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Neutral Citation Number: [2023] EWHC 2153 (Ch)

Case No: BL-2022-001293

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

IN THE MATTER OF MILESTAR LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 8 September 2023

Before :

MR NICHOLAS CADDICK K.C.
(sitting as a Deputy High Court Judge)

- -

Between :

BETWEEN:

HITESH GANDESHA

Claimant

-and-

(1) NARENDRA GANDESHA

(2) AMIT GANDESHA AND VINESH GANDESHA

(as executors of SURENDRA KUMAR GANDESHA deceased)

(3) MILESTAR LIMITED

Defendants

- -

EDWARD KNIGHT (instructed by **Lawrence Stephens Solicitors**) for the Claimant
ANNA MARKHAM (instructed by **Charles Russell Speechlys LLP**) for the First and Second Defendants

Hearing date: 26 July 2023

- -

JUDGMENT

Nicholas Caddick K.C. (Deputy High Court Judge):

Introduction

1. This is an application by the Claimant ("Hitesh") made pursuant to s.261 Companies Act 2006 ("the 2006 Act"). In it, Hitesh seeks the court's permission to continue a number of derivative claims that he has made on behalf of the Third Defendant, Milestar Limited ("the Company") against the First Defendant ("Narendra") and the Second Defendant (Amit and Vinesh Gandesha, as executors of Surendra Gandesha ("Surendra")). Hitesh also seeks an order that he be indemnified by the Company in respect of the costs of the action.

2. On 9 November 2022, Adam Johnson J, being satisfied that there was a prima facie case for giving permission, gave directions for the Defendants to be made parties to the application and to be served with the relevant documentation. On 5 May 2023, Narendra filed a witness statement in answer to the application and Hitesh responded with his second witness statement on 28 June 2023.

Background

3. The Company was incorporated on 17 September 1982 and has, since 1987, traded as a dispensing chemist and perfumery under the name Silverfields Chemist from two locations in east London (Homerton High Street and Kingsmead Way).

4. Hitesh is a director of the Company and holds 25 of its 100 issued shares. It is common ground that he is and has always been responsible for the day to day management and trading of the Company.

5. Narendra is Hitesh's eldest brother. He was and remains a director of the Company and he also holds 25 of its shares. Initially, he had an important role in the Company. However, after an illness in 2014, his involvement appears to have been limited to dealing with its finances and bank accounts and banking its cash receipts, at least until around October 2017 when Hitesh took over that role.

6. As mentioned above, the Second Defendant (Amit and Vinesh Gandesha) are the executors of Surendra. Surendra was another of Hitesh's brothers. Until his

death on 13 April 2018, he too was a director of the Company but it appears that his role in the Company was always limited. He also held 25 shares in the Company and it seems that beneficial ownership of those shares has passed via his widow (Pushpa) to their son, Kartik.

7. The final 25 shares in the Company are held by Kirti Amlani, a sister of Hitesh, Narendra and Surendra. Kirti was also a director of the Company until 1 August 2018 when she resigned that post. It appears that, until 2017, she acted as the Company's superintendent pharmacist and that her appointment as director was because the Company was (at that time, at least) required to have a director who was a qualified pharmacist. Hitesh and Narendra both say that Kirti holds her shares on trust for them and Surendra's estate in equal one third shares, although this has not been confirmed by Kirti. For present purposes, the precise nature of Kirti's role in the Company and the basis on which she holds the shares are not issues which I am able to or need to resolve.

8. Sadly, since around 2016, there has been a series of disputes within the family. This has resulted in a great deal of litigation. On 13 July 2017, Narendra and Surendra presented a petition under s.994 of the Companies Act 2006 claiming that they, as shareholders in the Company, had been unfairly prejudiced by the conduct of Hitesh and Kirti. In the event, the claims against Kirti were dropped before trial and the claims against Hitesh were dismissed with, apparently, indemnity costs on 10 July 2019, after a 4 day trial before Insolvency and Companies Court Judge Jones.

9. Following the dismissal of the s.994 petition, there were various property disputes involving the family. One of these was a claim by the Company for a new lease after its lease of premises at 139, 143 and 145 Homerton High Street was terminated by Narendra and Homerton Holdings Limited (a company owned by Surendra's executors). On 6 May 2022, after another 4 day trial, the Company's claim was dismissed by His Honour Judge Monty QC. As a result, the Company's Homerton business now operates from only 141 Homerton High Street, premises of which it was held in the s.994 proceedings to be the beneficial owner.

10. A number of creditors' winding up petitions have been presented against the Company, all of which were eventually dismissed. In one of these, the petition of HFC Prestige Products Limited presented on 30 October 2018, Narendra and Surendra's executors appeared as supporting creditors and Hitesh's evidence is that he had to take an assignment of the petitioning creditor's debt in order to prevent the Company being wound up.

The present claims

11. The Claim Form for the present action was issued on 11 August 2022 and the accompanying Particulars of Claim set out four derivative claims made by Hitesh on behalf of the Company.

The bank mandate claim

12. The first claim is the so-called bank mandate claim against Narendra. Hitesh's case is that, in June 2018, he and Kirti (who was then still a director of the Company) were concerned that Narendra was abusing his position as a signatory of the Company's bank account and for this reason, on 14 June 2018, sent a notice by post calling a board meeting for 10 am on 18 June 2018 to consider a resolution to remove Narendra as a signatory.

13. Narendra denies that he had abused his position but accepts that, on 16 June, he received the notice. It appears that the notice did not specify the purpose of the meeting. However, it is common ground that there was a telephone conversation between Hitesh and Narendra on 16 June during which, Hitesh says, there was a discussion of the proposed resolution. Narendra's evidence is that during this call he informed Hitesh that he had a hospital appointment that would prevent him attending the proposed meeting and that, as a result, it was agreed that the directors' meeting would be rescheduled. Hitesh denies this. He asserts that Narendra's appointment was actually a GP's appointment at 9.15 am in the premises next door to the venue of the proposed directors' meeting. On this basis, Hitesh says that Narendra could attend the meeting after the appointment but that, in any event, Narendra had said that he would cancel his appointment in order to attend the meeting.

14. It is common ground that, in the event, the meeting went ahead on 18 June 2018 without Narendra in attendance and that the proposed resolution was passed by the votes of Hitesh and Kirti. It is also common ground that Narendra has refused to give effect to the resolution and that the bank will not action it without his consent. On this basis, the claim is for a declaration that the resolution was effective and for an order that Narendra do all such things as are necessary to put it into effect.

The cash claim

15. The second derivative claim which Hitesh seeks to bring is also against Narendra. It seeks repayment of some £120,246.34 of the Company's money which Hitesh claims has been retained by Narendra.

16. The background to this claim is that, from around 1983 until 17 October 2017, Narendra was responsible for banking cash received by the Company. Hitesh asserts that Narendra failed to bank all of the cash that he had received. This is denied by Narendra who states that, so far as he is aware, he banked all of the Company's cash given to him by Hitesh.

17. The sums claimed are set out in a Cash Summary document produced for the purposes of this action. This Summary shows an opening "total cash Balance" of £70,536.36 as at September 2015 and then monthly figures from September

2015 until 17 October 2017 for Cash Sales, Cash Expenses, Cash Holding after exp, Cash Banked, and Cash Balance giving rise to the final Cash Balance figure claimed of £120,246.34.

18. There is no evidence to support the opening figure of £70,536.36. However, the Summary states that that figure is "bal as per 31st aug 2015 accounts". Those were accounts which Hitesh says had been signed off by Narendra as a director. The 2015 Accounts as exhibited do not actually show this figure. However, it is possible that it would have appeared on a separate working sheet (not exhibited) prepared by the accountants in the course of producing the accounts and that the figure was then included with others in the overall "Cash at bank and in hand" figure of £1,193,338 that appears in the main body of the accounts (as exhibited).[1] In any event, in his witness statement, Narendra appears to accept that the figure of £70,536.36 is taken from the Company's accounts to 31 August 2015 albeit that he asserts that it "was simply an accounting entry and not physical cash in hand".

19. As regards the other figures in the spreadsheet for the period between September 2015 and 17 October 2017, Hitesh's evidence is that these were produced by the Company's bookkeeper from the Company's contemporaneous records and bank statements. However, those materials are not currently in evidence.

The directors' loan account claim

20. The third claim is the Directors' Loan Account Claim against Narendra and Surendra's estate. According to the Particulars of Claim, Narendra and Surendra's estate are indebted to the Company in the sum of £494,103.57, although I have not been able to reconcile that figure with the figures referred to in the evidence.

21. It is common ground that Narendra and Surendra maintained a director's loan account with the Company reflecting dealings between the Company and a grocery business which Narendra and Surendra ran in partnership under the name "Mini Market". In relation to this loan account, the Company's accounts for the year to 31 August 2015 show, under the heading "Related Party Disclosures", that "SM & NM Gandesha T/as Mini-Market" (in other words Surendra and Narendra) were indebted to the Company in the sum of £35,983 (the debt having been £62,982 in the previous year). However, in a separate sheet to the partnership's accounts for the year to 31 March 2015, the partnership's debt to the Company was shown as being £431,103.57.[2] Hitesh's evidence is that, despite requests, Narendra has failed to explain this

[1] Certainly, in preparing the partnership accounts referred to below, the same accountants had a separate sheet for the director's loan account figure which was then included in the overall "other creditors" figure contained in the main body of the accounts - see paragraph [21] below.
[2] Which sum was then included in the global "other creditors" figure of £432,491 which appears in the main partnership accounts.

discrepancy and on this basis he asserts that the figure of £431,103.57 was the true debt as at 31 March 2015.

22. Hitesh's evidence is that after March 2015 Narendra and Surendra borrowed a further £86,000 (net) from the Company. In support of this, he has produced bank statements showing that further payments totalling £186,000 were made by the Company to Narendra and/or Surendra against which he gives credit for a repayment of £100,000 made by the partnership on 9 December 2015.

23. In fact, on the basis of the bank statements produced by Hitesh, it would appear that the £186,000 was made up of:

    a. Payments of £50,000 made to Narendra and Surendra on 17 August 2017 and on 2 January 2018 – i.e. a total of £100,000;
    b. Payments of £15,000, £10,000 and £11,000 made to Narendra and Mrs KN Gandesha on, respectively, 4 February 2016, 8 September 2017 and 8 September 2017 – i.e. a total of £36,000; and
    c. A payment of £50,000 made to Surendra on 4 February 2016.

24. Therefore, on Hitesh's evidence, not all of the £186,000 was referrable to the pleaded claim which relates to a joint directors' loan account for Narendra and Surendra and it is difficult to tell where the pleaded figure of £494,103.57 comes from. However, on any basis, the directors' loan account claim would appear to be a substantial one even if (as pleaded) it is only in relation to joint loans to Narendra and Surendra.

25. In his evidence, Narendra argued that the directors' loan account figure of £35,983 set out in the Company accounts had been fully substantiated and had, indeed, been agreed by Shailesh Gandesha (another brother who had acted as the Company's bookkeeper) as being the correct figure as at 31 August 2015. He argued that the much higher figure referred to in the partnership's accounts to 31 March 2015 must have been an accounting error which the accountants subsequently corrected when they came to prepare the Company's accounts. It would seem, therefore, that Narendra accepts that there was a partnership debt of £35,983 as at 31st August 2015. It is unclear what he says the position was as at 31 March 2015.

26. As regards the claim to the further £86,000 lent subsequently, the evidence produced by Narendra confirms the position as regards the payments referred to in paragraph 23(a) and (b) above. However, it also shows that the payment of £50,000 referred to in paragraph 23(c) was actually a partnership loan rather than a loan to just Surendra. Narendra's evidence also identifies a further repayment by the partnership to which Hitesh did not refer, namely a payment of £50,000 made on 29 February 2016. On this basis, Narendra's evidence shows that the partnership debt did not increase after March or August 2015 in that the further sums paid to the partnership (£150,000) were matched by the total of its repayments (£150,000). It is unclear why there were any payments

to the partnership in this period given Narendra's assertion that the Mini Market had ceased trading in 2014.

The trust income claim

27. The final derivative claim which Hitesh seeks permission to bring is the Trust Income Claim. This is a claim for an account of any rental payments received by Narendra and Surendra (or his estate) in respect of 141 Homerton High Street. Those were premises which were registered in the names of Narendra and Surendra but which, as mentioned above, were found in the s.994 proceedings, to be held on trust for the Company.

28. Although the claim is for an account of all sums received by Narendra and Surendra, Hitesh's evidence is that he believes that, between November 1987 and 2008, the upstairs flat at the premises was let to Hackney Council at a rent of £140 per week giving rise to a total sum of £131,040.

29. Narendra's evidence is that, prior to 2008, the flat had been only sporadically let to asylum seekers and had been used by the Company for storage when it was not let – something he says that Hitesh conceded in the s.25 proceedings (at least for the period after some time in 2006). Moreover, Narendra claims that any income received had been far outweighed by the expenditure that he and Surendra incurred in relation to the premises in the belief that they were its owners. In this regard, he has produced some evidence of expenditure (including a letter from Hackney Council setting out council tax paid on the flat). He has not, however, produced any details of the sums that he says were received by way of rent. He says that, given the passage of time, he no longer has records for that period except for two tenancy agreements for 1992/3 and the early 2000s.

Issue estoppel/res judicata

30. It appears from the evidence that attempts have been made to raise each of these claims in the course of earlier proceedings between the brothers – with the bank mandate claim featuring in the s.994 proceedings and the other claims in the s.25 proceedings. However, it was accepted by Ms Markham (counsel for Narendra and Surendra's executors), for present purposes at least, that the claims had not been determined and that they were not res judicata.

The Law

31. It is common ground that each of the claims outlined above is in respect of a cause of action vested in the Company and is seeking relief on behalf of the Company. They are all, therefore, derivative claims within the meaning of s.260(1) of the 2006 Act. Accordingly, under s.260(2), they may only be brought where the court gives its permission on an application made in accordance with the procedure set out in Chapter 1 of Part 11 of the 2006 Act

or in pursuance of an order made by the court in proceedings under s.994 of the 2006 Act.

32. Under Chapter 1 of Part 11 of the 2006 Act, a member of a company who brings a derivative claim is obliged to apply to the court for permission to continue that claim and, under s.261 of the 2006 Act, there are two stages to such applications.

The first stage

33. As to the first stage, which is determined on the papers, s.261(2) and (3) provide that:

> "(2) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie claim for giving permission … , the court -
>
> (a) must dismiss the application, and
>
> (b) may make any consequential order it considers appropriate
>
> (3) If the application is not dismissed under subsection (2), the court –
>
> (a) may give directions as to the evidence to be provided to the company, and
>
> (b) may adjourn the proceedings to enable the evidence to be obtained."

34. Accordingly, under s.261(2), the court is concerned with whether there is a prima facie case *for giving permission.* The court at stage 1 must, therefore, have regard to the matters set out in s.263, which is entitled "Whether permission to be given" (see below).

The second stage

35. Assuming that the application discloses a prima facie case for giving permission, it can proceed to a hearing (the second stage) at which the court will decide whether (a) to give permission, (b) to refuse permission and dismiss the claim or (c) to adjourn the proceedings on the application and give such directions as it thinks fit (see s.261(4). In reaching its decision, the court must again take into account the factors set out in s.263.

36. There has been some debate as to the standard of proof required at this second stage. The notes to Civil Procedure (the White Book) state (at para.19.15.6) that the application is not a mini trial and that the standard of proof at this stage is "to show a prima facie case". However, in *Iesini v Westrip Holdings Ltd* [2009] EWHC 2536 at [79], whilst agreeing that it would be wrong for the court to

embark on a mini-trial, Lewison J commented that as a prima facie case was what was required at the first stage, "something more must be needed" at the second stage. See also *Wishart v Castlecroft Securities Ltd* [2009] CSIH 65 where, at [33], Lord Reed commented that, whilst at the first stage the court was required simply to determine whether there was a prima facie case for giving permission, at the second stage it had to determine whether actually to grant permission. Having said this, as Roth J noted in *Stainer v Lee* [2010] EWHC 1539 at [29], the apparent antithesis between s.261(2) and s.263 may not be so stark given that, at the second stage, the court's assessment is made not only on the basis of the evidence that was before the court at the first stage, but also taking into account any evidence filed since then, including evidence filed by the other parties, as well as those parties' submissions.

37. The need for the courts to avoid s.261 applications turning into mini trials is clear, particularly when it comes to forming a view of the merits of the underlying derivative claims. However, it is possible that there may be cases where the court might need to resolve specific issues of fact arising in relation to the factors set out in s.263.[3] In theory, it may be that this would require cross examination although in the cases to which I was referred (and indeed in the present case), the parties appear to have been content for the court to deal with the application on the basis of the written evidence alone.

Section 263 – matters the court must consider in deciding whether to grant permission

38. As set out below, s.263(2) provides for various situations where permission must be refused and s.263(3) sets out matters which a court must take into account in considering whether to give permission.

Section 263(2) – mandatory bars to the grant of permission

39. Under s.263(2):

> "(2) Permission (or leave) 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, or
>
> (b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or

[3] For example, whether the act complained of was or was likely to be authorised or ratified (s.263(b) and (c), s.263(3)(c) and (d) quoted below) and, probably, whether the applicant was acting in good faith (see s.263(3)(a), also quoted below).

(c) where the cause of action arises from an act or omission that has already occurred, that the act or omission–

(i) was authorised by the company before it occurred, or

(ii) has been ratified by the company since it occurred."

40. In the present case, s.263(2)(b) is not relevant and s.263(2)(c) does not apply as it is not suggested that the acts complained of have been authorised or ratified by the Company. I will, therefore, say nothing more about those provisions. However, as the Defendants (by whom, for the rest of this judgment, I mean Narendra and Surendra's executors) rely on s.263(2)(a), it is necessary to consider the significance of the reference there to s.172 of the 2006 Act.

41. So far as relevant, s.172 provides that:

"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…"

42. In *Iesini* at [85]-[86], Lewison J provided the following guidance as to the importance of s.172 in relation to applications under s.261:

"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."

43. In *Re Nexbell Ltd* [2021] EWHC 1258 at [14], James Pickering QC, sitting as a Deputy High Court Judge, quoted the above paragraphs from *Iesini* and went on to conclude that:

> "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)."

The matters to be taken into account – s.263(3)

44. Section 263 sets out certain matters that the court must consider in particular in deciding whether to grant permission. It states:

> "(3) 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;
>
> (c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be–
>
> (i) authorised by the company before it occurs, or

(ii) ratified by the company after it occurs;

(d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

(e) whether the company has decided not to pursue the claim;

(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.

45. The words "in particular" in s.263(3) show that this is not intended to be an exhaustive list of matters for the court to take into account. Further, as noted by Roth J in *Stainer* at [29], s.263(3) does not prescribe any specific standard of proof. Rather, it requires consideration of a range of factors to reach an overall view.

46. In the present case, s.263(3)(c) and s.263(3)(e) do not apply. Further, as it was accepted during the course of the hearing that it is not likely that the Company would ratify the acts giving rise to the claims summarised above, s.263(3)(d) is also irrelevant. The relevant factors are, therefore, those contained in ss.263(3)(a), (b) and (f).

47. Under s.261(3)(b) the court must have regard to the importance that a hypothetical director acting in accordance with s.172 would attach to continuing the derivative claim, bearing in mind the sort of matters referred to by Lewison J in the passage from *Iesini* quoted in paragraph [42] above. Significantly, s.261(3)(b) does not set any threshold as to the strength of the proposed derivative claim. In relation to this, in *Stainer* at [29], Roth J commented that:

> "…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."

48. Having reviewed the authorities, James Pickering QC, in *Re Nexbell Ltd* at [25], stated that:

> "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."

49. Turning to s.263(3)(f), this requires the court to take into account whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member (i.e. the claimant) could pursue in his own right rather than as a derivative claim on behalf of the company. As was made clear in *Iesini* at [123] and *Wishart* at [45], the existence of such a cause of action does not mean that permission for the derivative action must be refused. It is merely a factor that the court must take into account in deciding whether to give permission.

50. As appears from cases such as *Iesini* at [124], *Wishart* at [46], *Franbar* at [51] and *Nexbell* at [27], the alternative cause of action available to the member might be unfair prejudice proceedings under s.994 of the 2006 Act. In *Iesini* at [124]. Lewison J pointed out that such an alternative may well be preferable from the company's view point (because it would be a nominal party to such proceedings and would not in the normal course of events incur legal costs in relation to them) and he stated (at [126]) that, if he had not decided to adjourn the relevant claim, the existence of this alternative claim (in combination with the fact that, under a derivative action, the Company would in the normal course have to give an indemnity in respect of the costs) would have led him to refuse permission.

51. Despite this, in cases such as *Wishart* and *Nexbell*, permission to continue a derivative claim was granted even though the matters in issue could have been raised in s.994 proceedings. In *Wishart,* Lord Reed stated (at [46]) that the existence of this alternative cause of action did not seem to be a compelling reason to refuse permission given that it would be an indirect means to achieve what a derivative action would achieve directly and that an order for the buying

out of shares under s.994 was not an attractive remedy for the claimant and that the Company was not deadlocked and was, in fact, continuing to trade. Similarly, in *SDI Retail Services Limited v King* [2017] EWHC 737 at [83], Richard Millett QC commented that a s.994 petition would "not be the appropriate procedural vehicle for vindicating the Company's claims for wrongs allegedly done to it.

52. In *Nexbell*, one of the factors that led to the court giving permission to continue the derivative claim was that that claim had a narrow and focussed scope and that a claim under s.994 was likely to be far wider reaching, far more protracted and far more expensive (see at [49]).

The issues raised in the present case

53. The onus is, of course, on the claimant to satisfy the court that permission should be granted and, at first stage, Adam Johnson J was satisfied that Hitesh had established a prima facie case in that regard. Now, at the second stage, the Defendants assert:

    a. That permission must be refused because this is a case where no director acting in accordance with his duties under s.172 would continue the claims (s.263(2)(a)).

    b. That permission should be refused because:

        i. A director acting in accordance with s.172 would attach little or no importance to continuing these claims (s.263(3)(b));
        ii. Hitesh is not acting in good faith in seeking to continue the claims (s.263(3)(a)); and
        iii. The acts in respect of which the claims are brought give rise to a cause of action that Hitesh could pursue in his own right rather than on behalf of the Company (s.263(3)(f)).

54. Also in issue is whether Hitesh should have an indemnity from the Company in respect of the costs of pursuing these claims on behalf of the Company and, if so, on what terms. As appears from the passage from *Iesini* quoted at [42] above, the Company's exposure to a costs liability is relevant when considering the s.172 factors (s.262(2)(a) and s.263(3)(b)). However, given the significant body of case law in this regard, it is convenient to deal with this issue separately.

The present case – the s.172 factors

55. I will deal with s.263(2)(a) and s.263(3)(b) together as they both require the court to consider how a director acting in accordance with his duties under s.172 would regard the various claims.

The bank mandate claim

56. On the basis of the evidence, the Company's bank mandate claim is clearly an arguable claim. A meeting of the directors undoubtedly took place on 18 June 2018 and at that meeting the directors there present (Hitesh and Kirti) passed a resolution to remove Narendra as a signatory on the Company's bank mandate.

57. In his evidence, Narendra complains that he was not provided with an agenda or with an opportunity to take legal advice prior to the meeting. He also asserts that Kirti did not consult the persons for whom it is said she held shares in trust before she voted in favour of the resolution. The difficulty with these complaints is that they do not affect the validity of the resolution. There is no requirement to provide a director with an agenda or with an opportunity to take legal advice in advance of a directors' meeting. Moreover, even if Kirti was a trustee of the shares, her vote at the meeting was in her capacity as a director and not as a shareholder. Ultimately, in the absence of s.994 proceedings brought by Narendra (in which these issues could be raised), I do not think that these are matters that would lead a director acting in accordance with s.172 to decide not to continue the claim.

58. More relevant is Narendra's assertion that there had been an agreement to reschedule the meeting, something which Hitesh denies. This is not something that I am in a position to resolve. However, in my judgment, it cannot be said that no director acting in accordance with s.172 would continue the claim relying on Hitesh's version of events, especially given the finding of ICCJ Jones in the s.994 proceedings that Hitesh was a reliable and "an open and patently honest witness", whose evidence he preferred to that of Narendra whenever the two were in conflict. In my judgment, therefore, the bank mandate claim would be seen by a director as having a good chance of success.

59. Against this, Narendra argued that the claim is not a valuable one, particularly in view of the Company's potential costs exposure. It is clearly right that the claim has no direct financial value to the Company. On the other hand, Hitesh's evidence is that having Narendra as a joint signatory on the Company's bank mandate has led to delays in the payment of staff and of creditors and to considerable disruption. Narendra defends his actions saying that they were driven by genuine concerns over mounting debts, a lack of transparency as regards stock and possible mismanagement by Hitesh. These are also issues which I am not in a position to resolve. However, in my judgment, it is likely that a director acting in accordance with s.172 would take the view that it would be important for the Company to bring action to ensure that its bank mandate reflected the resolution and that control of the bank was in the hands of those who were responsible for the day to day management of the Company. It might be different if Narendra had sought to raise his concerns by way, for example, of fresh s.994 proceedings, but that is not the case.

60. Another issue raised by Narendra is that since the meeting in 2018 the Company has acquiesced in his position as a signatory and Ms Markham queries why, if Narendra's removal as a signatory is important to the Company, Hitesh does not call a new meeting. Mr Knight's response was that, since Kirti has now resigned as a director, a new meeting would be pointless as Hitesh and Narendra are the only directors. In any event, Hitesh's evidence is that he has always maintained that the resolution to remove Narendra had been validly passed and should be implemented and the fact that Narendra has continued to act as a signatory is simply because Narendra and the bank have refused to give effect to the resolution. Whether on these facts the Company would now be prevented enforcing the resolution is a matter that would have to be established at trial. For present purposes, I do not think that this would affect the assessment of a director acting in accordance with s.172 that the bank mandate claim was of importance to the Company and worth pursuing.

The cash claim

61. As regards the cash claim, it is common ground that Narendra is under a duty to account for any of the Company's cash in his hands. However, Narendra's case is that he had not retained any such cash and that there is a lack of documentary evidence to support the figure of £120,246.34 to which Hitesh refers.

62. As set out above, the opening figure of £70,536.36 as shown in the Summary is apparently supported by the 2015 accounts which had been produced by the Company's accountants and had been signed off by Narendra. Narendra says that that figure was "simply an accounting entry and not physical cash in hand" but without some better explanation (for example from the accountant), I do not think that this would cause a director to decide not to pursue a claim for what, on the face of it, would appear to be cash identified by the accountants which needs accounting for.

63. As regards the balance of the cash (£49,709.98) said to have been received by Narendra after August 2015, the Summary provides a detailed monthly breakdown of the Company's net cash position (based on non-card sales, less cash expenses) and of the shortfall between that figure and the figure for the sums banked (presumably by Narendra). It is true that the underlying documents to support this breakdown are not in evidence. However, given Hitesh's evidence that the Summary was produced by the Company's bookkeeper from the Company's contemporaneous records and bank statements, in my judgment, the court is entitled to conclude that a director acting in accordance with s.172 would take the view that there was a claim worth pursuing without feeling the need to conduct a mini trial as to whether the underlying documents supported the figures in the Summary.

64. I also bear in mind that the claim is for Narendra to provide an account in respect of the Company's cash that he had received and I do not accept the suggestion,

certainly at this stage of proceedings, that the claim is effectively an allegation of fraud requiring the supporting evidence to be of much greater cogency. In my judgment, there is sufficient evidence to suggest that a director, acting in accordance with s.172, would conclude that it was likely that some sums may be due to the Company and that the claim in this regard was worth continuing.

65. Another point relied on by Narendra is what Mr Knight refers to as the "tit for tat" allegations that Hitesh himself had taken money out of the Company when he needed it and the assertion that the sums banked by Hitesh after he took over that role in October 2017 have been much lower than those previously banked by Narendra. However, in my judgment, a director acting in accordance with s.172 would not see this as relevant to the Company's cash claim against Narendra and, in the absence of a formulated claim against Hitesh (for example as part of a s.994 petition), would be unlikely to see it as a reason not to pursue the Company's separate claim against Narendra.

The directors' loan account claim

66. As outlined above, there are clearly issues as regards the true value of the directors' loan account claim being made against Narendra and Surendra. In particular, it is difficult to ascertain where the pleaded figure of £494,103.57 comes from. Moreover, there appear to be good grounds for saying that the debt did not increase after March or August 2015 given that subsequent payments appear to have been matched by subsequent repayments. The claim, therefore, turns on whether the starting position was the £35,982.73 as shown in the Company's accounts to 31 August 2015 or some higher figure reflecting the £431,103.57 figure as shown in the partnership's accounts to 31 March 2015.

67. In my judgment, a director acting in accordance with s.172 would consider that the directors' loan account claim relating to Narendra's and Surendra's partnership debt was one that should be continued. In the first place, even on Narendra's case, there was a sum due of £35,982.73. In the second place, there is a clear chance (one worth pursuing) that the debt was actually greater than that. In this regard, if (as Narendra suggests) the accountants had realised that the much higher figure in the 2015 partnership accounts had been mistaken, one would expect to see some form of explanation and evidence of correction from the accountants and/or in the partnership's subsequent accounts. This has not been provided. In the absence of such an explanation and evidence, it would be perfectly understandable for a director to conclude that litigation to resolve the matter was justified, particularly given that it does not appear to be disputed that the smaller sum is in any event due.

68. I should note that, although HHJ Monty QC in the s.25 action commented that he suspected that the (smaller) figure £35,982.73 as stated in the Company's accounts was correct, I do not think that this would cause a director to abandon the claim for the higher figure. In particular, HHJ Monty made it very clear that he was making no findings of fact. He had also commented on Narendra's

failure to produce the partnership accounts in those proceedings and said that he assumed it was because those accounts did not support Narendra's position.

The trust income claim

69. The final claim is the trust income claim. As set out above, there are various uncertainties with regard to this claim concerning the number of lettings, the period of lettings and the level of expenses to be offset against the rental income. In my judgment, notwithstanding these uncertainties, a director acting in accordance with s.172 would regard the trust income claim as a claim worth pursuing – at least for the time being.

70. First, as appears from the facts summarised above, it is common ground that Narendra and Surendra are liable to account for any sums received by them which were referrable to the property at 141 Homerton High Street.

71. Second, it is also common ground that there were some lettings of the first floor flat in the property to asylum seekers, with the rent being paid by Hackney Council. Narendra asserts that the lettings were sporadic and that he retains only two copy tenancy agreements. Clearly, the passage of time will present some evidential difficulties. However, in my judgment, before accepting Narendra's assertions, a director would expect to see much better evidence that he had carried out proper investigations. For example, it would an obvious course of action for Narendra and Surendra's executors to ask the Council for details of rental payments that it had made to them in respect of the flat, particularly as Surendra had earlier approached the Council for (and had obtained from it) full details of council tax that he and Narendra had paid in respect of the flat. There is no evidence that such a request has been made and, in my judgment, a director would regard the failure of Narendra and Surendra's executors to provide such evidence as significant.

72. Third, whilst the period during which the flat was let is unclear (Hitesh says it was from 1987 to mid-2007, whilst Narendra appears to say was from 2000 to sometime in 2006), that goes only to the quantum of the claim as to which, as mentioned above, a director would regard the absence of information from Narendra and Surendra's executors as significant.

73. Fourth, whilst Narendra asserts that the expenses that he and Surendra had incurred in relation to the flat exceeded any income, a director would be unlikely to see this is a reason not to continue the claim given the limited material that has been produced as regards expenses and the absence of proper details of the rental income.

Conclusion on the s.172 factors

74. Before reaching a conclusion as regards the s172 factors, it is worth noting that Narendra, in his evidence, does not suggest that pursuing the claims would have an adverse effect on the Company (in terms of disruption or because the

Company would be unable to fund the proceedings). Nor does he suggest that he or Surendra's executors would not be able to satisfy a judgment in the event that the claims were to succeed.

75. As mentioned above, I will deal separately with the issue of the Company's potential liability by way of an indemnity for Hitesh's costs. Subject to that, looking first at s.263(2)(a), in my judgment for the reasons set out above, none of the claims is a claim that no director acting in accordance with s.172 would continue. On this basis, permission should not be refused under s.263(2)(a). As to s.263(3)(b), again, for the reasons set out above, in my judgment a director acting in accordance with s.172 would regard each of the claims as being a valid claim which the Company ought to pursue – either because it had or might well have some financial worth or (in the case of the bank mandate claim) because it was of practical importance to the Company.

76. In reaching this view, it seems to me that a director would take the view that the claims appear to be well founded and worth pursuing on the basis that the merits of pursuing the claims could be reviewed if and when Narendra and Surendra's executors provide better evidence of their defence to the claims.

Is Hitesh acting in good faith – s.263(3)(a)

77. The next factor to consider is s.263(3)(a) – whether Hitesh was not acting in good faith in bringing the claims. As appears from *Nexbell* at [52], the issue here is whether it can be shown that Hitesh had some sort of ulterior and improper motive in seeking to bring these claims.

78. The Defendants assert that Hitesh is not acting in good faith but, rather, that he is pursuing a series of interpersonal grievances which have already been the subject of several court applications. In support of this assertion, Narendra gives evidence of an angry voicemail sent by Hitesh on 24 July 2019 and in which Hitesh had said "What you have done here is fucking wrong… I am warning you, this is war now. You have started a war, I am going to fucking finish it".

79. I reject the argument that Hitesh is not acting in good faith. In the first place, the fact that minority shareholder has a grievance against other shareholders does not mean that bringing a derivative action in relation to a cause of action vested in the company and of the benefit of the company must be in bad faith. In the present case, the Defendants suggest that the fact that these claims have been raised in other court proceedings between the parties supports their allegation of bad faith. The difficulty with this is that, whilst the various claims have featured in other proceedings, no court has reached a final conclusion with regard to them. Indeed, as set out above, the Defendants have accepted, for present purposes, that the claims are not res judicata. In principle, therefore, there is no abuse in bringing an action in respect of the claims.

80. Hitesh's message was clearly unfortunate. However, he has expressed regret for it and he has explained that it was left at a time of high stress – with bailiffs having arrived to enforce an order for possession which Narendra and Surendra's estate had obtained against the Company, and shortly after judgment had been handed down by ICCJ Jones. Ultimately, it seems to me that, as set out above, the claims have sufficient merit to justify their being brought and the fact that Hitesh expressed anger at a very stressful time does not show that they have been made otherwise than in good faith.

Is there a cause of action that Hitesh could pursue in his own right – s.263(3)(f)

81. The final factor listed is s.263(3)(f) – whether the acts complained of give rise to a cause of action that Hitesh could pursue in his own right rather than on behalf of the Company.

82. I have found this a difficult point because it is clear that the various matters complained of are all capable of being raised in s.994 proceedings. I also bear in mind the point made by Lewison J in *Iesini* that, from the Company's perspective (as opposed to the shareholders'), s.994 proceedings may be preferable as it would be a nominal party. However, in considering the s.263(3)(f) factor, the court can look at more than just what is in the Company's best interests (as those interests would have been the focus when considering the s.263(3)(b) factor).

83. Looking at the case more broadly, I can see that s.994 proceedings might provide a means whereby the rival factions in this family could be separated (at least so far as the business of this Company is concerned) by means, for example, of an order for the buy-out of one side's shares or by a winding up order. Given the history of conflict, such a separation seems an attractive option. The difficulty I have is that neither side appears to want that course. Narendra and Surendra have already brought s.994 proceedings without success and have shown no particular inclination to go down that path again. Hitesh's evidence is that he wishes to continue with the Company and considers himself to be unable to afford to buy out the other parties' shareholdings.

84. Moreover, although the claims could be raised in s.994 proceedings, it seems to me that (as in *Leslie v Ball* [2023] EWHC 1771 (Ch) at [97]) pursuing them in a derivative action is the more natural and proper way and is likely to be less time consuming and less costly. Whilst I do not think that the claims are as "narrow and focussed" as those in *Nexbell* (at [49]), the bank mandate claim appears to be relatively confined and simple and the cash claim, directors' loan account claim and trust income claim may be resolved by information from the accountants or, as the case may be, from Hackney Council and, in any event, appear to require relatively little further input on the Company's side. In contrast, it seems to me that s.994 proceedings would inevitably become more complicated and time consuming - particularly given that in such proceedings the value of the parties' shareholding is likely to be important.

Indemnity

85. Another factor in deciding whether to grant permission is whether the Company would have to give Hitesh an indemnity in respect of his costs of the derivative action and, if so, the nature of that indemnity.

86. Hitesh's application is that the court makes such an order, pre-emptively at this early stage in the action, that he is entitled to an indemnity in respect of his costs up to and including the trial, and not merely his costs up to a certain stage in the action. He does not, for the present at least, seek a "pay as you go" order (i.e. order that the Company pays the costs as and when he incurs them). Accordingly, this judgment does not address the basis for making such an order and whether there is a difference of approach between Walton J in *Smith v Croft* [1986] 1 W.L.R. 580 at p.597D and Lewison J in *Iesini* at [124] (see also Peter Knox KC in *Leslie* at [84]).

The authorities

87. The starting point with regard to an indemnity in respect of a claimant's costs in relation to a derivative claim is CPR r.19.19. This provides that:

> "(1) 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.
> (2) If the claimant seeks an order that the defendant company … indemnify the claimant against liability incurred in the permission application or the claim, this should be stated in the permission application or claim form or both."

88. Interestingly (and contrary to the Claimant's submission in the present case), CPR r.19.19 does not require the issue of the indemnity to be resolved at an early stage (such as at the same time as the permission application). It simply requires a claimant who seeks an indemnity to state that that is the case in the application for permission and/or in the claim form.

89. Having said that, in *Iesini* at [125], Lewison J stated that:

> "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."

However, as set out below, the position is somewhat more complex than simply saying that where a court is satisfied that permission should be given, it should also then make an order for an indemnity (i.e. pre-emptively) rather than leaving the issue to be determined after the trial of the claims.

90. As noted in several of the cases to which I was referred, the Court of Appeal's decision in *Wallersteiner v Moir (No.2)* [1975] QB 373 was the origin of CPR r.19.19 and, indeed, of the current practice governing applications for permission to continue derivative actions. In *Wallersteiner*, the Court made an order that a minority shareholder bringing an action on behalf of a company was entitled to be indemnified for his costs because the action was being brought on behalf of the Company. Moreover, that was the case even if the action were to fail. However, the premise on which this order was appropriate was that the minority shareholder had reasonable grounds for bringing the action. It was for this purpose that the court proposed a procedure whereby the minority shareholder could apply for the sanction of the court to bring the action. The fact that the court had sanctioned the action, would allow the minority shareholder to say that he had acted reasonably and that he should, therefore, be entitled to his costs. See Lord Denning MR at pp.391-392 and Buckley LJ at pp.403E-405A.

91. A problem with such a procedure is that, in many cases, the court at the permission stage will not have the full facts. To make an unlimited order for an indemnity at that stage would present difficulties if, subsequently, further facts were to emerge or the circumstances were to change such that it was no longer reasonable for the derivative action to continue and/or for the claimant to have an indemnity. This could be because further evidence had come to light undermining the claim or because the situation of the parties had changed (for example, because the defendant had become insolvent) in a way that would make continuing the action pointless. In such a case, as appears from the comments of Buckley LJ in *Wallersteiner* at p.404, if the case was viewed post-trial, the indemnity could only cover the claimant up to the time of that change. For this reason, in his comments on the suggested procedure for seeking the court's sanction for the derivative action, Buckley LJ (at p.404-405) envisaged that, in deciding whether a claimant should be authorised to proceed with the action, the court should also consider "to what stage he should be authorised to do so without further directions from the court".

92. This point was also discussed by the Scottish Court of Session in *Wishart*. There, having referred to *Wallersteiner*, Lord Reed referred (at [56]) to the Court of Appeal's decision in *McDonald v Horn* [1995] I.C.R. 685. *McDonald* was a case where the beneficiary of a pension fund wished to bring an action for the benefit of the trust. Hoffman LJ accepted that the *Wallersteiner* approach was appropriate but went on (at p.700) to comment that:

> "The judgment of Walton J. in *Smith v. Croft* [1986] 1 W.L.R. 580 contains a useful reminder of the dangers of too easily making orders which allow minority shareholders to litigate at the cost of the company."

On this basis, as Lord Reed noted, Hoffman LJ had:

> "… approved an approach whereby, rather than granting a blanket indemnity to cover the whole of the future litigation, the court made an indemnity order covering only a particular stage of the litigation, on the basis that the matter would be reviewed at the end of that stage."

93. In *Wishart*, Lord Reed went on, at [59]-[61], to state:

> "59. A shareholder who is given leave by the court to raise derivative proceedings under section 265[4] does so "in order to protect the interests of the company and obtain a remedy on its behalf". *Ex hypothesi*, the court has decided, after considering a range of factors including the shareholder's good faith, that it is reasonable that he should raise the proceedings in the interests of the company and on its behalf. Unless leave has been given on a staged basis, however - that is to say, unless leave is granted on terms which enable the court to keep under review the reasonableness of the continuation of the proceedings - the court cannot presume that it is necessarily reasonable that the shareholder should continue with the proceedings after raising them. The apparent strength of the shareholder's case may diminish, for example, as more becomes known about the relevant facts; or a reasonable offer in settlement may be made. Since the shareholder is seeking a remedy on the company's behalf, he ordinarily falls within the scope of the general principle which we have discussed, and is entitled to be indemnified by the company in respect of liabilities and expenses reasonably incurred in the interests of the company; but, *prima facie*, it cannot be predicted whether any particular liability or expense incurred in connection with the derivative proceedings should be the subject of such an indemnity.
>
> 60. We have said that the shareholder raising derivative proceedings "ordinarily" falls within the scope of the relevant principle because the court's power to grant leave on terms enables it to impose terms which modify or exclude the application of that principle. It is possible to conceive of circumstances in which the court might hesitate to grant leave if the effect of doing so were to require the company to indemnify the member even if the proceedings proved to be unsuccessful. An example of such circumstances might be a case where the shareholder had ample means and the company was impecunious (as, for example, in the Australian case of *Carpenter v Pioneer Park Pty Ltd* [2004] NSWSC 1007). It would be open to the court to grant leave in such a case on a basis which protected the company's position: for example, by limiting the extent of any indemnity to the amount, if any, which was recovered by the company as a result of the derivative proceedings.
>
> 61. In general, however, we have no difficulty accepting that a shareholder who is the pursuer in derivative proceedings is, for the purposes of

[4] The Scottish equivalent to s.260

> expenses, in an analogous position to that of a trustee or an agent, and that the court should therefore, in appropriate circumstances, order that he should be indemnified by the company in respect of his own expenses, to the extent that they are not recovered from other parties to the derivative proceedings, and in respect of any awards of expenses which may be made against him in favour of other parties to those proceedings."

94. Lord Reed then turned (at [62]), to how the issue of the indemnity should be decided and he indicated that it would be more appropriate for this to be done within the leave (permission) proceedings than within the derivative action. This does not mean, however, that the decision on the indemnity needs to be made once and for all at the time that permission is given. Indeed, it is clear that Lord Reed had in mind that the permission proceedings would remain live (presumably using the power to adjourn under s.261(4) or, in Scotland, s.266(5)). In this regard, he stated that:

> "It is in those proceedings, in particular, that an assessment can best be made of whether there has been a material change of circumstances since leave was granted, such that it has ceased to be reasonable that the derivative proceedings should be continued at the company's expense. The judge in the leave proceedings can discuss more freely the merits of the derivative proceedings while those proceedings are ongoing, and can take into account matters, such as an offer in settlement, to which the judge in the derivative proceedings could only have regard after those proceedings had been concluded. It is also possible to conceive of circumstances in which it might be appropriate to make an order in relation to an indemnity which was not related to any award of expenses, or any specific procedural step, in the derivative proceedings: the shareholder might, for example, run out of funds and require to be indemnified in order to continue (as in *Wallersteiner v Moir (No.2)* and *McDonald v Horn*).

95. Lord Reed went on to consider more fully the position as regards an order for an indemnity for expenses which have yet to be incurred (i.e. a pre-emptive order). At [68], he concluded that:

> 68. If a finding is to be made, at the stage when leave is granted, as to the shareholder's entitlement to be indemnified in respect of liabilities and expenses which may be incurred in the future, the terms in which the finding is made should reflect the fact that there is a limit to the extent to which the court can assess, in advance, the reasonableness of his having incurred any particular liability or expense, and therefore the appropriateness of an indemnity. The dangers of the court's writing a blank cheque for the shareholder as to the amount of expenses which he can incur in the derivative proceedings are obvious. That has a number of implications. **First, the court must be satisfied that it is necessary for such an order to be made prospectively, rather than the shareholder's**

> **entitlement to indemnification being considered after the expenses have been incurred**. We do not however doubt that there may in appropriate cases be compelling reasons for finding the member entitled to be indemnified at the stage when leave is granted: in particular, as Buckley LJ explained in *Wallersteiner v Moir (No.2)* at page 399, minority shareholders may require the assurance of a prospective order so that they are not deterred from bringing derivative proceedings, where such proceedings ought to be brought, by the risk of incurring not only their own expenses but also a liability for the expenses of the defenders. **Secondly, in cases where a prospective finding is appropriate, it makes sense for such findings to be made on a staged basis**: that is to say, a finding can be made in respect of liabilities and expenses incurred up to a specified stage in the derivative proceedings, reserving leave to the shareholder to apply in the leave proceedings for a further finding once that stage has been reached. The appropriate stages will depend upon the circumstances….
>
> Although it may be desirable that the member should be able to embark on the derivative proceedings in the confident expectation that he will be indemnified against outlays and liabilities which have been reasonably incurred, the court cannot definitively prejudge the question whether all his future outlays and liabilities have been so incurred. A reasonable offer in settlement, for example, might be made at any time, rendering the further prosecution of the derivative proceedings unreasonable. Even if leave were granted on a staged basis, the possibility of a material change of circumstances occurring during the intervening period could not be excluded. For these reasons, it appears to us that a prospective finding that the shareholder is entitled to be indemnified should not be unconditional, but should reserve leave to the company to apply for the finding to be modified in the event of a material change of circumstances." (**emphasis added**).

96. The court in *Wishart* had in mind, therefore, that where a pre-emptive order is made for an indemnity, such order could (probably should) be limited to the costs up to a particular stage in the proceedings[5] *and* that, even in the period before that stage is reached, the defendant could apply to have the order modified if there had been a material change in circumstances. I would add that the receipt of a reasonable offer in settlement is not the only material change of circumstances that might render the further prosecution of the derivative proceedings unreasonable and/or lead to the removal or limitation of the indemnity. As appears from earlier in Lord Reed's judgment (at [59]), the emergence of new evidence which undermines the strength of the derivative claim could also be a material change. Ultimately, the entitlement to an indemnity rests on whether it is (and remains) reasonable for the claimant to be bringing the action on behalf of the Company.

[5] In *Wishart* it was until the procedural hearing in the derivative proceedings, .

97. The significance of *Wishart* was recently considered by Peter Knox KC in *Leslie*. His conclusion, at [74], was that:

> "74. In short, although *Wishart* upheld the general principle that a minority shareholder should have a costs indemnity from the company after trial when he has properly brought a claim in the company's interest, it did not hold that he should, either of right or even normally, be granted a pre-emptive indemnity to this effect …. On the contrary, it appears to have suggested a test, for a pre-emptive order, that such order should be "necessary" (see paragraph 68, recited above). Although the specific context in which this was said was whether an order should be made at the same time as permission to sue is granted, there is nothing to suggest that a different principle is supposed to apply at a later pre-trial stage of the proceedings".

98. I agree with that conclusion. I would only add that in *Wallersteiner* and in *Wishart* (at [68], as quoted above), it was envisaged that the necessity for a pre-emptive indemnity order might arise from the fact that, without it, a minority shareholder might be discouraged from bringing a derivative action for the benefit of the company by the risk of personal liability in costs.

99. Another case discussed in *Leslie*, was *Bhullar v Bhullar* [2016] B.C.C. 134 where, at [69], Morgan J stated that:

> "69. The later authorities show that the court should exercise considerable care when deciding whether to order a pre-emptive indemnity. The court should have a high degree of assurance that such an indemnity would be the proper order to make following a trial on the merits of the claim. In the present case, Jat will plead a defence of limitation to the claim to recover the payments made to Torex. Inder will allege that Jat was dishonest. I have held that Inder has shown a prima facie case of dishonesty but the claim might fail. If it emerges at the trial that Jat was not dishonest and an order for costs is made in favour of Jat against Inder, it is not obvious that in all cases the trial judge would award Inder an indemnity in relation to the adverse order for costs. Similarly it would not be obvious in such a case that Inder should have an indemnity for his own costs. Conversely, if the claim succeeded and Jat was held to have been dishonest, then Inder could expect to obtain an order for costs against Jat and an indemnity from the relevant company in relation to any reasonably incurred costs which for some reason were not recovered from Jat. Inder would have that expectation even without the certainty which he would have pursuant to a pre-emptive order for an indemnity."

100. In the event, Morgan J refused to make a pre-emptive order for an indemnity two reasons. First, because he could not be satisfied that there was a high degree of assurance that, at trial, an indemnity would be the proper order and, second,

because he considered that there was a prospect of an unfair prejudice petition being brought by the claimant in respect of the issues raised in the derivative action so that giving the claimant a pre-emptive indemnity would be giving him an unfair advantage over the defendants.

101. As to the first of these reasons, in *Leslie* at [113]-[114], Mr Knox KC agreed with the "high degree of assurance" test applied by Morgan J, pointing out (as Buckley LJ had done in *Wallersteiner* and Lord Reed had done in *Wishart*) that there would be cases where, at the time that permission is granted, there is considerable room for debate as to the strength of the derivative claim and, therefore, whether the company would be called on to provide an indemnity after trial. Where there is a lesser degree of assurance, a pre-emptive indemnity may well be inappropriate even if, on the facts, the claimant is given permission to pursue the derivative claim.

102. Turning to the second of Morgan J's reasons. In *Wishart* at [69]-[71], Lord Reed rejected the argument that an indemnity should be refused in a case where the claimant and defendant were both shareholders and where the effect of the indemnity would be that the defendant would indirectly be funding the litigation against himself, even if that litigation failed. Lord Reed concluded that, where the court has decided that a shareholder should be permitted to bring an action in the interests of the company, it follows that he is in principle entitled to be indemnified. The position may, however, be different if, as in *Leslie*, s.994 other proceedings were already on foot involving the same allegations (see per Peter Knox KC at [104]). See also *Bhullar* where, as discussed in *Leslie* at [105], the results of the derivative claim were likely to be used in later s.994 proceedings. In such cases, because the derivative claim was not being used simply for the company's benefit, but might operate to enhance the minority shareholder's position in the s.994 proceedings, the court whilst giving permission for the derivative claim to continue, refused to make a pre-emptive order for an indemnity.

103. A somewhat different approach was adopted in *Iesini* at [126] where, in relation to a trust claim which in his view was a strong claim, Lewison J commented (obiter) that if he had not already adjourned this aspect of the application, he would have refused permission on the basis that to give permission would mean that the company would have a potential liability under an indemnity for the costs and because the matters in issue could give rise to s.994 proceedings as an alternative remedy. In other words, he was proceeding on the basis that if he were to grant permission in that case, it was likely that, with it, he would make an order for an indemnity (see the passage from his judgment quoted at [89] above).

104. Finally, I should mention *Nexbell* in which James Pickering QC at [55]-[59], having quoted the passage from *Iesini* set out in [89] above, gave the claimant permission to pursue the claim and ordered the company to indemnify him against costs "of both the permission application and the underlying derivative

claim generally". He does not seem to have been asked to consider the possible impact of changes of circumstances on either the giving of permission or the indemnity and, in particular, whether the permission and indemnity could be granted on a staged basis.

The present case

105. In the present case, on behalf of Hitesh, Mr Knight submitted that some sort of indemnity is inevitable and that a pre-emptive order for an indemnity is appropriate on the basis that pre-emptive orders "normally" follow the grant of permission and that cases like *Leslie* and *Bhullar*, where such an order was refused, are distinguishable because, in those cases, s.994 proceedings were already on foot or were likely, whereas in the present case, they are not.

106. Against this, Ms Markham submitted that, even if permission was granted for the derivative claims to continue, the issue of an indemnity should be determined after the trial of those claims. She argued that an order for a pre-emptive indemnity was not necessary and that, given what she characterised as the weak merits of the claims, the court could not be satisfied with a high degree of assurance that, after trial, an indemnity would be considered appropriate. There is, she argued, a risk that to order an indemnity would cause an injustice. In the alternative, she submitted that, if an indemnity is granted, it should be limited either by way of time or quantum – particularly in view of what she says are the high level of costs already incurred by Hitesh.

107. In my judgment, in the present case, some sort of indemnity is inevitable. In the first place, this is not a case where there are existing or a clear likelihood of s.994 proceedings being commenced on the same facts. Second, this is a case where Adam Johnson J concluded at the first stage of this application that there was a prima facie case for permission. Third, on the basis of the evidence as it appears at this second stage and subject to the issue of an indemnity, I am satisfied that this is a case where a director acting in accordance with his duties under s.172 would regard these claims as being important and where, therefore, permission should be granted. Fourth, there is some truth in Mr Knight's submission that the defendants have not, as yet, done much more than join issue on the merits of the claims (except as regards the bank mandate claim). For example, in the earlier property action, HHJ Monty QC had commented (unfavourably) on Narendra's failure to produce the partnership accounts, yet Narendra has still not produced those accounts. Accordingly, as matters stand, it seems to me that Hitesh's actions in bringing the claim (and making the current application for permission) are reasonable and that there is a high likelihood that, at the end of the trial, he would be awarded an indemnity in respect of his costs. It also seems to me that an indemnity is necessary in this case in order that a minority shareholder such as Hitesh is not discouraged from bringing this action for the benefit of the Company.

108. I am, however, very conscious that the current position might change (particularly in relation to the cash claim, the directors' loan claim and the trust income claim) if Narendra and Surendra's estate were to file evidence dealing more satisfactorily with the claims. If this were to happen then, even if Hitesh's conduct in relation to this application and the action has been reasonable so far, that evidence may mean that it would cease to be reasonable for him to proceed with the action and/or that it would no longer be appropriate for him to do so with the benefit of a pre-emptive order for an indemnity from the Company. In such event, the court could not be satisfied to a high degree of assurance that a court in the future, post-trial, would think it appropriate to grant an indemnity for future costs.

109. On this basis, on the facts before me and taking into account all of the factors set out in s.263, I have decided that the appropriate course is that suggested by Hoffman LJ in *McDonald* and Lord Reed in *Wishart* and (see paragraphs [92] and [95]-[96] above), namely, to give Hitesh permission to continue the claims and to order that he has a pre-emptive costs indemnity but only for a limited period. In my judgment, the appropriate limitation is up to the time when witness statements are exchanged as it seems to me that in this case that is the stage at which the merits of the defence are most likely to be apparent. At that stage, the parties and the court will have a fuller view of whether it would be beneficial to the Company to continue the action and whether the action is being pursued for that reason or for Hitesh's own interests. It seems to me that, at that point, Hitesh should return to court by application within this permission application, as envisaged by Lord Reed in *Wishart* at [62] (see paragraph [94] above), so that a further decision can be made as to whether the permission and indemnity should be extended, for example, to trial.

110. Of course, as indicated above, if before the exchange of witness statements the Defendants believe that there has been a material change in circumstances, it would be open to them to apply to court seeking to modify or rescind the orders for permission and/or an indemnity before that date.

Conclusion

111. For these reasons:

a. Subject to (c) below, I propose to give the Claimant permission pursuant to s.261(4)(a) of the 2006 Act to continue the derivative action.

b. Again, subject (c) below, I propose to order pursuant to CPR r.19.19(1) that the Company is liable to indemnify the Claimant against liability for costs incurred to date in the permission application and in the derivative action.

c. The above permission and indemnity be limited to the period up to and including the exchange of witness evidence in the derivative action.

d. Subject to the above, the application for permission and for an indemnity be adjourned with liberty for:

    i. The Claimant to apply for an extension of the grant of permission and/or of the order for an indemnity;
    ii. The Defendants to apply to vary or revoke the above grant of permission and/or order for an indemnity on the basis of a material change in circumstances.

112. I ask the parties to prepare a draft order reflecting the above and given such further directions as they think appropriate for the future conduct of the derivative action.