Neutral Citation Number: **[2023] EWHC 308 (Ch)**

Case No: BL 2019 001698

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

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

Date: 14 February 2023

Before :

HHJ JOHNS KC
Sitting as a Judge of the High Court

- -

Between :

(1) BOSTON TRUST COMPANY LIMITED
(2) BOSTON FIDUCIARY MANAGEMENT LIMITED
(as trustees of the Erutuf Trust and shareholders in Tellisford Limited)

Claimants

- and -

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

Defendants

- -

MR MATTHEW PARFITT (instructed by **Osborne Clarke LLP**) for the **Claimants**

MR ADRIAN PAY (instructed by **Francis Wilks & Jones LLP**) for the **Fifth, Seventh, Eighth, Ninth** and **Tenth Defendants**

MR ULICK STAUNTON (instructed by **Thomson Snell & Passmore LLP**) for the **Sixth Defendant**

Hearing dates: 15-30 November 2022
Written submissions: 5 December 2022

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APPROVED JUDGMENT

This judgment is handed down by email to the parties' representatives and release to The National Archives at 10.30 am on Tuesday 14 February 2023

HHJ JOHNS KC:

A. Introduction

1. This is, in substance, a dispute between two men. Mr Earl Krause and Mr Gordon Verhoef. They knew each other at school in South Africa. They surfed together. And then went into business together as long ago as 1960. They established successful businesses in South Africa, and later in England. Very sadly, they have fallen out in their later years. The men are now in their 80s. There has been a failed mediation. Negotiations at the start of trial also bore no fruit. These proceedings launched in 2019 must now be determined.

2. In form, the proceedings are a multiple derivative claim. The Claimants, Boston Trust Company Limited and Boston Fiduciary Management Limited (together **Boston**), as trustees of a family trust established by Mr Krause and known as the Erutuf Trust (**Erutuf**), complain on behalf of three operating companies of breaches of director's duties by Mr Verhoef. The three operating companies (together **the Operating Companies**) are the First to Third Defendants; Szerelmey Limited (**Szerelmey**), Szerelmey (GB) Limited (**Szerelmey GB**) and Szerelmey Restoration Limited (**Restoration**). Mr Verhoef was a de jure director of each of the companies from 6 June 2017. Before that, he was, Boston says, a de facto or shadow director.

3. In essence, it is said that Mr Verhoef used his control of the Operating Companies to orchestrate the transfer of money and assets away from them to himself or to companies owned and/or controlled by him.

4. There are four transactions, or categories of transaction, complained of giving rise to four broad heads of claim.

5. One, a transfer and leaseback of assets entered into between Szerelmey and the Seventh Defendant, London Stone Limited (**London Stone**), in April 2016. Complaint is also made of licence fee agreements made between the Operating Companies and London Stone dated 7 December 2016. Those related to use of the Szerelmey trademark owned by London Stone.

6. Two, a suggested transfer of part of the Operating Companies' business, being that concerned with providing labour on projects, to the Sixth Defendant, Szerelmey (UK) Limited (**Szerelmey UK**). The suggestion in closing was that around £600,000 would be sought on any account directed under this head of claim.

7. Three, guarantees and loans for the benefit of companies referred to together as the Heritage companies (**the Heritage companies**). Relief is sought in respect of losses of around £776,000 said to have been suffered under the guarantees, in respect of an outstanding loan of £1.057m made to London Stone for lending onwards to the Heritage companies, and in respect of loans totalling £450,000 made to the Eighth Defendant, Heritage House (York) Limited (**Heritage York**), for the purchase of a building called Heritage House.

8. Four, the payment of consultancy or management fees to or for Mr Verhoef between 2016 & 2019 totalling around £1.18m, with relief also being claimed as to a further sum of over £383,000 apparently due from the Operating Companies to Mr Verhoef by way of such fees but not yet paid.

9. Being a derivative claim, the proceedings could be continued only with the permission of the court. Permission was given first by Charles Hollander QC and then by Stephen Houseman QC, both sitting as Deputy Judges of this court. Mr Houseman QC said in his judgment given on 7 May 2020 that at that permission stage "*The court*

should look under the bonnet of each claim, but need not strip down the engine so to speak".

10. The trial has been the occasion to strip down the engine. Before turning to set out what, in my judgment, that revealed, I first give some background, next refer to the witnesses from whom I heard oral evidence, and then state the law.

B. Background

11. A relatively brief statement of the background suffices to put the impugned transactions in context. I will refer in a little more detail to those transactions when considering each head of claim.

12. The Operating Companies are in the business of stonework. Szerelmey operates that business within the M25, Szerelmey GB outside it. Restoration focusses on repair and renovation projects. They are successful companies with an impressive list of past projects including King's Cross Station, the Tower of London, Somerset House, the Palace of Westminster and the Natural History Museum.

13. The three Operating Companies are all part of the Tellisford group of companies; so-called because the principal holding company is Tellisford Limited (**Tellisford**). Tellisford is owned and controlled equally by Mr Verhoef and Mr Krause in that (a) its shares are held as to 50 percent by Erutuf and (prior to 1 August 2020) as to 50 percent by VOC Trustee Limited (**VOC**) for Mr Verhoef or his family, and (b) the four directors are Mr Krause, his son, Mr Verhoef and his wife.

14. Tellisford owns two-thirds of a company called Szerelmey International Limited (**International**). The other third is held by a company called Warthog Investments Limited (**Warthog**) in return for an injection of funds which was required in the

1990s. Warthog subsequently became, and is still, owned by VOC so that Mr Verhoef is the majority stakeholder in International; his ultimate overall stake being two-thirds.

15. Two of the Operating Companies, being Szerelmey and Szerelmey GB, are wholly owned by International so that Mr Verhoef has a two-thirds stake and Mr Krause a one-third stake in them.

16. The position is similar in relation to the third Operating Company, Restoration, in that Warthog is a one-third owner of its immediate parent company (Ipser Limited) and a Tellisford group company, being Tellisford UK Limited (**Tellisford UK**), owns the other two-thirds. The position is a little more complex than with the other Operating Companies though as while Tellisford UK is largely owned by Tellisford (and so ultimately for Mr Verhoef and Mr Krause in equal shares) there is also a minority shareholding of 9.94 percent held by what was referred to before me as the Dune Trust (which I understood to be associated with Mr Klein, Mr Krause's accountant) and a further 21.41 percent shareholding is the subject of dispute between Mr Verhoef and Mr Krause in separate proceedings under claim number CR 2021 000818. For practical purposes, little was made of this difference at trial. Submissions were made largely on the basis of the two men holding stakes in all three Operating Companies in the same proportions, being two-thirds/one-third.

17. As to directorships of the immediate parent companies for the Operating Companies, prior to these proceedings both Mr Verhoef and Mr Krause were (with others) directors of International, and Mr Verhoef alone was the director of Ipser Limited.

18. Mr Verhoef has been a registered director of each of the Operating Companies since 6 June 2017. At all material times until around 2019 (when further directors were

appointed), the other directors of Szerelmey were Mr Darren Moore, Mr Neil MacEachin, Mr Antonio Buffa, and Mr Peter McColm. Mr Darren Moore was the sole registered director of Szerelmey GB from March 2016 until he was joined by Mr Verhoef on the register from 6 June 2017. Further directors were appointed in 2021 and 2022. The registered directors of Restoration at all material times up to 2020 (when further directors were added) were Mr Mark Chivers, Mr Paul Morris, and (from 6 June 2017) Mr Verhoef.

19. Mr Paul Wisdom was company secretary of the Operating Companies until 2016. After that time, he continued to act as head accountant for them.

20. Together, these men undoubtedly had a wealth of experience which they brought to their roles. A short description of their experience and expertise was part of Mr Moore's evidence. And Mr Krause accepted in cross-examination that they were all very experienced.

21. Mr Verhoef and Mr Krause also held interests in a successful construction business in South Africa run through companies there. The arrangement between the two men involved Mr Krause focussing on their interests in South Africa, with Mr Verhoef doing likewise in the UK.

22. They shared a secretary, a Ms Andrea Shabason. Correspondence to and from Mr Krause was usually sent using her email account.

23. Payments were made to both Mr Verhoef and Mr Krause out of profits from the South African business.

24. There was also a long-established practice of both Mr Verhoef and Mr Krause as stakeholders in the Operating Companies receiving sums referred to as fees but which

were calculated by reference to the profits of the Operating Companies. Company profits were first divided into four slices of 25 percent each and dealt with as follows: 25 percent was retained for payment of tax liabilities, 25 percent was retained to build the balance sheet, 25 percent was distributed among the management team, known as the staff profit share, and 25 percent was paid out to, or for, Mr Krause and Mr Verhoef. By way of example, in 2012 25 percent of the profit was calculated as £150,000 so that £50,000 was paid to Mr Krause and £100,000 was paid to a company called Tusk Limited for Mr Verhoef; that split reflecting the proportions in which they held their ultimate stakes.

25. The focus at trial was on events from 2015.

26. It was in 2015 that guarantees were provided by Szerelmey in respect of projects taken over by Heritage companies, namely Heritage Building and Conservation (North) Limited and Heritage Building and Conservation Limited, as part of the acquisition by those companies of the business of Fairhurst Ward Abbotts Limited (**FWA**). Those guarantees included one given in respect of a project known as Chapel Farm. These two Heritage companies were ultimately owned by Mr Verhoef; the parent company, HB&C Investments Limited, being owned by VOC and a New Zealand company called Warthog Limited (**Warthog NZ**).

27. It was also in 2015 that there was put in train some restructuring to the business conducted by the Operating Companies. Two measures in particular were decided upon. First, a transfer of operational assets out of Szerelmey to London Stone with a leaseback to Szerelmey. Second, whereas the labour for each project had, in part, been engaged directly by the Operating Companies from a pool of self-employed

tradesmen, for the future Szerelmey UK would engage that labour and Szerelmey and Szerelmey GB would pay Szerelmey UK to supply that labour.

28. Thrings solicitors assisted with both measures from around the second half of 2015, and they were completed in the spring of 2016. The written framework agreement for the supply of labour made between Szerelmey and Szerelmey UK is dated 31 March 2016. The asset sale agreement between Szerelmey and London Stone, and two associated agreements, were entered into on 14 April 2016.

29. Both London Stone and Szerelmey UK are outside the Tellisford group. Tellisford has no interest in them. There is a dispute about their ownership which I will need to resolve. Boston says that Erutuf has no stake in these recipient companies and that the asset sale and framework agreement represent a diversion by Mr Verhoef of assets and business away from the Operating Companies for his own benefit. The active Defendants say that Erutuf has a one-third stake in these recipient companies, just as with Szerelmey and Szerelmey GB, and that these are innocent business arrangements made for good commercial reasons, not a diversion of benefits to Mr Verhoef.

30. At the time of these transactions, Erutuf was registered as a one-third shareholder in each of the parent companies. London Stone is wholly owned by Marmoran (UK) Limited (**Marmoran**). As at 2016, and indeed since 30 July 2014, Erutuf was registered as owning a third of the shares in Marmoran; with VOC and Warthog NZ also owning a third each for Mr Verhoef. Szerelmey UK is wholly owned by Szerelmey (UK) Holdings Limited (**Holdings**). Again, as at 2016, and indeed since 30 July 2014, Erutuf was registered as owning a third of the shares in Holdings; with VOC and Warthog NZ also owning a third each.

31. By the spring of 2016, the harmonious working which had brought the two men such success had broken down. There were complaints by Mr Verhoef about actions of Mr Krause's family in connection with the business of the two men in South Africa.

32. Mr Krause received his last payment of fees from the Operating Companies on 30 September 2015. Mr Verhoef was candid in his oral evidence that the reason, so far as he was concerned, for the payments being stopped was to put pressure on Mr Krause in negotiations between them. But payments to Mr Verhoef did not stop. He received substantial sums out of the profits of the Operating Companies in May 2016 as well as in later years (2017 and 2019; forgoing a payment in 2018 in the interests of the companies).

33. The flow of financial information about the Operating Companies to Mr Krause also came to an end at around this time. Mr Krause had been used to receiving weekly and monthly financial reports via his accountant, Mr Hans Klein. But these were stopped by around spring 2016.

34. In that regard, Mr Krause emailed Mr Wisdom on 23 August 2016 requesting that weekly and monthly financial reports be sent to Ms Shabason for him, Mr Klein having now retired. Mr Wisdom informed Mr Moore by email the next day, 24 August 2016, that Mr Verhoef had said to ignore Mr Krause's request. Despite further requests, this flow of information never restarted.

35. The South African business was sold in or around 2016.

36. At the end of 2016, agreements were made between London Stone and each of the Operating Companies for use of the Szerelmey name and logo which had been the property of London Stone since 2010. These trademark licences complained of by

Boston are dated 7 December 2016 and involved an annual fee of £18,000 payable by each of the Operating Companies. There had been an annual fee of £12,500 under like agreements which these replaced.

37. By letter of 5 July 2017 from lawyers for Mr Krause to Mr Reid Corin of Engage Negotiations, Mr Verhoef's representative in negotiations, Mr Krause proposed that Mr Verhoef purchase Mr Krause's interest in Tellisford at a value to be determined. By an email of 11 July 2017 back from Mr Corin, Mr Verhoef agreed and a meeting was proposed to "*finalize matters*". But no deal was done.

38. Erutuf's shareholding in Marmoran and Holdings was cancelled as at 1 January 2017, with the necessary forms going to Companies House in November 2017.

39. Loans for the purchase of Heritage House by Heritage York were made by Szerelmey in 2017 and at the start of 2018; £250,000 being advanced on 26 September 2017 and a further £200,000 being loaned on 12 January 2018.

40. January 2018 was also the time of a facility agreement under which sums were then advanced by Szerelmey to London Stone for onward lending to Heritage companies. The facility agreement is dated 8 January 2018 and is in a maximum sum of £1.4m.

41. Litigation began at the end of 2018. On the application of Mr Krause, orders were made on 3 December 2018 against Mr Verhoef and others for the provision of detailed financial information including in relation to Szerelmey and Szerelmey GB.

42. On 12 December 2018 the company register was altered so as to show again a one-third shareholding for Erutuf in Marmoran and Holdings.

43. The information ordered was provided to Mr Krause in early 2019. Armed with that information, Boston commenced these proceedings in September 2019.

44. There are two other sets of proceedings commenced during the currency of this claim. One is the dispute as to share ownership in Tellisford UK to which I have already referred. The other is what has been referred to as the partnership claim. That is a claim brought by Mr Krause concerning the alleged personal arrangements between him and Mr Verhoef. As described to me in opening, those proceedings include a complaint that Mr Verhoef's increased ultimate stake in the immediate parent companies of the Operating Companies, so International and Ipser, by virtue of Warthog's membership of those companies, involved a breach of a partnership agreement between the two men. A Defence was due shortly after the trial before me. The active Defendants failed in a bid at the pre-trial review in these proceedings for the trial to be adjourned and for these proceedings to be heard with the partnership claim.

C. Trial and witnesses

45. The 10-day trial was spread over three weeks in the second half of November. Some written submissions followed.

46. Mr Parfitt appeared for Boston. Mr Staunton appeared for Szerelmey UK. Mr Pay appeared for the other active Defendants, being Mr Verhoef and the recipient companies other than Szerelmey UK said to have benefited from the impugned transactions. The Operating Companies did not participate in the trial. The co-operation between counsel, as well as their time management, was exemplary. I thank them for that and for their submissions. Those were plainly the product of a great deal of hard work.

47. Both the two main protagonists, Mr Krause and Mr Verhoef, gave oral evidence.

48. The following further witnesses were called by Szerelmey UK or the other active Defendants:

Mr Darren Moore. A director of both Szerelmey and Szerelmey GB. He joined the business in 1994.

Mr Paul Wisdom. Company secretary for the Operating Companies up to 2016 and sole director of Szerelmey UK since then. He has been the Tellisford group accountant from 2010, having worked in the accounts office since 1995. He took the minutes of the meetings of the boards of the Operating Companies.

Mr Neil MacEachin. Szerelmey's director of estimating. He has been with the business for 35 years.

Mr Leslie Kerrison. A business turnaround consultant. He was involved in the deal which resulted in the provision of guarantees by Szerelmey for the benefit of the Heritage companies.

D. Law

49. Helpful guidance as to the approach to be taken in deciding whether a person is a de facto director was given by Arden LJ in *Smithton Ltd v Naggar* [2014] EWCA Civ 939 at [33] – [44], drawing on the decision of the Supreme Court in *Revenue and Customs Comrs v Holland* [2010] UKSC 51:

"*33. Lord Collins JSC sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to*

make himself responsible as if he were a director. However, a number of points arise out of Holland's case and the previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.

34. The concepts of shadow director and de facto are different but there is some overlap.

35. A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.

36. To answer that question, the court may have to determine in what capacity the director was acting (as in Holland's case).

37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.

38. The court is required to look at what the director actually did and not any job title actually given to him.

39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.

40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances 'in the round' (per Jonathan Parker J in Secretary of State for Trade and Industry v Jones [1999] BCC 336).

41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.

42. Relevant factors include: (i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director.

43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.

44. Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period."

50. Shadow director is a statutory concept. It "*means a person in accordance with whose directions or instructions the directors of the company are accustomed to act*" – see s.251 Companies Act 2006 (**CA 2006**).

51. The principles to be applied in approaching that statutory concept include the following propositions set out by Morritt LJ in *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 at [35].

"(2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities … (3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. In that connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or

expectation may be relevant but it cannot be conclusive. Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction. (4) Non-professional advice may come within that statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover the concepts of "direction" and "instruction" do not exclude the concept of "advice" for all three share the common feature of "guidance". (5) It will, no doubt, be sufficient to show that in the face of "directions or instructions" from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are "accustomed to act" "in accordance with" such directions or instructions."

52. Morritt LJ added this observation at [36] about "*the use of epithets or descriptions in place of the statutory definition of a shadow director*":

"*They may be very effective in graphically conveying the effect of the definition in the light of the facts of that case, as shown by their frequent use in the reported cases to which I have referred. But, it seems to me, they may be misleading when transposed to the facts of other cases. Thus to describe the board as the cat's paw, puppet or dancer to the tune of the shadow director implies a degree of control both of quality and extent over the corporate field in excess of what the statutory definition requires. What is needed is that the board is accustomed to act on the directions or instructions of the shadow director. As I have already indicated such directions and instructions*

do not have to extend over all or most of the corporate activities of the company; nor is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them. Further, in my view, it is not necessary to the recognition of a shadow director that he should lurk in the shadows, though frequently he may, for example, in the case of a person resident abroad who owns all the shares in a company but chooses to operate it through a local board of directors. From time to time the owner, to the knowledge of all to whom it may be of concern, gives directions to the local board what to do but takes no part in the management of the company himself. In my view such an owner may be a shadow director notwithstanding that he takes no steps to hide the part he plays in the affairs of the company. Lurking in the shadows may occur but is not an essential ingredient to the recognition of the shadow director."

53. While de facto and shadow directorship are separate categories, the distinction between them is somewhat blurred. Hildyard J said in *Sec of State for Business Innovation and Skills v Chohan* [2013] EWHC 680 (Ch) at [46] that "*It is now, I think, clear that (a) the same sort of evidential indicia are likely to be relevant to establishing both shadow and de facto directorship and (b) a person may act as both, the one in fact shading into the other*".

54. As to the duties owed by de jure directors, those include by s.171 CA 2006 a duty to exercise powers only for the purposes for which they are conferred. It is clear from *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71 at [15] and [17] that (a) this proper purpose rule is concerned with abuse of power, by doing acts within the scope of the power but for an improper reason, and (b) what is important is the primary or dominant purpose.

55. There is also a duty in the terms set out by s.172 CA 2006 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.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

56. Determining whether there has been a breach of this duty usually involves assessing the honesty of the director; asking whether he honestly believed that the decision was in the interests of the company. But, where there was no actual consideration of the best interests of the company, the question is instead an objective one; being (in the language of the related fiduciary duty) whether an intelligent and honest man in the position of a director of the company could reasonably have believed that the transaction was for the benefit of the company. See *Hellard v Carvalho* [2013] EWHC 2876 (Ch) at [92(c)]

57. Some reliance is also placed in this case on the duty under s.177 CA 2006 of a director to declare the nature and extent of his interest in a proposed transaction or arrangement to the other directors, save where the other directors are already aware of it or ought reasonably to be so aware.

58. The width of the definition of director in s.250 of the CA 2006, being "*any person occupying the position of director, by whatever name called*", means that those duties are owed by de facto directors as well as de jure directors.

59. While the position for shadow directors is more nuanced, it has been said that "*a shadow director will typically owe fiduciary duties in relation at least to the directions or instructions that he gives to the de jure directors*" – see *Vivendi SA v Richards* [2013] EWHC 3006 (Ch) at [143], per Newey J. And the alleged breaches of duty in this case post-date 26 May 2015 and so fall to be considered under s.170(5) of the CA 2006 as amended which provides that "*The general duties apply to a shadow director of a company where and to the extent that they are capable of so applying*."

E. Key issues

60. By the end of the trial, the shape of the case for the Claimants was rather different to that appearing in Boston's statements of case and skeleton argument.

61. The skeleton argument held little back in its allegations of dishonest diversion of assets by Mr Verhoef. By way of two examples, London Stone was referred to as a washing machine for funds paid out to entities under Mr Verhoef's control. And the increase in fees for trademark licences was described as part of a scheme to transfer as much value as possible out of the Operating Companies.

62. I have to say that, even before hearing the evidence, such a suggested dishonest scheme seemed to me most unlikely; not least because of the relatively modest sums involved in some of the impugned transactions in the context of successful companies.

63. This scheme was not pressed in closing.

64. Instead, on the duty to act in good faith, Mr Parfitt indicated in closing that it was not now being said that Mr Verhoef actively considered the interests of the Operating Companies and did not honestly believe the impugned transactions were in their interests. Accordingly, it was no longer argued that the subjective test applied or that (subject to one point I will come to later) Mr Verhoef was dishonest. Rather, the submission was that the objective test applied. The case being made was that no intelligent and honest director could reasonably have believed the transactions were in the interests of the Operating Companies; or, using the language of s.172 CA 2006, believed that the transactions were likely to promote the success of the Operating Companies for the benefit of their members as a whole.

65. Despite the change of case, I must decide whether the transactions nevertheless involved breaches of duty by Mr Verhoef.

66. For there to be any duties at all owed by Mr Verhoef in respect of transactions before 6 June 2017, Boston must establish that he was a de facto or shadow director in that period. This is therefore a key issue in the claim.

67. Some other issues disappeared. Reflecting the different case now made against Mr Verhoef, the case against the recipient companies was no longer put on the basis of dishonest assistance. Rather, knowing receipt was relied on. For their part, those Defendant companies did not argue against knowing receipt if breaches of duty were established.

68. One issue that had not been in focus previously came to the fore. It was whether the breaches of duty which Boston sought to establish, after the evidence, still justified a derivative claim. There was, initially, disagreement about whether it remained necessary to show at trial, as opposed to the permission stage, for each head of claim that such came within an exception to the rule in *Foss v Harbottle*. But Mr Parfitt, on reflection, accepted that that did have to be demonstrated at trial.

69. I will proceed on that agreed basis.

70. At least the principal basis for Boston's contention that its claims remained within an exception to the rule in *Foss v Harbottle* was that there was wrongdoer control and personal benefit to Mr Verhoef.

71. In that regard, in order to come within the fourth exception to the rule in *Foss v Harbottle*, known as fraud on a minority, in the absence of actual fraud (so deliberate and dishonest breaches of duty), it must be shown that the wrongdoers have

personally benefited from their breaches of duty – see *Harris v Microfusion 2003-2 LLP* [2016] EWCA Civ 1212. Boston says there was a personal benefit in respect of the transactions with London Stone and Szerelmey UK because Erutuf had no real interest in these companies. They were, in reality, owned by Mr Verhoef through VOC and Warthog NZ.

72. Mr Parfitt also closed the case on the basis that ownership of these recipient companies was, in addition, a strong factor in deciding whether there had been a breach of duty. Ownership of these companies is therefore another a key issue to be determined.

73. There are, accordingly, two central issues which I therefore decide first, namely:

(a) Was Mr Verhoef, in the period before 6 June 2017, a de facto director of the Operating Companies? Or a shadow director, at least for the purposes of the decisions to enter into the impugned transactions?

(b) Does Erutuf have a one-third interest in the recipient companies London Stone and Szerelmey UK?

E.1 De facto or shadow director?

74. I start with the first of those key issues: Was Mr Verhoef a de facto or shadow director? The case against Mr Verhoef being a de facto or shadow director was well argued by Mr Pay. He described the claim as a surgical strike against Mr Verhoef which ignored the role of the de jure directors. He highlighted the facts that there were highly competent de jure directors of the Operating Companies, proper board minutes, and that Mr Verhoef could legitimately influence decision-making given his role as ultimate majority stakeholder as well as a director of the immediate parent companies.

Mr Verhoef was entitled, said Mr Pay, to put his shoulder in as a stakeholder, but the decisions were those of the de jure directors.

75. But even having full regard to the facts that Mr Verhoef was a stakeholder and that the Operating Companies had experienced and able de jure directors, I have reached the conclusion Mr Verhoef was a de facto director of the Operating Companies in the period before 6 June 2017. Looking at all the circumstances in the round, he was a decision maker, indeed a key decision maker, in the Operating Companies. He acted as a director. The following factors have contributed to that conclusion.

76. First, even on the Defendants' evidence, Mr Verhoef was very heavily involved in the business of the Operating Companies. Mr Moore gave this description of his involvement:

"… throughout my time with the business, Gordon has been involved quite heavily in the Szerelmey business. He wasn't involved in day to day operational decisions. There was always a separate Managing Director and management team, as well as a board of directors. But he took an interest in strategic decisions and was involved in problem areas for the business. He would also sit in on meetings to discuss sales, contracts or general management issues. He would be involved in business development, contributing marketing ideas and drives and attending client functions. He was also heavily involved in industry federations and with key suppliers".

77. That level of involvement, particularly focussed as it was on strategic rather than merely operational decisions, raises firmly the possibility that Mr Verhoef was in truth acting as a director.

78. Second, there was no real change in his role when he became a de jure director from 6 June 2017. He continued to take the same part in the life of the Operating Companies as before. That points firmly to him being a de facto director in the earlier period. Both before and after 6 June 2017 he was, at the very least, on an equal footing with the other directors. I give a significant example of this when considering the individual heads of claim.

79. Third, having heard Mr Verhoef give evidence, it is clear he is a forceful personality. Mr Moore, Mr MacEachin and Mr Wisdom less so. I could quite see him wanting and being allowed to be involved in decision making. I do not doubt the experience and skill of those who were the de jure directors of the Operating Companies as well as Mr Wisdom. But, having heard the evidence and contrary to the submission of Mr Pay, I do not consider it at all unlikely that they allowed Mr Verhoef a key role in decision making.

80. Fourth, Mr Verhoef had his own office in the Operating Companies' premises at 369 Kennington Lane. And he attended most days, at least when he was in England. That suggests a greater role than that of stakeholder or adviser.

81. Fifth, the terms which Mr Verhoef used to describe how he saw himself betrayed his role as a key decision maker. In answering questions about the labour and asset sale arrangements he said more than once that for 50 years he has been making all the decisions. This provides much of the answer to the submission that Mr Verhoef could act as an influencing stakeholder. That is not the role which emerged from these answers given in his own evidence. Rather, it was decision maker. His other suggestion, made in the context of the asset transfer arrangement but which was not

borne out by the documents, was that he was simply happy to go along with the ideas of the de jure directors.

82. Sixth, Mr Krause's role in South Africa provided something of a mirror in which to view the involvement of Mr Verhoef in England. It was plain that Mr Krause was a key decision maker in the South African businesses. Mr Krause told me *"…in South Africa. At the end of the day the managing directors, if I said something, they would do what I asked them to do and it was run the same in England.*" And Mr Verhoef said in cross examination that "*If you look at the history and I think you need to go to thousands of pages of history over 50 years, I had to make all the decisions and Earl did the same in South Africa*."

83. Seventh, the language in the contemporaneous correspondence both before and after 6 June 2017 points to Mr Verhoef being involved as a decision maker. Some examples. In relation to a loan by Szerelmey of £102,500 to provide the funds for Heritage York to exchange contracts for the purchase of Heritage House, Mr Wisdom emailed Mr Moore and Mr MacEachin on 8 September 2016 as follows: "*Gents, I have been instructed by Gordon today to loan this money*". An accounting spreadsheet showing figures for each of the Operating Companies had this comment for 2018: "*As company's profits had reduced Gordon cancelled the management fee provided in the previous years accounts*". An email of 20 February 2018 from Mr Moore to Mr Wisdom in relation to a funding request for Heritage companies said of Mr Verhoef, "*He has instructed us to assist with this weeks funding*".

84. Eighth, that he was able to, and did, stop the flow of financial information from the Operating Companies to Mr Krause (as I find, such being revealed by the email of 24 August 2016 I have already referred to, and not really being denied by Mr Verhoef in

cross-examination) also pointed to his role as a decision maker in the Operating Companies. An exchange with Mr Wisdom in cross-examination was illuminating. It was he who asked Mr Moore what to do about Mr Krause's request for information; telling me it was a decision *for the directors*. The response from Mr Moore was to communicate a decision *of Mr Verhoef*, namely to ignore Mr Krause's request. This at a time before Mr Verhoef was a de jure director.

85. Mr Pay emphasised that Mr Moore rejected firmly any idea that the de jure directors were the puppets of Mr Verhoef. I accept that they were not mere puppets. In terms of the type of work undertaken by the Operating Companies, the other directors did not always abide by Mr Verhoef's views. And there was at least one other example of the other directors not accepting a proposal made by Mr Verhoef. That was to calculate management fees for himself and Mr Krause as a percentage of turnover rather than profit. Though, as I find, Mr Verhoef came to agree with their objections to this proposal. He said he "*understood what they were talking about*" and a percentage of profit was better. This was not therefore an instance of Mr Verhoef trying but failing to cause the directors to carry out his wishes, but rather of an agreed position emerging. However, whether the de jure directors were puppets is not the test.

86. Mr Pay also highlighted the fact that Mr Verhoef was referred to in some board minutes as "consultant". But I must look at his true role, not the label given to him in this period. In my judgment, his true role did not match the label. He was not merely consulted. He was a key decision maker. That was better reflected by the fact that in some board minutes, even before being a de jure director, he is referred to as chairman, as Mr MacEachin told me.

87. Mr Staunton emphasised that Mr Verhoef was not held out as a director. But that is just one factor. And I note, in any event, that his email signature on his Szerelmey.com account sometimes described him as "Chairman" of "Szerelmey".

88. I do not ignore that Mr Krause was unable to give me specific examples of Mr Verhoef telling the boards what to do. But he largely left the UK business to Mr Verhoef.

89. It follows from my conclusion that Mr Verhoef was a de facto director that he owed to the Operating Companies the duties relied on by Boston, namely those set out in sections 171(b), 172, and 177 CA 2006. As already noted, a de facto director owes the same duties as a de jure director – see s.250 CA 2006 and *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 521 (Ch) at [19].

90. Had I not concluded that Mr Verhoef was a de facto director, I would have decided he was a shadow director.

91. Given that the same sort of indicia are often relevant to shadow directorship as well as de facto directorship, the factors I have already set out point also to shadow directorship. If I am wrong to characterise Mr Verhoef's role as that of de facto director, those factors support the conclusion he was a shadow director instead.

92. The key point to my mind is that Mr Verhoef had a decisive influence. If I am wrong and it was the boards of the Operating Companies, without him, making the key decisions, then they were accustomed to doing so at his direction or instruction.

93. I turn to the second of the key issues.

E.2 Does Erutuf have a one third interest in the recipient companies London Stone and Szerelmey UK?

94. Despite Erutuf being shown on the register of members for the relevant holding companies, Marmoran and Holdings, as having such an interest, Mr Parfitt argued that this was not a real interest. It was, he submitted (at least before the evidence), from the very start when such shareholding was registered on 30 July 2014, a contrivance of Mr Verhoef to give only the impression of ownership by Erutuf. In fact, Erutuf had never accepted the shares and so was not a shareholder; s.112(2) CA 2006 providing that a *"...person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company*".

95. In my judgment, Erutuf does have a one-third interest in the recipient companies London Stone and Szerelmey UK. My reasons are these.

96. It is clear to me on the evidence that this was no contrivance. That suggestion anyway seemed to me to conflict with the suggestion for Boston in opening that the allotting of the shares to Erutuf in 2014 was a mistake. The truth behind the allotting of shares on 30 July 2014, the cancellation as at 1 January 2017, and the reinstatement in 2018, as I find, is this.

97. In causing the original allotment of shares to Erutuf, Mr Verhoef intended to give Mr Krause, through Erutuf, a one-third stake in the companies which were to be used for at least protection of Tellisford group assets. When the dispute between the two men was in full swing in 2017, and there was the prospect of Mr Krause selling his stake in the Tellisford group, Mr Verhoef did act, by the cancellation, with the design of putting an end to Mr Krause's stake. But he then thought better of that in 2018 and, by

the reinstatement, restored Erutuf to its always intended position as one-third shareholder.

98. That seems to me to fit with the inherent likelihoods, including because of the timing of the dispute between the two men; the issue of shares in July 2014 rather pre-dating the dispute (on the balance of the evidence) and, certainly, the cessation of payments and the flow of information to Mr Krause. Indeed, Mr Parfitt did not press the idea of a contrivance in closing. And when I raised this interpretation of events with Mr Verhoef, he gave me the clear impression there was no great disagreement. He said merely "*I think it is not quite right*". Mr Pay also accepted it made some sense and had no other explanation to offer for the share movements.

99. I do not ignore the fact that some of the management fees paid for the benefit of Mr Verhoef went, at his direction, to the Tenth Defendant, Hare & Ransome Joinery Limited (**Joinery**) which, at least since December 2018, has been a subsidiary of London Stone and so of Marmoran. But that use of Joinery is an oddity in that it is out of step with the basis on which he dealt with the other directors of the Operating Companies and Thrings in relation to London Stone generally. That was that the ultimate ownership of it was the same as Tellisford. It is an insufficient basis for concluding that Erutuf's apparent interest in Marmoran and Holdings was all some device of Mr Verhoef.

100. In any event, I am satisfied on the facts that Erutuf has accepted the shares.

101. First, by reason of the authority given by Mr Krause to Mr Verhoef in the making of corporate arrangements. It was clear to me from Mr Krause's oral evidence that Mr Krause authorised, indeed, expected Mr Verhoef to deal with the taking of shares by Erutuf as part of making corporate arrangements for the business of the two men in

the UK; mirroring what Mr Krause did for Mr Verhoef in South Africa. In that regard, Mr Krause agreed that when UK shareholdings were set up he never signed anything to agree to such shareholdings, presuming that all that was done for him. He agreed too that the recorded shareholdings would match the reality without him having to specifically agree them. He also said at one point "*I would have relied on Gordon to sort this out for me*".

102. Second, Erutuf has agreed, anyway, in these proceedings to being a member. Boston's original Particulars of Claim asserted such ownership of the companies. It was averred that Erutuf owns 33.33 percent of the shares in both Holdings (para.19) and Marmoran (para.23). While by a later amendment, that averment was changed to one that the shares are "*currently recorded as being owned*" in that way, I cannot see how a person can cease to be a shareholder by later withdrawing an earlier agreement to the shareholding. I would add that, although it was a little confused, the oral evidence of Mr Krause seemed to me to be to the effect that Erutuf was indeed a shareholder in the companies; from which I infer acceptance, not rejection, of membership. He did not support the idea, represented by the amendment, that Erutuf had no interest in the companies despite being on the register of members.

103. In arguing that Erutuf had not agreed to be a shareholder, Mr Parfitt placed great reliance on an email of 28 September 2015 from Mr Krause to Mr Somers of Trevor Jones, external accountants and auditors for the Tellisford group. By that email Mr Krause indicated agreement "*as long as the shareholding proportion remains the same and all the directors remain the same*". But that, in my judgment, was referring to agreement to a different proposed arrangement, namely the Tellisford group being moved wholesale into another group; with another company, perhaps Marmoran,

taking the place of Tellisford as the group holding company. That accords with: (a) the opening paragraph of the email which records that Gordon "*wanted to swop the Group into another holding company (possibly Marmoran)*"; (b) Mr Verhoef's later email of 20 April 2016 to Mr Krause which draws a clear distinction between what it calls stage 1, comprising the moving of assets and the sub-contracting of labour to Marmoran, London Stone, and Szerelmey UK, and stage 2, being the dissolution of Tellisford with its shareholding being replicated in International (see too Mr Krause's manuscript notes on that email and his subsequent response dated 22 April 2016, which address stage 2); (c) Mr Krause's oral evidence. It was clear from that that he had no issue with the asset protection scheme, so stage 1. His requirements were addressed to stage 2, that is the different arrangement for a new holding company to replace Tellisford; (d) Mr Wisdom telling Mr Krause, as I find, about the labour protection arrangement in a telephone conversation shortly after the 20 April 2016 letter and Mr Krause being content. I had no reason to doubt Mr Wisdom's account of that conversation. A witness statement of Mr Krause recorded that he believed he did speak with Mr Wisdom and stated only that he could not recall what was said. It was consistent with Mr Krause's later response of 22 April 2016.

F. Heads of claim

104. With those central questions decided, I must work now through the other issues taking each broad head of claim in turn. For each head of claim I will give a little more detail of the transactions impugned and describe Mr Verhoef's role, if any, in the decision of the Operating Companies to enter into those transactions. I will then consider for each transaction whether this part of the claim comes within an exception to the rule in *Foss v Harbottle* and whether it involves any breach of duty by Mr Verhoef.

F.1 Asset transfer and licence agreements

105. The asset transfer agreement was made between Szerelmey and London Stone in writing on 14 April 2016. It was for office assets such as computers and chairs. The price was £75,000. It was accompanied by an agreement for hire of the assets by Szerelmey and an agency appointment agreement to deal with assets acquired later. The hire agreement was for a period of 5 years at a monthly rent equating to £21,000 per year. Under the agency appointment agreement, assets acquired later in the name of Szerelmey would be the property of London Stone, to whom a database used by Szerelmey was also assigned. No further payment is required under the agreements for use by Szerelmey of these other assets. Those accompanying agreements, prepared by Thrings, are on the express basis (recorded as part of the recited background) that London Stone and Szerelmey are in the same ultimate beneficial ownership.

106. Mr Verhoef suggested in cross-examination that the pattern was that he was quite happy to go along with the ideas of the registered directors. And that he did not deal with Thrings on this transaction.

107. It is true that discussions about the transaction feature in board minutes. But the decision to restructure the business in this way was, as I find, first and foremost a decision of Mr Verhoef.

108. First, the contemporaneous correspondence points in that direction.

109. There is an email dated 4 June 2015 from Trevor Jones to Mr Wisdom: "*Tim Somers received a phone call from Gordon Verhoef yesterday, and Gordon would like to move all the fixed assets from the Szerelmey International group into London Stone*". That fits with the restructuring beginning with Mr Verhoef. And while it does refer to

International, the assets were those of Szerelmey so that this cannot be explained away as Mr Verhoef acting as director of International. Indeed, Mr Verhoef did not seek to explain his involvement on that basis in his oral evidence at all. Instead, he made different suggestions which did not fit with the email and which I therefore reject; namely, that he was just agreeing with Mr Wisdom about this, or that he had simply responded as stakeholder to an enquiry from Trevor Jones.

110. That the assets were those of Szerelmey and that the impetus for the proposed change came from Mr Verhoef is underlined by an email of 26 October 2015 from Melissa George of Thrings to Mr Wisdom. She informed him, "*As part of the restructuring, Gordon wanted the tangible assets of Szerelmey to be transferred to London Stone*". While this refers to London Stone, of which Mr Verhoef was a registered director, his role in London Stone does not properly explain this email. The concern is to restructure Szerelmey's business. This is part of Mr Verhoef making the decision for Szerelmey. And again, Mr Verhoef did not suggest his role was to be explained by his being a director of London Stone. Further, this fits with Mr Moore's evidence (see para.11(b) of his fifth witness statement) that the discussions about sale and leaseback were "*inhouse*" between him, Mr Verhoef and Mr Wisdom.

111. The importance of Mr Verhoef in the taking of the decision continues to be apparent in what followed.

112. By email of 20 November 2015 from Melissa George to Mr Wisdom, Thrings gave advice to the effect that there should be an undisclosed agency agreement under which assets bought by Szerelmey pass automatically to London Stone. She informs him that she has "*not yet chatted this through with Gordon*". Then on 20 January 2016

Melissa George of Thrings emailed Mr Wisdom regarding the proposed asset sale, indicating that "*matters have stalled a little in Gordon's absence*".

113. Mr Verhoef was also part of finalising the arrangements. Mr Wisdom emailed Melissa George at Thrings on 13 April 2016 setting out some changes to the draft documents introduced in this way: "*I have now discussed with Darren, John and Gordon. We have agreed to make the following changes*". In the context of the earlier emails, Mr Verhoef's role was not merely, indeed not primarily, as acting for London Stone. And anyway, as I have said, he did not seek to explain his dealings with Thrings on that basis. His stance, as I have said, was that he just went along with the ideas of the registered directors and did not deal with Thrings on this.

114. That he was the primary decision maker for Szerelmey is also apparent from an email dated 18 March 2016 from Mr Verhoef to Mr Wisdom and the response of 21 March 2016. Mr Verhoef requires completion of the sale "*so that it falls within the 2015 year*". The focus in that respect is on the accounts of Szerelmey as Mr Wisdom's response spells out. "*I have spoken with the auditors and they are happy for us to backdate the asset sale in our accounts to 31 December 2015*".

115. Second, as was accepted in the written closing submissions for Mr Verhoef, the proposed restructuring represented a pattern which Mr Krause and Mr Verhoef had used in South Africa as well as in at least one other UK business. That points to Mr Verhoef rather than the registered directors coming up with and deciding upon it for Szerelmey.

116. Third, that the decision at least began with Mr Verhoef was reflected in Mr Moore's own evidence. He said "*I think Gordon would have proposed the idea of the asset transfer and leaseback*" (para.11(b) of his fifth witness statement).

117. I make clear I do not ignore the board minute dated 31 December 2015 recording the decision as that of the board of de jure directors. But that came later as part of the backdating exercise, as Mr Moore agreed during cross-examination.

118. The reality is, as I have explained, that the decision came from Mr Verhoef. It was a decision in which he participated or on which the board acted in accordance with his instructions or directions.

119. Accordingly, if he was a shadow director, rather than a de facto director, I consider that he owed Szerelmey the general duties of directors in connection with this transaction. In that regard, the transaction was within the instructions which, if I am wrong about him being a de facto director, make him a shadow director in the first place.

120. I turn to consider the trademark licences. Trademark licence agreements had been made between London Stone and each of the Operating Companies back in 2010. They were for use of the name "Szerelmey" and the logo. This also reflected the arrangement in the South African business; the trademarks there being held, as Mr Krause told me during cross-examination, outside the trading companies for asset protection. The evidence was the Szerelmey trademark had never been in the ownership of the Operating Companies; it had earlier been held by International. The existing annual licence fee as at 2016 was £12,500 per company. That had been set in 2012 for a term expiring at the end of 2016. The new replacement licences of which complaint is made in these proceedings are dated 7 December 2016 and are at a rate of £18,000 per year for each of the Operating Companies. Perhaps unsurprisingly given the limited sums involved and the fact that this was merely a renewal of expiring licences, there is no documentary trace of any decision. The evidence of Mr

Moore was simply that the figure would have been approved as part of the annual budget approval. I note that Szerelmey UK also pays the same licence fee for use of the name and logo; that arrangement being reached in 2018.

121. Mr Verhoef was, as I find, not involved in this decision. He told me pricing was a small matter that was decided by others; "*I never looked at that*". That seemed to me inherently likely. It was not a strategic matter of the sort he did get involved with. And there was no document linking him to this decision. While Mr Wisdom did suggest, during his oral evidence, some involvement of Mr Verhoef, his evidence on this was particularly uncertain.

122. I consider next whether this head of claim falls within an exception to the rule in *Foss v Harbottle*.

123. Given my conclusion as to the ownership of London Stone, namely that Erutuf had and has a one-third stake in London Stone by virtue of a shareholding in Marmoran, it can now be seen, in my judgment, that this part of Boston's claim does not come within an exception to the rule in *Foss v Harbottle*.

124. The principal argument that the claim was within the fraud on a minority exception was that the transactions were for the benefit of Mr Verhoef as the wrongdoer. But the ownership of London Stone means there was not the required benefit to Mr Verhoef. Both he and Mr Krause, via Erutuf, had a like stake in London Stone as in the Operating Companies. The transactions did not move assets or money out of co-owned companies into companies solely owned by Mr Verhoef or in which he had a greater share of ultimate ownership than Mr Krause. They involved only a shift of assets and money between corporate entities ultimately owned for the two men in the same shares. While Mr Verhoef is a director of London Stone (as well as of its parent,

Marmoran), that has not involved any benefit to Mr Verhoef from these transactions on the evidence. No money from them has gone out to or for the benefit of Mr Verhoef. The only sums benefiting Mr Verhoef paid to subsidiaries of Marmoran are referable to different transactions entirely, namely the payment of fees to Joinery which I have already referred to.

125. Given the agreed basis on which I am proceeding, that means this head of claim fails.

126. I should nevertheless consider the question of breach of duty.

127. The basis of the allegation for breach of the duty of good faith became, as I have explained, that no intelligent and honest director could reasonably have believed the asset transfer and trademark licence agreements were in the interests of the Operating Companies.

128. I consider that this objective basis was the right one. I am not satisfied there was actual consideration of the interests of the company by Mr Verhoef or the other directors. The essence of the overall scheme was as described by Mr Wisdom at para.74 of his third witness statement: "*The idea was that if Szerelmey did ever go bankrupt, the assets would be protected and could be used by a new company to continue the business*". Or, as Mr Moore put it, "*it was viewed as a future-proofing exercise*" (para.11 of his fifth witness statement). When Mr Verhoef was asked "*It is not risk management for the benefit of the Operating Companies is it?*", he responded, "*Why should it be? It is for the shareholders to not lose money.*"

129. Applying the objective test, I do not accept that there was a breach of this duty.

130. That answer is clear, in my judgment, in the case of the trademark licence agreements; even if I am wrong and Mr Verhoef was involved in this decision. London Stone

owned the trademark. The Operating Companies needed to use it. And there was no valuation evidence before me from which it might be concluded that the fee they agreed to pay was over the top.

131. The difficulty of maintaining a case that no intelligent and honest director could properly have authorised these agreements is highlighted, in my judgment, by considering the position if Boston were to succeed in the relief claimed, being to avoid the licences. That would be to leave the Operating Companies without any rights to use the trademark and having either to give up its use, with potentially damaging effects on the business, or else to negotiate with London Stone for fresh agreements; a negotiation which, given the apparent importance to the Operating Companies of using the trademark, may well result in a higher price.

132. Accordingly, and quite apart from the fact that Mr Verhoef was not, as I have found, involved in deciding the renewal fee for the trademark licence agreements, the decision did not represent a breach of duty.

133. I also consider the asset transfer arrangement, certainly looked at as a whole, could readily be regarded by an intelligent and honest director as being likely to promote the success of the Operating Companies, in particular Szerelmey, for the benefit of the members as a whole. This was a low value transaction which represented an alternative to the Operating Companies continuing to hold their own assets and which may well work out to the financial benefit of the Operating Companies. I find on the evidence that it did. Mr Moore's evidence in cross-examination was that the arrangements involved Szerelmey having the use of newly acquired assets without the payments going up. That reflected Mr Wisdom's evidence (see para.73 of his third witness statement) that it was thought, as London Stone would purchase assets in the

future, that that would help Szerelmey's cash flow. The upshot was, as Mr Moore told me and I accept, there was no financial detriment to the Operating Companies.

134. Given my conclusion as to ownership, which Mr Parfitt submitted was a strong factor in assessing whether there was a breach of duty, the arrangement also involved acting fairly between the ultimate stakeholders in Szerelmey.

135. I would add that sale and leaseback arrangements are an everyday feature of business life. There was nothing about this one which meant a director could not properly decide to enter into it.

136. It was suggested for Boston, in the alternative, that these arrangements were for an improper purpose and so were carried out in breach of the duty in s.171 CA 2006. The improper purpose suggested was that Mr Verhoef was acting so as to prefer himself. But this relied on Boston's case that Erutuf had no interest in the recipient companies. That case having been rejected, there is no basis for a finding that Mr Verhoef acted for any such improper purpose. In any event, it is clear to me on the evidence that he did not act with the purpose of preferring himself. He and the other directors were motivated by a desire to protect the business of Szerelmey for the future.

137. My conclusions are reinforced by the fact that Mr Krause agreed with these transactions when they were put to him in cross-examination. Indeed, he said they had always taken such an approach, including in South Africa.

138. Returning to the question whether this head of claim could properly be brought as a derivative claim, while it was also argued, though with considerably less enthusiasm, that the alleged breaches of duty were deliberate and dishonest, I have no hesitation in rejecting that alternative way of seeking to come within the exception to the rule in

Foss v Harbottle. The submission was that Mr Verhoef was dishonest because he was at least recklessly indifferent as to whether his breaches of duty were in the interests of Szerelmey.

139. Even if dishonesty extends to reckless indifference to the interests of the company, as is the position for trustee exoneration clauses as explained by Lewison J in *Fattal v Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch) at [78] – [82], any breach here was neither deliberate nor committed with reckless indifference to the interests of Szerelmey. Both, of course, would need to be shown for Boston to succeed. Mr Verhoef did not act in a way he knew to involve a breach of his duties to Szerelmey so that any breach was not deliberate. It is simply that he did not focus on the interests of Szerelmey rather than wider interests including of the business and Mr Krause and himself as stakeholders. Further, that lack of focus means only that the objective test applies. It is no proper foundation for a finding that he was recklessly indifferent to the company's interests. In any event, I do not consider that such serious allegations were squarely put to Mr Verhoef.

F.2. Labour arrangements

140. These arrangements did not in fact involve any transfer of assets or employees.

141. The framework agreement is dated 31 March 2016. It is between Szerelmey and Szerelmey UK, though it appears Szerelmey UK also arranged labour for Szerelmey GB in the same way. Under the agreement, Szerelmey pays for the supply of labour at cost plus 20 percent. The business of supplying the labour was not in fact administered by Szerelmey UK as it had no employees. The work was done by Szerelmey which then charged Szerelmey UK for that service. Those charges were in substantial sums. According to a schedule produced by Boston, the charges for 2016-

2022 totalled in excess of £2.6m. The result was a small profit for Szerelmey UK each year. To the tune of around £60,000 to £80,000.

142. This was part of the same risk management strategy as the asset sale and leaseback arrangement. And as with that arrangement, I find that Mr Verhoef was the primary decision maker.

143. It again reflected what Mr Verhoef and Mr Krause had done in other businesses according to Mr Moore (see his fifth witness statement at para.12) and Mr Wisdom (see his third witness statement at para.48).

144. That the decision at least began with Mr Verhoef was again reflected in Mr Moore's evidence. "*I believe the concept was suggested by Gordon …*" (para.12 of his fifth witness statement).

145. And Mr Verhoef's involvement as the moving force was plain from the explanatory note prepared by Thrings in relation to the framework agreement. The section headed "*client requirements*" began in this way: "*Client requirements have developed through several different conversations: the overview discussed between Gordon Verhoef and Melissa George*".

146. Mr MacEachin agreed in cross-examination that this risk management transaction was the sort of high-level strategic decision which Mr Verhoef used to be able to control.

147. Given all that, I cannot accept the way Mr Verhoef sought to portray his role in this: "*I do not decide, I agree with things*".

148. The documents included a board minute of International signed by Mr Verhoef on 4 April 2016 approving and authorising a director to sign a members' resolution of

Szerelmey approving the framework agreement. But, as with the board minute dealing with the asset transfer and sale, this was a paper exercise carried out after the agreement and well after the transaction had been decided upon. In case it is of relevance, I find there was no telephone board meeting between Mr Verhoef and Mr Krause as suggested by the minute. Mr Verhoef agreed in cross-examination that this was probably just a paper exercise. He said *"... when the staff send me things like this and we have talked about it, then I just sign. I agree*."

149. Again, if Mr Verhoef was a shadow director, rather than a de facto director, he would, in my judgment, owe the Operating Companies the general duties of directors in connection with this transaction. It was within the instructions which, if I am wrong about him being a de facto director, make him a shadow director in the first place.

150. As with the asset transfer and licence agreements, my conclusion as to the ownership of Szerelmey UK, namely that Erutuf has a one-third stake in Szerelmey UK by virtue of a shareholding in Holdings, means, in my judgment, that the complaint about the framework agreement is not one that comes within an exception to the rule in *Foss v Harbottle*. The benefit of supplying labour from the pool simply passed to a different corporate entity ultimately owned for Mr Verhoef and Mr Krause in like shares as the Operating Companies; certainly, Szerelmey and Szerelmey GB.

151. It is also, in my judgment, clear that there was no improper purpose here. As with the asset transfer transaction, the purpose was to protect the business of Szerelmey for the future, not prefer Mr Verhoef. Given Erutuf had an interest in Szerelmey UK, there is no proper foundation for inferring that suggested improper purpose.

152. The question whether this transaction involved a breach of the duty in s.172 CA 2006 is a more difficult one though than with the asset transfer and licence agreement

transactions.

153. As with those transactions, Boston relies on the objective test and asks for a finding that no intelligent and honest director could reasonably have believed the framework agreement was in the interests of Szerelmey or the other Operating Companies.

154. Again, it does seem to me that the objective test is the right one. Mr Verhoef, and the other directors, did not consider the interests of the Operating Companies, but rather the interests of the business. That fits with it being part of the same strategy as the asset sale and leaseback transaction and the evidence of Mr Moore that "*If the worst had happened to any of the Operating Companies and they were unable to continue trading then it would in principle be open to Earl and Gordon to reinstate labour the next day if they were able to trade via an alternative vehicle*." It fits too with what Mr Wisdom says he told Mr Krause, namely that the arrangement was to protect the Szerelmey business in case the Operating Companies collapsed – see para.60 of his third witness statement. When it was put to Mr Verhoef that he did not believe the labour arrangements were for the benefit of the Operating Companies, he answered "*I did not think about that. I just thought about this, the protection of the business*".

155. Mr Staunton argued that the subjective test applied as there was actual consideration of the interests of the business or the shareholders. But it is my judgment that the interests of the business or shareholders do not equate, at least not necessarily, with the interests of the company. Here, the concern was for the survival of the business for the benefit of the stakeholders, whatever happened to the company.

156. As to the application of that objective test, the framework agreement does come at a net cost to Szerelmey and involve a profit for Szerelmey UK. In that regard, the arrangement involves Szerelmey paying and Szerelmey UK receiving a 20 percent

mark-up on the labour cost. And while Szerelmey makes charges of Szerelmey UK for administration, those charges do not fully offset that mark-up. They do, however, as Mr Parfitt put it to Mr Moore in cross-examination, absorb a fairly large slice of the 20 percent. A modest surplus is left in favour of Szerelmey UK. But this is not giving Szerelmey UK a major income, as Mr MacEachin emphasised in his evidence.

157. The arrangements do give a prospective protection to employees, to Mr Krause and Mr Verhoef as stakeholders, as well as to the pool of labour and current customers; catering for the possible future failure of the Operating Companies. In that event, there will have been established a company ready to take up the business of providing labour to customers on projects.

158. I have come to the conclusion that an intelligent and honest director could consider these arrangements likely to promote the success of the Operating Companies for the benefit of their members as a whole.

159. While the duty is owed to the company, it is for the benefit of the shareholders (see *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 at [65]). They can be identified here with the ultimate stakeholders, Mr Krause and Mr Verhoef. S.172 also makes clear that regard should be had to employees and customers. And a long-term view taken. Here, while the arrangement means Szerelmey and Szerelmey GB do not make quite as much profit on projects as they might otherwise have done, the long-term interests of the stakeholders, customers and employees are served by the arrangement. Further, given my conclusion as to the ultimate ownership of Szerelmey UK, the arrangement does not involve dealing unfairly as between Mr Krause and Mr Verhoef as stakeholders. Mr Parfitt accepted in closing that was a key factor. Whether looking after the stakeholders, employees, customers and others in this way at a limited annual

cost to Szerelmey and Szerelmey GB promotes the success of those companies seems to me a matter of judgment for directors. It does not seem to me a question on which there is only one possible answer. There is the further point that this is part of the same scheme as the asset transfer arrangement. Viewing those transactions together as directors might legitimately do, they probably involve even less or no overall cost to the Operating Companies.

160. It follows that this head of claim fails both by reason of it not being properly the subject of a derivative claim and there being, in my judgment, no breach of duty by Mr Verhoef.

161. Finally on this head of claim, by his further written submissions made after the conclusion of the hearing, Mr Pay asked that any breach of duty be excused under s.1157 CA 2006. This does not arise given my other findings. And while a request for such relief would appear to have real merit, I make clear I do not consider the argument open to Mr Verhoef. There was no mention of s.1157 in his Defence, or in Mr Pay's skeleton argument for trial. Accordingly, the evidence heard was not directed to the question of relief under the section and Mr Parfitt made no submissions on it in closing. Had Mr Verhoef been in breach, it would not, in my judgment, have been fair to excuse Mr Verhoef given all that.

F.3. Guarantees and loans

162. This broad head of claim breaks down into three sub-categories of transaction.

163. The first is guarantees in respect of work originally to be carried out by FWA, a contractor in the heritage sector. Its work was described by Mr Moore as heritage-

badged work. One of the Heritage companies, Heritage Building & Conservation Limited, was incorporated to acquire the assets of FWA.

164. According to Mr Moore, Mr Verhoef played a leading role in putting a deal together for the novation of existing FWA contracts and, as part of that, proposed to FWA customers that guarantees be given by Szerelmey. I consider that reflected the fact he was indeed a decision maker in Szerelmey including for this purpose. He proposed guarantees as he knew or believed he would be able to deliver a decision by Szerelmey to give such guarantees. And he was right. They were given.

165. That the decision to give the guarantees was his was betrayed by his own oral evidence. His explanation for why he did not seek Mr Krause's consent to the giving of guarantees was this: *"...for 50 years I have been making these types of decisions. So, if you make these decisions year after year, older than you are, please understand that I do not need always to go back*."

166. These guarantees later resulted in Szerelmey stepping in and completing work on projects in an attempt to reduce or extinguish its liability under the guarantees. For one project known as Chapel Farm, a very significant loss was still suffered. Even giving credit for more successful interventions by Szerelmey under the guarantees, it resulted in an overall loss said to be in the sum of £776,155.

167. That these were Mr Verhoef's decisions was underlined, to my mind, by the fact that he later agreed to the losses under these guarantees being ignored for the purposes of calculating the Szerelmey staff profit share. If I am wrong about him being a de facto director, then I would consider, given the same points, that the guarantees are within the instructions which make him a shadow director.

168. The second sub-category of transactions is loans to Heritage York applied towards the purchase of Heritage House. There are two complained of: £250,000 on 8 October 2017 and £200,000 on 12 January 2018. They were therefore at a time when Mr Verhoef was a de jure director. They are secured and are at an interest rate of 6.5 per cent per annum. There was a period when Heritage York fell into arrears with payment of that interest but, as Mr Moore told me, it is now paying those arrears down.

169. Further, and third, loans were made to London Stone for loaning on to the Heritage companies from around spring 2017. A formal facility agreement between Szerelmey and London Stone was entered into on 8 January 2018. It provided for advances of up to a total borrowing level of £1.4m at an interest rate of 6 per cent per annum. Mr Verhoef was a de jure director at the time the advances complained of were made. In that regard, there was no sum outstanding as at December 2017, previous advances having been repaid. The sum complained of is one made up of advances after that time.

170. I find that both sub-categories of loan were primarily decisions of Mr Verhoef.

171. As to the loans to Heritage York, they were preceded by an earlier advance for payment of the deposit. An email of 8 December 2016 from Mr Wisdom to Mr Moore and Mr MacEachin makes plain this was done at Mr Verhoef's direction: "*Gents, I have been instructed by Gordon today to loan this money to HHY from SZL. The accounting for this transaction will need to be agreed at a later date*." Mr Moore agreed in cross-examination that that was Mr Verhoef telling Mr Wisdom to use Szerelmey's money to pay the deposit for the purchase of Heritage House.

172. As to the loans to London Stone, funding requests for the Heritage companies were passed to Mr Verhoef by Mr Wisdom to approve; such appearing from emails of 19 May 2017. The approval was, in my judgment, for Szerelmey. Mr Verhoef told me during cross-examination that he okayed the requests as "*we had so much money lying in the bank*". It was Szerelmey which had that money. That was reinforced by an email of 16 October 2017 from Mr Moore to Mr Verhoef: "*Gordon, please confirm your instructions/requirements to myself and Paul W for any Szerelmey input for this funding*".

173. Such was Mr Verhoef's influence that money continued to be advanced under the facility even when Mr Moore had become plainly uncomfortable with it. He explained to Mr Verhoef by an email of 20 February 2018 that Szerelmey would struggle to have any more cash available to loan and that it was now almost certain that the Heritage group would not be able to repay all of its funding originating from Szerelmey, at least not for some significant time. At that stage there was £750,000 outstanding. And yet there were several advances after that time, resulting (even with some repayments) in a total outstanding sum of £1.057m.

174. Further, Mr Verhoef accepted in cross-examination that he was involved in the decisions about providing loans for the Heritage companies. That Mr Verhoef has offered to underwrite the loans seemed to me to underline that these were transactions which he was involved in deciding.

175. Decisions on the guarantees and loans are a good illustration of the fact that Mr Verhoef's role did not change with his appointment as a de jure director of the Operating Companies. He had acted in the same way, namely as a director, in relation to these transactions both before and after 6 June 2017.

176. Mr Pay recognised the greater difficulty he had in submitting that the complaints about these transactions were not properly brought as a derivative claim. In my judgment they are, if otherwise made out, within the exception to the rule in *Foss v Harbottle*, save for the loans to Heritage York.

177. The guarantees and other loans were for the benefit of Mr Verhoef. In the case of the Heritage companies other than Heritage York (save for a company called Roofing Developments Limited which was placed in the ownership of Marmoran only in late 2018), Erutuf has had no stake in the Heritage companies. They are not owned by Marmoran or Holdings. Rather, Mr Verhoef is the ultimate beneficial owner through VOC and, later, VOC and Warthog NZ. I accept Mr Verhoef's evidence to the effect that the intention was to bring the Heritage companies into shared ownership if they were successful. That fitted with the fact, as I find, that these companies and their work were not hidden from Mr Krause. By way of example, Mr Krause attended a management meeting of Heritage Building and Conservation Limited on 1 September 2015 when novations of contracts, including on Chapel Farm, were discussed. But this intention does not mean that Mr Verhoef was not the immediate beneficiary of any wrongdoing. Nor does the fact that the businesses, other than Roofing Developments Limited, ultimately failed; Heritage Building and Conservation (North) Limited being dissolved and Heritage Building and Conservation Limited entering administration.

178. As to Heritage York, the shares in this company were however, straight after the loan of 8 October 2017, transferred to London Stone. The shares remained with London Stone at the time of the 12 January 2018 loan. After an interruption, they are currently

with London Stone. These loans were therefore transactions with a company in which Mr Krause and Mr Verhoef had like stakes as in Szerelmey.

179. My conclusions so far mean that Boston can succeed under this head of claim in relation to the guarantees and loans, other than those to Heritage York, if breach of duty is established. I will now consider the question of breach of duty for all three sub-categories of transaction, including the loans to Heritage York, and start with the guarantees.

180. The directors did, in my judgment, consider the success and interests of the Operating Companies in deciding upon these. A charge was made for the guarantees and Mr Wisdom's evidence was that they were intended to bring in some money for the Operating Companies; being made on usual commercial terms. It was also his evidence that opportunities may come Szerelmey's way as a result of working together with the Heritage companies.

181. If I am wrong, and the objective test is to be applied as Boston argued, then that evidence means, in my judgment, that an honest and intelligent director could well have considered the guarantees likely to promote the success of Szerelmey.

182. Turning to the loans, again it was the submission for Boston that no honest and intelligent director could properly have authorised such loans; particularly in circumstances where there was no security given in relation to the loans to London Stone, the stakeholders were in dispute, and London Stone had no underlying business.

183. But again, as I find, the directors of the Operating Companies did consider the success of those companies in deciding upon these. Mr Moore was clear, and I accept, that the

thinking was that there was money in the bank and more interest could be gained on it for Szerelmey by making the loans. He also agreed in cross-examination that, as with the guarantees, the loans may have produced "follow-on work" for the Operating Companies. Overall, as he put it "*it is a question of is it a good, was it a good deal for us? We perceived it was*". Further, Mr Verhoef was trusted. As Mr Moore said in cross-examination, that gave Szerelmey more confidence in making the loans; confidence which, at least in one way, was well placed in that Mr Verhoef now says he will underwrite the loans.

184. If I am wrong and the objective test applies, I consider it impossible to say, given the rates of interest and that Mr Verhoef was trusted, that these loans are such as no intelligent and honest director could see as promoting the success of Szerelmey.

185. In relation to the loans to Heritage York, there is the further point that security was given.

186. Mr Parfitt drew attention to the fact that the loans from Szerelmey to Heritage York represented a good deal for Heritage York because they attracted a lower rate of interest than was available from the bank, the source of the rest of the purchase monies. But that point goes no way to establishing a breach of duty. It is in the nature of business that deals are done which benefit both sides.

187. It follows that there was no breach of the duty of good faith. It also follows, in my judgment, that there was no breach of the proper purpose duty. The directors acted with the purpose of making a good investment for Szerelmey.

188. The duty of disclosure in s.177 CA 2006 was relied on by Boston in the alternative in relation to the loans to Heritage York. But, as I find, Mr Verhoef did not hide his

interest in that company. The directors of Szerelmey knew of it. That was the clear evidence of Mr Moore and fits with his evidence that it was a factor in favour of making the loans.

189. There being, in my judgment and for the reasons I have given, no breach of duty by Mr Verhoef, this head of claim fails.

F.4 Fees

190. In 2016 sums totalling £610,000 were paid or credited for the benefit of Mr Verhoef. These were at a time before he became a de jure director.

191. The figure for 2017 was £319,167. According to an invoice dated 30 November 2017 in a similar sum for management fees to Szerelmey from Joinery, this was paid and related to a period after Mr Verhoef became a de jure director.

192. No sum was paid in 2018. Whereas a sum had been provided for, reduced profits led to a decision that no management fees would be paid. A spreadsheet showing summary accounts figures for each of the years to 2018 included this: "*As company's profits had reduced Gordon cancelled the management fee provided in the previous years accounts*".

193. The figures for 2019 are that Mr Verhoef received the benefit, again by way of payment to Joinery, of £250,000 and a further sum of £383,472 was declared as payable but has not yet been paid.

194. Payments to Mr Verhoef ceased in 2019 and so have not been made during the currency of the proceedings. It has been decided instead, and more conventionally,

that any share of profits to the stakeholders should be distributed by way of dividends up the chain of companies.

195. While Mr Verhoef's evidence was that Mr Krause's share of the fees were simply being held back by the Operating Companies, Mr Pay, in response to a question from me, made clear he was not asking for any such finding of fact.

196. But it was argued that Mr Verhoef had not received more than his proper share as the payments over the period 2016-2019 amounted to less than two-thirds of the 25 percent profit share. I cannot accept that. As I find, he was receiving the whole of the 25 percent profit share previously split between him and Mr Krause. First, the figure of £610,000 for 2016 represented the whole of the 25 percent for that year. Second, the figures for subsequent years also represented the whole of the entitlement once part of what would otherwise be due was written off by Mr Verhoef for the benefit of the companies.

197. It was abundantly clear to me on the evidence that the decision that the Operating Companies would not, as before, make payments calculated by reference to profits to both stakeholders, but would instead pay Mr Verhoef alone, was a decision of Mr Verhoef. He agreed in cross-examination that he could control whether the Operating Companies paid fees to the two men and that he "*turned off the tap*" to Mr Krause (albeit he suggested this cutting off of money to Mr Krause was a temporary measure). That reflected the evidence in one of his witness statements: "*It is correct to say that I have withheld payments of Earl's profit share since 2015. I did this in part to try and bring Earl to the negotiating table rather than get us involved in a lengthy and bitter dispute. I also felt very upset about Earl's actions. He has done very well out of the business, largely as a result of my decisions and my work*."

198. Again, if the proper analysis is that Mr Verhoef was a shadow, rather than de facto, director, payment of these fees is another area where he owed the general duties of directors; being within the instructions which, on this alternative analysis, constitute him a shadow director in the first place.

199. Any breach of duty by payment of these fees is a matter, in my judgment, properly pursued by way of a derivative claim. The fees paid were for the benefit of Mr Verhoef alone so that, if he was a wrongdoer, he was certainly a benefited wrongdoer.

200. I do consider there was a breach of duty here. In my judgment, in making the decision to pay himself alone instead of splitting the profit share and making payments to both stakeholders, Mr Verhoef was acting for an improper purpose.

201. This decision to increase his remuneration from the Operating Companies at the expense of Mr Krause, whose payments were reduced to nil, was taken for a purpose which was clear on the evidence. It was to cut Mr Krause out of remuneration to try and force his hand in negotiations to resolve the dispute between the two men. That is not a proper use of the power Mr Verhoef had as director to decide upon remuneration.

202. Mr Moore said he would have felt unable to pay Mr Krause after his retirement. But that was not Mr Verhoef's purpose in acting. It was his decision, and his purpose in making it was to cut off funds to Mr Krause in order to put pressure on him in their negotiations. And, in any event, the decision was not simply one to stop payment to Mr Krause. The decision also involved increasing the payments to Mr Verhoef by paying him what previously would have been Mr Krause's share.

203. In my judgment, this decision also involved a breach of the s.172 duty of good faith by Mr Verhoef. That duty includes having regard to the need to act fairly between the members of the company. It was not fair to decide to take Mr Krause's part of the share of the profits with a view to putting pressure on him in the negotiations. Applying the objective test, I cannot see that an honest director could have regarded it as in the interests of, or likely to promote the success of, the Operating Companies to act in that way.

204. Mr Pay argued that there was no real decision at all here. Payments were made by the Operating Companies in accordance with an arrangement long since agreed to by the stakeholders. It was just that Mr Krause was no longer entitled to payments as he was no longer working. Any entitlement on the part of Mr Krause was part of his personal arrangement with Mr Verhoef, but that was not the claim made. But it will be apparent from the above that Mr Pay's analysis was, in my judgment, too subtle and artificial. It fails to reflect the commercial reality, which is a straightforward one. Mr Verhoef decided that the Operating Companies would not, as before, make payments calculated by reference to profits to both stakeholders, but would instead pay him alone.

205. There was a further argument made for the active Defendants which I do not accept. It was that Mr Verhoef's pattern of acting for Mr Krause meant there has been ratification (or perhaps more properly authorisation) by the stakeholders of any breaches of duty as to the payment of fees. Mr Pay relied on the case of *Ciban Management Corpn v Citco (BVI) Ltd* [2020] UKPC 21 to submit that Mr Krause having set up that way of working, he could not now complain. But that case concerned ostensible authority; it being decided by the Privy Council that the

Duomatic principle prevented the beneficial owner of the company from denying that he had consented to the giving of authority to the agent for the particular transaction (the grant of a fifth power of attorney) with the result that the company could not complain of the director acting on the agent's instructions. Significantly to my mind, the director relying on the ostensible authority was not a party to the arrangement between the owner and the agent. Here, Mr Verhoef is both agent and director. He knew he did not have the consent of Mr Krause for the decision as to the fees. Indeed, he agreed in cross-examination, and I therefore find that, Mr Krause did not know about the management fees being paid to Mr Verhoef from 2016 and Mr Verhoef did not tell him about them. It follows that there is no room for ostensible authority. Accordingly, Mr Krause is not prevented from denying such consent and so the *Duomatic* principle does not result in the company being prevented from complaining of the breaches of duty.

206. In closing submissions, it was also argued by Mr Pay that, if there was a breach of duty with the consequence that the fees were to be repaid, Mr Verhoef should receive an equitable allowance for his work for the Operating Companies.

207. It is my judgment that there should be no equitable allowance. No claim for an equitable allowance was pleaded by Mr Verhoef. That brought the result that there was not, at trial, the evidence one would expect for such a claim. There was insufficient material to fix any figure. Further, such an allowance would be contrary to what Mr Verhoef regarded as right by the time of trial. That was that he should get two-thirds of the 25 per cent profit share and Mr Krause one-third. Indeed, he had persuaded himself that is how things had in fact been arranged. As I have already indicated, he told me he had only taken two-thirds and one-third was simply held back

in the Operating Companies. That was obviously wrong, being contrary to the documents and the evidence of the other directors. I did not accept it, and, in the end, was not even asked to accept it. But Mr Verhoef made no suggestion other than that the profit share should be divided in those proportions. An equitable allowance would defeat that. An order that what was paid out is paid back would honour it. It would then be back in the Operating Companies and, provided there are sufficient profits, available to be shared between stakeholders by being passed up the chain of companies as dividends.

208. Accordingly, Boston succeeds in full on this final head of claim, including against the companies receiving the fees for Mr Verhoef; there being no resistance to the conclusion that, if there was a breach of duty, then there was knowing receipt.

G. Further points and conclusion

209. Mr Pay made an argument with which I have not had to deal in order to determine the claims but which I should perhaps address in case I am wrong. The argument was that the Szerelmey board would have made the same decisions, at least on the transactions other than payment of fees, even without Mr Verhoef with the consequence that he is not liable. I am not satisfied the decisions would have been made without him. The impetus for them came from him.

210. Further, I was not persuaded that this argument was sound, even if a factual basis could, contrary to my finding, be made out. I was not taken to any law on this, but where a number of directors participate in a decision taken in breach of those directors' duties, I would expect the relevant question of causation to be what loss has been caused to the company as a result of the decision. Not whether the same decision would have been reached, presumably also in breach of duty, by the same group of

directors save for the director against whom the claim is brought. But the argument anyway fails on the facts in this case.

211. There was a further overarching argument made by Mr Pay. It was that Mr Verhoef was acting throughout for Mr Krause so that there has been authorisation or ratification of any breaches of duty by the stakeholders. This did not appear to be a pleaded issue, but Mr Parfitt made clear to me in closing he was taking no pleading point and said that it should be tackled on its merits. It does not arise given my other conclusions. I state what would have been my decision on it briefly. Had I found that the asset transfer and labour arrangements otherwise involved a breach of duty, at least on the basis eventually advanced, namely that there was no dishonesty so that the objective test applied, I would have considered that any such breach was authorised under the *Duomatic* principle. Those strategic decisions were matters which Mr Krause, on the evidence, entrusted to Mr Verhoef for the two stakeholders. Mr Krause told me as much himself. Further, he had no issue, it became clear in cross-examination, with these transactions. That reflected his lack of objection to the stage 1 restructuring which he was informed about by Mr Verhoef's letter of 20 April 2016 and then discussed with Mr Wisdom. Any breach of duty arising out of the guarantees and loans for the Heritage companies save for the loans to Heritage York, however, should not, in my judgment, be regarded as having been authorised or ratified by Mr Krause. These were transactions which may later become part of the two men's shared arrangements but were, for the moment, ventures of Mr Verhoef. Heritage York was, though, part of those shared arrangements which Mr Krause entrusted to Verhoef and so I would have considered those loans authorised or ratified by both ultimate stakeholders in Szerelmey.

212. Overall, it follows from my decisions set out above, that Boston succeeds on its claim in relation to the consultancy or management fees paid out, and otherwise due to be paid out, for Mr Verhoef, but that the balance of the claim will be dismissed.

213. I will deal with any consequential matters which cannot be agreed at a short further hearing with the benefit of brief skeleton arguments.