Ved executed declarations of trust in favour of Mrs Chohan in respect of 50% of the shares in the Company.

[1] The Trustees of M & L Brenner (Merchants) Ltd Retirement Benefit Scheme

(8) In March 2016, Mr Chohan, who as stated above had been occupying part of the Property, relocated his legal practice to central London. It is clear that this frustrated Mr Ved who asserts that this was contrary to the understanding or agreement which had been reached between the parties that Mr Chohan would continue to licence or sub-licence his part of the Property from Mr Ved and thereby effectively contribute to the rent burden under the Original Lease.

(9) In about August 2016, Mr Chohan (who at all times represented Mrs Chohan in respect of her interest in the Company) and Mr Ved negotiated with a company called Success Appointments Ltd (" Success ") for it to take a sub-lease of part of the Property from Mr Ved (who, as stated above, now held the Original Lease). The terms of the proposed sub-lease were for a term of 5 years starting in October 2016 and expiring in October 2021. The term, therefore, was to last roughly a year longer than the term of the Original Lease which, as stated above, was to expire in September 2020.

(10) As a result, Mr Ved and Mr Chohan agreed that the Company would grant Mr Ved a new lease of the Property to bring it into line with the proposed sub-lease to Success. Following this, Mr Chohan prepared a first draft of a proposed further lease to Mr Ved. Under the terms of this first draft as prepared by Mr Chohan, the new lease would start immediately after the expiry of the Original Lease (in September 2020) and, although the end date was left blank, the intention was that it would expire shortly after the expiry of the proposed sub-lease to Success in October 2021. Otherwise, however, the terms of the first draft as prepared by Mr Chohan were materially the same as the Original Lease - including the express exclusion of security of tenure under Part II of the LTA 1954 .

(11) By late 2016, however, the relationship between Mr Ved and Mr Chohan had broken down. Mr Ved instructed new solicitors who, on his instructions, prepared an alternative draft of the proposed new lease. Under the terms of the draft as prepared by Mr Ved's new solicitors, rather than the new lease taking effect at the end of the term of the Original Lease, instead the new lease was to take effect straight away, thereby effectively replacing the Original Lease. More significantly, however, while the terms of this alternative draft lease were otherwise materially the same as the first draft prepared by Mr Chohan:

> (a) the provisions expressly excluding security of tenure under Part II of the LTA 1954 had now been omitted; and
>
> (b) it now included a rolling tenant-only break clause, allowing Mr Ved as tenant (but not the Company as landlord) to terminate the sub-lease at any time after the 5th anniversary of the commencement date.

(12) Following the above, on 9 December 2016, Mr Ved arranged - without the consent of Mr and/or Mrs Chohan - for the Company to grant to himself a new lease of the Property on the terms of the alternative draft lease as prepared by his solicitors (as opposed to on the terms of the first draft as prepared by Mr Chohan)

(" the New Lease ") [2] . In short, therefore, the New Lease did not contain the provisions expressly excluding security of tenure under Part II of the LTA 1954 and did include a tenant's only break clause. It is Mrs Chohan's case that by arranging for the New Lease to be executed on the above terms Mr Ved acted in excess of his authority such that the New Lease is void.

(13) Meanwhile, a separate dispute had broken out between the parties over the shareholding in the Company and in particular the declaration of trusts which Mr and Mrs Ved had signed in favour of Mrs Chohan back in November 2015. Proceedings were issued by Mrs Chohan, and on 11 December 2017 a declaration was made in her favour confirming that she was indeed the beneficial owner of 50% of the shareholding in the Company. Pursuant to that order, on 14 December 2017, Mr and Mrs Ved transferred 50% of the shareholding to Mrs Chohan, and Mr Chohan was appointed as a director alongside Mr Ved. In short, therefore, the Company's deadlock at both board and shareholder level was confirmed.

(14) In April 2018, further proceedings were issued, this time by Mr Chohan in his capacity as a director, for access to the Company's books and records. Within those proceedings, Mr Chohan then sought permission to issue a contempt application against Mr Ved - in other words, an application seeking to commit Mr Ved for contempt of court. In due course, the application to commit was unsuccessful (with costs being awarded against Mr Chohan) but the underlying application for access to the books and papers was successful (with costs being awarded against Mr Ved).

(15) On 30 June 2020, Mrs Chohan (through Mr Chohan's firm) sent a letter before action to Mr Ved in relation to a proposed derivative claim on behalf of the Company in relation to the (purported) granting of the New Lease. On 7 July 2020, Mr Ved's solicitors responded, denying liability on various grounds.

The procedural background

4. The procedural background can be summarised as follows:

(1) On 27 August 2020, Mrs Chohan issued a derivative claim on behalf of the Company by way of a Claim Form supported by Particulars of Claim. At the same time, she issued the present application for permission to continue pursuant to section 261(1) of the CA 2006 supported by a witness statement from Mr Chohan.

(2) On 14 October 2020, Zacaroli J considered the permission application on paper. He concluded that the matter did disclose a prima facie case for the purposes of section 261(1) and accordingly gave directions for the matter to be considered at an inter partes hearing.

(3) On 6 November 2020, Mr Ved filed and served his witness statement in answer to the permission application. On 20 November 2020 witness statements in reply were served on behalf of both Mr and Mrs Chohan.

[2] Two versions of the New Lease have been produced - one expiring in September 2021, the other in December 2021. For present purposes, at least, nothing appears to turn on this.

(4) On 8 December 2020, the hearing of the application for permission came on before me.

Part III: The Law

Introduction

5. Where a company has a cause of action which entitles it to claim a remedy, in general it will be for the company itself to bring any court proceedings to seek that remedy. In general, a shareholder cannot bring such a claim; the shareholder may be a part-owner of the company, but it is the company itself which owns, and has the right to pursue, the claim.

6. A derivative claim is an exception to the above general rule in that, in certain prescribed circumstances, a shareholder may bring a claim for the company to be granted the relevant remedy. The position was famously summarised by the Court of Appeal in Prudential Assurance Co Ltd v Newman Industries Limited (No.2) [1982] 1 Ch 204 at 210D-E as follows:

> "A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the `Rule in Foss v Harbottle' (1843) 2 Hare 461 when applied to corporations but it has a wider scope and is fundamental to any rational system of jurisprudence."

The first stage: consideration on paper

7. The substantive requirements for the bringing of a derivative claim are contained in Chapter 1 of Part 11 of the CA 2006 [3] . That Chapter sets out a two-stage process.

8. The first stage is effectively a filter whereby the court will consider the matter on paper and form a view as to whether the evidence discloses a prima facie case: CA 2006, section 261(2) . If it does not, the court will dismiss the application for permission there and then: CA 2006, section 261(2)(a) . If the court considers that it does disclose a prima facie case, it will give directions for a further hearing: CA 2006, section 261(3) , (4) .

9. In the present case, as stated above, Zacaroli J considered the matter on the papers and directed that it should be dealt with at the present hearing.

The second stage: the hearing

10. For those applications which survive the first stage, the second stage is an inter partes hearing at which the court will consider whether it should exercise its discretion to grant or refuse permission to continue the derivative claim. Section 263 of the CA 2006 contains two important sub-paragraphs which guide the court as to how its discretion should be exercised.

---

[3] For the procedural requirements, see CPR 19.9 and (as relevant to the present claim) CPR 19.9A

(a) the sub- section 263(2) requirement

11. The first important sub-paragraph is section 263(2) which (so far as relevant) provides (with underlining added):

> "(2) Permission... must be refused if the court is satisfied... (a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim..."

12. The reference to section 172 is of course a reference to section 172 of the CA 2006 which provides:

> "172 Duty to promote the success of the company
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to -
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company..."

13. As to how section 172 interacts with section 263(2)(a) , useful guidance was given by Lewison J in Iesini v Westrip Holdings [2009] EWHC 2526, [2011] 1 BCLC 498 who stated as follows:

> "85. As many judges have pointed out (e.g. Warren J in Airey v Cordell [2007] BCC 785, 800 and Mr William Trower QC in Franbar Holdings Ltd v Patel [2009] 1 BCLC 1, 11) there are many cases in which some directors, acting in accordance with section 172 , would think it worthwhile to continue a claim at least for the time being, while others, also acting in accordance with section 172 , would reach the opposite conclusion. There are, of course, a number of factors that a director, acting in accordance with s.172 , would consider in reaching his decision. They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and

> so on. The weighing of all these considerations is essentially a commercial decision, which the court is ill- equipped to take, except in a clear case.
>
> 86. In my judgment therefore... section 263(2)(a) will apply only where the court is satisfied that no director acting in accordance with section 172 would seek to continue the claim. If some directors would, and others would not, seek to continue the claim the case is one for the application of section 263(3)(b) . Many of the same considerations would apply to that paragraph too."

14. In short, therefore, if the court forms the view that no director acting in accordance with his or her duties under section 172 would seek to continue the claim, the court must refuse permission to continue the derivative claim. If, however, the above threshold is met, the court will go on to consider the various matters set out in the second important sub-paragraph, section 263(3) .

(b) the sub- section 263(3) factors

15. So far as relevant to the present case, sub- section 263(3) provides:

> "In considering whether to give permission (or leave) the court must take into account, in particular-
>
> > "(a) whether the member is acting in good faith in seeking to continue the claim;
> >
> > (b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;...
> >
> > (f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company."
> >
> > (c) Sub- section 263(3)(b) - section 172 (again)

16. As can be seen, once again consideration has to be given to the notional person "acting in accordance with section 172 " - and in particular the importance he or she would attach to continuing the claim.

17. As Lewison J said in the above quoted passage from Iesini , when considering what a person acting in accordance with their section 172 duties would do in relation to a potential claim, there are a number of factors to consider such as the strength of the claim, the size of the claim, the cost of bringing the claim, the risk of an adverse costs order, and the prospects of recovery if successful. It is clear, however, that of these various factors, the strength of the claim is of particular significance in the balancing exercise. It is perhaps for this reason that a number of authorities have expressed views as to how strong a case needs to be before permission to continue is granted and, in that context, the nature of the enquiry which the court ought to be undertake at this stage.

18. Again, a useful starting point is Iesini . Having referred to the first (on paper) stage where, as set out above, a claimant has to establish a prima facie case, Lewison J went

on to consider what was required at the second (hearing) stage. At [79], he said (with underlining added):

> "I do not consider that at the second stage this is simply a matter of establishing a prima facie case...as was the case under the old law, because that forms the first stage of the procedure. At the second stage something more must be needed ."

19. Lewison J then added:

> "In Fanmailuk.com v Cooper [2008] EWHC 2198 (Ch) Mr Robert Englehart QC said that on an application under section 261 it would be "quite wrong ... to embark on anything like a mini-trial of the action". No doubt that is correct; but on the other hand not only is something more than a prima facie case required , but the court will have to form a view on the strength of the claim in order properly to consider the requirements of section 263(2)(a) and 263(3)(b) . Of course any view can only be provisional where the action has yet to be tried; but the court must, I think, do the best it can on the material before it."

20. The above dicta were qualified slightly by Roth J in Stainer v Lee [2010] EWHC 1539 (Ch), [2011] BCC 134 who stated at [29]:

> "As regards the standard to be applied generally under section 263 , Lewison J held that something more than simply a prima facie case must be needed since that forms the first stage of the procedure; and that while it would be wrong to embark on a mini-trial the court must form a view on the strength of the claim, albeit on a provisional basis: see at [79]. It seems to me possible, with respect, that the court might revise its view as to a prima facie case once it has received evidence and argument from the other side, so the antithesis between section 261(2) and 263 may not be so stark..."

21. Importantly, however, Roth J then went on to hold that there was in any event no particular threshold to be applied. He said, again at [29]:

> "But in any event, I consider that section 263(3) and (4) do not prescribe a particular standard of proof that has to be satisfied but rather require consideration of a range of factors to reach an overall view. In particular, under section 263(3)(b) , as regards the hypothetical director acting in accordance with the section 172 duty, if the case seems very strong, it may be appropriate to continue it even if the likely level of recovery is not so large, since such a claim stands a good chance of provoking an early settlement or may indeed qualify for summary judgment. On the other hand, it may be in the interests of the Company to continue even a less strong case if the amount of potential recovery is very large. The necessary evaluation, conducted on, as Lewison J observed, a provisional basis and at a very early stage of the proceedings, is therefore not mechanistic."

22. The view that no particular threshold was to be applied was endorsed by Newey J in Kleanthous v Paphitis [2011] EWHC 2287 who said at [42]:

> "In the circumstances, it seems to me that the Court can potentially grant permission for a derivative claim to be continued without being satisfied that

there is a strong case. The merits of the claim will be relevant to whether permission should be given, but there is no set threshold" [4]

23. A further view on the approach to be taken was expressed by David Richards J in Abouraya v Sigmund [2014] EWHC 277 . At [53], he said:

> "The first requirement is that the claimant must demonstrate a prima facie case that the company... is entitled to the relief claimed. A prima facie case is a higher test than a seriously arguable case and I take it to mean a case that, in the absence of an answer by the defendant, would entitle the claimant to judgment. In considering whether the claimant has shown a prima facie case, the court will have regard to the totality of the evidence placed before it on the application."

24. Most recently, a useful summary of some of the above case law was set out in the judgment of Chief Insolvency and Companies Court Judge Briggs (sitting as a Deputy High Court Judge) in Saatchi v Gajjar (Triptych Logistics Limited) [2019] EWHC 3472 . At [29], he stated:

> "...although there is no threshold test, and the court should not conduct a mini trial, a claimant will need to satisfy the court that there is something more than a prima facie case, but not necessarily a strong case. In order to reach a conclusion as to whether permission should be given, the merits of the claim will be relevant. In this respect the nature of the inquiry is fact sensitive."

25. Drawing the above authorities together, it seems to me that the position in relation to section 263(2)(a) and section 263(3)(b) - and the approach to be taken by the court when considering the position of the notional director acting in accordance with his or her duties under section 172 - can be summarised as follows:

> (1) The strength of the proposed claim is important. While there is no particular threshold test, at the very least a prima facie case (which if unanswered would entitle the company to judgment) is required.
>
> (2) The strength of the proposed claim is not, however, determinative - there are other (often quasi-commercial) factors to be taken into account too. These may include (but are not limited to) the size of the claim, the cost of bringing the claim, the risk of an adverse costs orders, and the prospects of recovery if successful. For example, a claim which is very strong on the merits but where there is virtually no prospect of recovery may well fail to cross the line; a case which is weaker but of huge financial or other significance, by contrast, may well in the balancing exercise be able to cross that line.
>
> (3) In carrying out the above exercise, the court should not embark on a mini-trial. Instead, it should form a view on the basis of the evidence before it at the hearing - which is likely to be more than the evidence which was before the court at the time of the first (on paper) stage consideration.

(d) Sub- section 263(3)(f) - alternative remedy

---

[4] See also the opinion of Lord Reed in the Scottish case of Wishart v Castlecroft Securities Ltd [2009] CSIH 65 at paragraph 40 .

26. Before leaving the substantive requirements, I should also make brief mention of the factor to be considered as set out in section 263(3)(f) of the CA 2006 , namely:

> "...whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company..."

27. In short, therefore, the court is required to take into account the availability or otherwise of an alternative remedy. There is no limit to the type of alternative remedy which might come into play but in practice the issue often arises in the context of a potential alternative claim for relief under the unfairly prejudicial conduct provisions contained in section 994 of the CA 2006 .

28. As to this, in Mumbray v Lapper [2005] EWHC 1152 , HHJ Reid QC said:

> "In my judgment, the true position is that, while the availability of an alternative remedy is a factor, and may well be an extremely important factor, it is not an absolute bar and the fact that it is possible to point to some other alternative method of achieving the desired result does not mean that it is inevitably inappropriate for permission for a representative action to be continued..."

29. On the other hand, in the context of an application for permission to continue a derivative claim by a member who also has available to him or her the alternative remedy of presenting an unfair prejudice petition, as Lewison J pointed out in Iesini at [124]:

> "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 its costs, even if the claim is unsuccessful..."

Part IV: The Present Case

The sub- section 263(2)(b) requirement

30. Given the above analysis, it seems to me that I should start by considering the section 263(2)(b) requirement - in other words, whether I am of the view that no director acting in accordance with his or her duties under section 172 would seek to continue the claim.

(a) Mrs Chohan's basic case

31. Counsel for Mrs Chohan argues that the claim is a straightforward and obvious one. In particular:

> (1) The Original Lease expressly excluded the security of tenure provisions contained in Part II of the LTA 1954 . Mr Chohan's first draft of the New Lease similarly excluded those provisions. On Mr Ved's instructions, however, that express exclusion was omitted in the version of the New Lease which was ultimately executed at his instigation without the knowledge and consent of the Chohans. That omission was to the obvious detriment of the Company (which

now has its hands tied by a tenant with security of tenure) and was to the obvious benefit of Mr Ved. This, so it was argued, was a clear breach of Mr Ved's duties to the Company under sections 171(b) and 172(1) of the CA 2006 .

(2) Nor did either the Original Lease or Mr Chohan's first draft contain a tenants' break clause. On Mr Ved's instructions, however, the version of the New Lease which was ultimately executed did contain such a tenant's break clause. Again, such a clause was to the obvious detriment of the Company and to the obvious benefit of Mr Ved such that, again, this was a clear breach of Mr Ved's duties.

(3) Given that an agent has no authority to act other than for the principal's benefit, by procuring the execution of the New Lease on behalf of the Company on the above terms Mr Ved acted outside of his authority to bind the Company. Further, given that Mr Ved himself was the counterparty to the New Lease, no issue of apparent authority could have arisen. This being the case, so it was argued, the New Lease is void (alternatively, voidable).

(b) Mr Ved's first argument: lack of independent expert evidence

32. In answer, counsel for Mr Ved raised a number of arguments. First, they pointed to Mrs Chohan's failure to adduce independent expert evidence as to the loss (if any) suffered by the Company as a result of the New Lease being granted on the terms that it was. While in his evidence Mr Chohan had given opinion evidence as to rental yields and his view of the loss suffered by the Company, given that Mr Chohan was neither qualified nor obviously experienced to give such evidence (and clearly was not independent), such opinion evidence was, so it was submitted, unreliable and indeed inadmissible [5] .

33. This being the case, so it was argued, a person acting in accordance with section 172 would not seek to continue the claim. In circumstances where no independent expert evidence had been obtained to show whether the Company had suffered financial loss and, if so, how much, no director acting in accordance with his or her duties to promote the success of the Company would commit to expose the Company to such litigation. To do, so it was argued, would be potentially negligent, thereby exposing the director to liability.

34. In the context of what a reasonable director would do in the absence of expert evidence, I was referred to the case of Seven Holdings Ltd [2011] EWHC 1893 (Ch) where David Donaldson QC was of the clear view that as a result of various failings including the lack of expert evidence "no director seeking to comply with his section 172 duty would consider that it was appropriate for the company to prosecute" the relevant claims. I was also referred to Zavahir v Shankleman [2016] EWHC 2772 where John Baldwin QC carried out a risk to benefit analysis to assist in his assessment as to what a prudent director would do in relation to the proposed claim. In the present case, so counsel for Mr Ved argued, in the absence of independent expert evidence - and therefore any reliable material as to the potential loss and damage being suffered by the Company as a result of the New Lease - a prudent director simply could not sensibly carry out a meaningful risk to benefit analysis and, therefore, so it was submitted, would not embark on or continue Mrs Chohan's claim.

[5] See, for example, Re Colt Telecom Group plc (No 2) [2002] EWHC 2815

35. I have considered this argument carefully. Counsel for Mr Ved are no doubt correct to suggest that Mr Chohan's opinion evidence as to rental yields and as to loss generally is inadmissible. It seems to me, however, that this misses the point. The relief sought by the Company is - as can be seen from the Particulars of Claim - narrow and focused. The Company does not seek financial compensation. It merely seeks a declaration that the New Lease is void. On the face of it, so it seems to me, Mr Ved did act in ways which were to the detriment of the Company and for the benefit of himself and which therefore were, on the face of it, outside his authority. Proof of financial loss is not an ingredient of the claim and therefore the lack of independent expert evidence is, so it seems to me, of limited, if any, relevance.

36. Instead, so it seems to me, the claim is being brought for sound commercial reasons which are not readily measured in monetary terms. As counsel for Mrs Chohan explained, the effect of the New Lease remaining in place is to effectively tie the Company's hands as to what it can and cannot do with the Property - its sole asset. As things stand, on the expiry of the New Lease the Company would have little option but to negotiate with Mr Ved or force a renewal claim by serving the appropriate notice under the LTA 1954 . Aside from the obvious difficulties which (given that the Company is in deadlock) any such negotiation would present, the security of tenure given to Mr Ved would put him at significant negotiating advantage - something which would be to his benefit and to the Company's detriment. As for the only realistic alternative - forcing a renewal claim under the LTA 1954 - it seems to me that further potentially expensive and protracted litigation - would be, from the Company's perspective, far from an attractive prospect. By contrast, if the proposed claim is successful and the New Lease is declared to be void, the Company would be free to consider all of its potential management options in relation to the Property (letting the whole property, letting part of the Property, selling the whole Property, selling part of the Property etc) - something which would be to its obvious commercial advantage.

37. In short, therefore, this case - no doubt in contrast to both Seven Holdings and Zavahir - is not a case where expert evidence of loss or damage is required. If anything, given the narrow focus of Mrs Chohan's claim and the significant practical benefits which a successful outcome would bring (not least avoiding a LTA 1954 renewal claim) a risk to benefit analysis would suggest that a prudent director acting in accordance with his or her duties under section 172 would wish to continue the claim.

(c) Mr Ved's second argument: the current economic and property climate

38. A related albeit distinct point made on behalf of Mr Ved was that even if it was clear that he had acted in breach of duty and even if I were to form a view that any claim against him was a strong one, a prudent director acting in accordance with his or her section 172 duties would nevertheless not wish to continue the claim given the current economic climate and in particular the current landlord and tenant dynamic which, so counsel for Mr Ved told me, was very much a tenants' market. This being the case, so counsel for Mr Ved rhetorically asked, would a prudent direct wish to pick a fight with a paying commercial tenant?

39. The first difficulty with this argument, however, is that (to use his own argument against him) Mr Ved has adduced no independent expert evidence to support his

proposition. While in the post-pandemic world, I can understand the argument that a tenants' market may have emerged in certain types of property in certain locations, I have absolutely no basis for concluding that this is in fact the position in relation to a property such as the Property (office space) in a location such as the Property is located (non-central). Who is to say that office space away from central London is not now in demand? The reality is that, in the absence of expert evidence, I have no basis for forming a view as to the position either way.

40. The second difficulty is that this is not a claim for possession against Mr Ved. It is true that, if in due course the New Lease is held to be void, one of the options open to the Company would be to require Mr Ved to leave the Property; but, as counsel for Mrs Chohan explained, of all the options which would be open to the Company in the event of the proposed claim being successful, there is no suggestion that this is the option which the Company would in fact pursue. In any event, I certainly have no basis for concluding that the current economic and/or property climate is such that no director would wish to bring the present claim for the purposes of section 263(2)(a) .

(d) Mr Ved's third argument: agreement tantamount to security of tenure

41. A further argument advanced on behalf of Mr Ved was that, as set out in Mr Ved's witness statement evidence, the Company was effectively a quasi-partnership between the Veds and the Chohans and that, importantly, there was an understanding or agreement that Mr Ved would be entitled to occupy the Property indefinitely. This being the case, so it was argued, what Mr Ved had - even prior to the New Lease - was tantamount to security of tenure under Part II of the LTA 1954 in any event. In such circumstances, so it was argued, a person acting in accordance with their section 172 duties would not bring the present claim - either because it would be inconsistent with the above agreement or alternatively because it would inevitably lead to complex and hard fought litigation.

42. Again, I have considered this argument carefully but, again, I am not persuaded. Even if there was such an agreement, I cannot see how that would justify Mr Ved having unilaterally altered the terms of the New Lease. If the position was that he had the protection of the alleged agreement prior to the grant of the New Lease, then that would also have been the position if the New Lease had been granted on the terms which expressly excluded the security of tenure provisions under Part II of the LTA 1954 . Nor does this in any way explain the insertion of the tenants' break clause.

43. Nor, does it seem to me that the existence of the alleged agreement would provide a defence to Mrs Chohan's proposed claim - if there was a lack of authority, the grant of the New Lease would be void (alternatively voidable) in any event. If there was such an agreement as alleged by Mr Ved, that might entitle him to bring a claim in the event of a threatened or actual breach of the alleged agreement but, as counsel for Mrs Chohan has stressed, the present claim does not involve any attempt to remove Mr Ved from the Property - as stated above, the relief sought is tightly focused on the status of the New Lease.

(e) Conclusion as to the section 263(2) requirement

44. All in all, therefore, it seems to me that Mrs Chohan's claim is a strong one. In addition, however, it is also clear to me that, as explained above, this is a narrow and

focused claim which if successful would be likely to be of significant value (albeit not in clear monetary terms) to the Company while (given its narrow and focused nature) would involve only relatively limited costs and with relatively limited adverse costs exposure. It is also relevant, so it seems to me, that the Property is the sole asset of the Company and indeed its raison d'etre such that the bringing of the claim is needed to enable the Company to sensibly carry on the sole purpose for which it was incorporated.

45. Overall, therefore, I am far from satisfied that no person acting in accordance with section 172 would seek to continue the claim. This being the case, the sub- section 263(2)(b) requirement is met and I should go on to consider the various factors in section 263(3) .

The sub- section 263(3) factors

(a) Section 263(3)(b) : section 172

46. As explained above, one of the relevant factors is the importance that a person acting in accordance with section 172 would attach to continuing it. As to this, for the reasons given in the previous section, it seems to me that the notional prudent director would attach a significant amount of importance to the claim - particularly given its narrow and focused nature. As explained above, this is not just because of the apparent strength of the claim but also the various other quasi-commercial considerations referred to above.

(b) Section 263(3)(f) : alternative remedy

47. As explained above, it is Mr Ved's position that the Company was effectively a quasi-partnership between the Veds and the Chohans. That may or may not be the case. It is clear from the witness statements from both sides, however, that there are a number of issues between the parties relating to the management of the Company (including, but not limited to, the alleged agreement that Mr Ved could occupy the Property indefinitely). The issues between the parties are certainly of a sort often seen in unfairly prejudicial conduct petitions under section 994 of the CA 2006 . This being the case, when considering whether or not to grant or refuse permission to continue, I have to consider whether "the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company" - in other words, whether Mrs Chohan has an alternative remedy and, if so, what impact that should have in the balancing exercise which I have to conduct.

48. In my judgment, however, while there are issues between the parties which could perhaps be litigated by way of a 994 petition, I remind myself that I have to focus on the extent to which Mrs Chohan has an alternative remedy in relation to the particular "act or omission in respect of which the claim is brought". In the present case, the relevant act or omission is the procuring by Mr Ved of the granting of the New Lease on the altered terms. As stated above, that is a narrow and focused matter. The other issues between the protagonists are separate matters which do not have any obvious bearing on the discrete matter of the New Lease.

49. Moreover, as set out above, it seems to me that given its narrow and focused scope, Mrs Chohan's proposed claim could be litigated relatively quickly and inexpensively. To refuse her permission to continue that claim on the basis that she could instead bring a 994 petition would no doubt result in the issuing of wide reaching, protracted and expensive litigation - far wider, far more protracted and far more expensive in all likelihood than the present claim. That is not an attractive prospect for the Company and so, even bearing in mind the guidance of Lewison J in Iesini at [124] [6] , I am far from encouraged to refuse permission to continue Mrs Chohan's claim.

(c) Section 263(3)(a) : good faith

50. The final factor within section 263(3) which the parties have suggested may be of relevance is that contained within sub-paragraph (a), namely, "whether the member is acting in good faith in seeking to continue the claim".

51. In this context, it is suggested on behalf of Mr Ved that by seeking to continue the present claim Mrs Chohan and/or Mr Chohan are not acting in good faith. In particular, it is suggested that the present claim is the latest instalment of litigation initiated by Mrs Chohan or her husband against Mr Ved including of course the unsuccessful attempt to commit him to prison. The true motivation of the present claim, it is therefore suggested, is in fact to intimidate Mr Ved, expose him to costs and/or cause him vexation and distress.

52. This, of course, is a serious allegation. Having carefully considered the position, I reject it for the following reasons:

(1) The declaration of trust proceedings were successful. I therefore have no basis for concluding that they were not justified or otherwise motived by an ulterior purpose.

(2) The access to records proceedings were also successful. Again, therefore, I have no basis for concluding that they were not justified or motivated by an ulterior purpose.

(3) It is correct that the committal proceedings were unsuccessful. It does not follow, however, that the proceedings were motivated by an ulterior purpose. Applications are unsuccessful every day and it certainly does not follow that those who brought them were doing so in bad faith - even in high-stake matters such as committal applications. In any event, I have no basis for concluding that they were motivated by an ulterior purpose.

(4) Mrs Chohan's present claim is in any event a discrete matter which arises out of what appears prima facie to have been Mr Ved acting outside his authority and in breach of his duties to the Company. Certainly, I have no basis for concluding that it has been motived by an ulterior purpose or for any other reason than to right the apparent wrong which prima facie has been caused by Mr Ved's breach of duty.

53. In short, therefore, I have no basis for concluding other than that Mrs Chohan is acting in good faith in seeking to continue the claim.

(c) Conclusion on the sub- section 263(3) factors

---

[6] See paragraph 29 above

54. In conclusion, therefore, taking into account all relevant factors including in particular those referred to above, I am of the view that I should grant Mrs Chohan permission to continue the claim.

Part V: Indemnity for Costs

55. CPR 19.9E provides:

> "The court may order the company... for the benefit of which a derivative claim is brought to indemnify the claimant against liability for costs incurred in the permission application or in the derivative claim or both."

56. In Wishart at [71] Lord Reed said (with underlining added):

> "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."

57. Similarly, in Iesini at [125] Lewison J said (with underlining added):

> "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 ."

58. In the present case, I have decided that Mr Chohan should have permission to continue her claim on behalf of the Company. As explained above, I have done so for various reasons including that, in my judgment, a director acting in accordance with his or her duties under section 172 would attach importance to the claim - in other words, that the claim is for the benefit of the Company. On that basis - and consistent with the above authorities - it seems to me that the default position is that I should also order the Company to indemnify Mrs Chohan against any liability for the costs incurred in both the present permission application and in the underlying derivative claim itself.

59. One reason to depart from the above default position would be if the dispute was in fact a quasi-partnership dispute which, although brought in the name of the Company, was in reality brought for the benefit of the warring shareholders. In my judgment, however, this is not such a case. As set out above, despite the many issues between the Chohans and the Veds, the present claim is tightly focused and can properly be considered to have been brought for the benefit of the Company. In these circumstances, it seems to me that there is no good reason for me to depart from the above default position and that I should make an order for an indemnity pursuant to CPR 19.9E accordingly.

Part VI: Conclusion

60. In conclusion:

    (1) I will grant Mrs Chohan permission to continue the claim pursuant to section 261(4)(a) .

    (2) I will order the Company to indemnify Mrs Chohan against liability for costs incurred in respect of both the permission application and the underlying derivative claim generally pursuant to CPR 19.9E .

61. I invite counsel to prepare a draft order in the above terms for my approval. If the parties are unable to agree such terms, a short consequentials hearing can be arranged in the usual way.

62. Finally, I conclude by expressing my gratitude to all three counsel and their respective legal teams for the clear and helpful submissions made both in the skeleton arguments and orally at the hearing.