CLAIM NO. BVIHC (COM) 0466 of 2024

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE MATTER OF CLERKENWELL LIFESTYLE LIMITED

AND

IN THE MATTER OF SECTION 184C OF THE BVI BUSINESS COMPANIES ACT

BETWEEN

ZVI DEKEL

Claimant

And

CLERKENWELL LIFESTYLE LIMITED

Defendant

Appearances:

Mr Ben Woolgar and, with him, Mr Matthew Brown and Mr André Sheckleford (instructed by Conyers Dill & Pearman, BVI) for the Applicant

Mr Ryan James Turner and, with him, Ms Tamara Cameron (instructed by Appleby (BVI) Ltd) for the Respondent

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2025: February 10 and 11

4 March 2025

JUDGMENT

THE APPLICATION

[1] **MITHANI J [AG]:** In these proceedings, the applicant ("the Applicant") is Zvi Dekel. The respondent is Clerkenwell Lifestyle Ltd ("CLL BVI", "the Company", or "the Respondent"), a company registered in the BVI.

[2] By an application dated 16 September 2024 ("the Application" or "this Application"), the Applicant applies for leave to bring a derivative claim (the "the Claim", "the Derivative Claim" or "the Intended Claim") under **s. 184C of the Business Companies Act 2004 ("BCA 2004")** against CLL BVI.

[3] The Applicant seeks the leave of this court ("the Court" or "this Court") to bring the Claim in England and Wales, rather than in the BVI. Both parties agree that only this Court can grant leave to do so, even if the Claim is not brought in this jurisdiction. It is also common ground between the parties that if leave is granted, the court in England and Wales will need to apply BVI Law to determine the Claim.

[4] I find this strange for several reasons, though I do not need to go through those reasons because the parties are agreed that the Application must be determined by this Court. My unease arises from the fact that I do not see that it is for this Court to decide upon the grant of leave in relation to an Intended Claim which is to be brought in another jurisdiction, even if that other jurisdiction applies BVI Law. However, I was informed that whilst this issue had not been conclusively determined, such authority as there was on the issue suggested that leave could only be granted by this Court. The principal authority to which I was referred was **Novatrust Ltd v Kea Investments Ltd and other companies [2014] EWHC 4061 (Ch), [2014] All ER (D) 149 (Dec),** in which His Honour Judge Pelling KC, sitting as a Judge of the High Court, said, at [39]:

> "In my judgment the effect of **s.184C(6)** is that by BVI law a member of a company does not have the right to bring proceedings in the name of or on behalf of a company unless that member has complied with the other provisions within s.184C and that is so whether the proceedings are to be brought in the courts of the BVI or elsewhere. Absent this provision I would have agreed that the requirement for leave from the BVI Court was procedural. However, the effect of **s.184C(6)** is that before the member of a BVI company can have the right to bring derivative proceedings in respect of that company,

> permission has to be obtained by that member from the BVI High Court ("the Court" being defined for these purposes by s.2 of the act as meaning the BVI High Court). Obtaining that permission is a condition precedent to the ability of the member to bring such proceedings. That provision is entirely general in effect. It is common ground between the experts in this case that the effect of **s.184C(6)** is to preclude the existence of a parallel common law system relating to derivative claims in the BVI. There is nothing within **s.184C** that suggests its scope is confined either generally or in part to domestic BVI proceedings. There is first instance authority in the BVI that suggests at least by implication that **s.184C(6)** applies in relation to derivative proceedings to be brought outside the BVI as it applies to proceedings before the courts of the BVI – see **Microsoft Corporation v. Vadem Limited BVI HC (Com) 2012/0048.** It is noteworthy that neither party in that litigation appears to have suggested otherwise. In those circumstances I consider it fanciful to suggest that Novatrust has the right to bring such proceedings in the English courts in the absence of such permission."

[5] I entirely understand why Judge Pelling concluded that only the High Court in the BVI could and should grant permission in a case such as this. Among the difficulties that could arise if only the BVI High Court can grant permission is the extent to which the court in England and Wales (and such a court may well be the County Court) would be free to depart from any observations that the BVI Court reached on any aspects of BVI Law or of the facts of the case. This is particularly so if the English Court had to look at the reasoning given by the BVI judge on applications such as security for costs where one of the matters that the court in England and Wales would need to take into account in exercising its discretion on whether to order security would be the strength of the derivative claim against the proposed defendant.

[6] There is also another difficulty with courts in different jurisdictions dealing with the grant of leave, based on where a company is incorporated or where the registered office of the company is situated. There is an overlap between the claims that CLL BVI is entitled to pursue and those that Clerkenwell Lifestyle (UK) Limited ("CLL UK") is entitled to pursue. The underlying facts relating to those claims cut across both companies and both jurisdictions, i.e. the UK and BVI, and are said to be similar. It is undesirable for courts in different jurisdictions to determine the grant of leave in relation to each company separately, even if the applicable law upon which the determination is made is different. There must be a lot to be said for one court dealing with both applications. For my part, I have not considered what is said by the parties in the application for leave made by the Applicant against CLL UK in the English proceedings.

[7] It is possible that the definition of the expression "the Court" in s. 2 of the BCA 2004, which applies "unless the context otherwise requires", can be adapted for this purpose to allow a leave application to be heard in the courts in England and Wales where a BVI company has some

connection with England and Wales[1]. However, I appreciate that when I raised this with counsel in the course of my exchanges with them, it was little more than an impromptu remark. Of course, a substantially more detailed analysis of the issue would be required by this Court to come to that conclusion. That may be appropriate for the Court to determine on another occasion. For present purposes, I will proceed on the basis, which is common ground between the parties, that it is this Court that must decide whether leave should be granted to bring the Derivative Claim in relation to CLL BVI. However, I make it clear that whatever the status of the court that has to determine any issue that arises in the application for leave in England and Wales in relation to CLL UK, any conclusion reached by me on any issue in this Application cannot be said to be binding (or even persuasive) on any court in England and Wales.

[8] The parties agree that if leave is granted, the Court has to specify where the Claim should be brought. Although the Applicant maintains that the Claim should be issued in England and Wales, he accepts that it is open to the Court to direct that it should be issued in this territory. That would certainly avoid some of the difficulties to which I have referred above and some of the other difficulties arising from issuing the Claim in England and Wales that I explored with counsel for both parties. But one difficulty with having claims heard in different courts, particularly in different jurisdictions, is the possibility that those courts may reach different findings and conclusions on similar material and evidence (and would have to hear the same witnesses twice over). However, the position of the Respondent is that if permission is granted, the Court should direct that the Claim be brought in the BVI.

THE BACKGROUND

[9] I cannot improve on the excellent summary of the facts provided in the skeleton argument prepared by Mr Woolgar, who appeared on behalf of the Applicant with Mr André Sheckleford and Mr Matthew Brown, and I do not do so.

[10] In short, CLL BVI holds the entire issued share capital of CLL UK. The purpose of CLL BVI was to fundraise for a property-development project ("the Project") in London's Clerkenwell area, composed of the acquisition and refurbishment of an office building, and the construction and operation of a hotel. CLL UK owns the property in Clerkenwell (the "Property") which was the site of the Project. The development opportunity was originally presented to the Applicant by the

[1] The analysis provided by Jonathan Parker J (as then was) in **Secretary of State for Trade and Industry v Jones [1999] BCC 336**, on the meaning of the expression "the High Court", may be thought to be illustrative in this context.

Geneva Management Group ("GMG Group"), which acted as trustee of various trusts for him until October 2022. GMG provided corporate services and, within its structure, included a company called GMG Real Estate Ltd ("GMG RE").

[11] GMG RE initially acted as the property manager for the Project under a management agreement dated 1 December 2017 (the "Management Agreement"). GMG RE was later acquired by Mr Newman Leech ("Mr Leech"), one of the founders of GMG and the CEO of RE Capital (Switzerland) SA ("RE Capital"), together with Skybound Capital ("Skybound"), an asset manager based in South Africa. GMG RE (now named Kaydan Accounting) became a wholly owned subsidiary of RE Capital following that transaction, and RE Capital replaced GMG RE as property manager.

[12] Mr Leech's precise role in the issues subject to this dispute is a matter of controversy between the parties. He is one of the proposed defendants in the Claim. The other intended defendants to the Claim are: (a) CLL BVI, which is a necessary defendant to the Derivative Claim in a nominal capacity; (b) Control Services Corporation ("Control"), a BVI company that provided corporate directorship services in relation to the Project; (c) Sean Gaskell ("Mr Gaskell"), a director of CLL BVI and an employee of RE Capital (he is CLL BVI's witness in these proceedings); (d) Christopher Stuart McKenzie ("Mr McKenzie"), a lawyer who also appears to have provided corporate directorship services to CLL BVI; (e) CAF6 Luxembourg SARL ("CAF6"); (f) RE Capital; and (g) Euro Sterling Facilities SARL ("ESF"), both of which companies (i.e., those referred to in (f) and (g)) advanced monies into the Project by way of loans. These companies are alleged to be controlled by Mr Leech.

[13] There is no issue that a business plan for the Project was produced and provided to the Applicant. I do not need to refer to this, other than to say that the Applicant alleges that the "base case" scenario would have produced a net profit of £17.2m, a return on equity of 1.75 times, and a net yield of 7.02%. He claims that these projections have proved to be wildly over-optimistic.

[14] The Applicant invested £4m into the Project, of which £1.2m was returned to him in what he alleges were controversial circumstances. It is common ground between the parties that the Project has spectacularly failed and that the entirety of the balance of the amount of £2.8m, which the Applicant invested, will now be lost. The Applicant refers to various reasons why the Project failed. They include the following: (a) the business plan was unrealistic; (b) several hopelessly over-optimistic assumptions were made, including: (i) making no provision for affordable housing (even though it would have been obvious that no such development could proceed in London

without affordable housing being included); (ii) no contingency being included in the construction budget; (iii) costs being underestimated across the board, ultimately being 176% higher than projected; (c) severe delays being occasioned to the timetable for the Project; (d) the Project was overloaded with unsustainable levels of debt; (e) various loans or advances being made, including three loans made by ESF, and these together with other costs incurred in relation to the Project and an early partial repayment of equity to investors, meant an unsustainably high loan-to-cost ratio from the outset; and (f) there was a failure to consider alternative strategies for the Project, such as: (i) refinancing the Project through raising additional equity; (ii) securing forward sales of parts of the development to third parties; (iii) "mothballing" the project post-planning permission in order to preserve equity; and (iv) a full exit from the Project post-planning.

[15] The Applicant has lost a substantial amount of the amount he invested in the Project. He, therefore, seeks the leave of this Court to allow him to bring the Derivative Claim. It appears to be common ground between the parties that there is no alternative claim available to him to pursue, such as a claim for unfair prejudice or the possibility that he might be able to seek the winding up of CLL BVI. I am not sure that I agree with this, but I will accept that this is the case as it is agreed by the parties.

[16] To complete the summary of the factual background, two further points should be mentioned: first, the Application to bring the Claim is supported by at least 5 independent shareholders who have also lost considerable sums which they invested in CLL BVI; and second, the Applicant commenced the same or similar proceedings ("the UK claim") in relation to CLL UK the day before he brought the Application. In the UK claim, the Applicant seeks leave to pursue claims against Mr Gaskell and Mr Leech, the directors of CLL UK, allegedly in connection with the same events that are the subject of the Claim, but, apparently, in a way that cuts across the factual allegations that he seeks to make in the Claim.

[17] There are six heads of claim that have been formulated by the Applicant against the Proposed Defendants. I do not intend to refer to these in terms. It will be obvious from my judgment which head of claim is being referred to.

THE LAW

[18] The law governing the bringing of a derivative claim is set out in section 184C of the BCA 2004. The material provisions of that section are to the following effect:

[19] First, subsection (1):

"Subject to subsection (3), the Court may, on the application of a member of a company, grant leave to that member to:

(a) bring proceedings in the name and on behalf of that company; or

(b) intervene in proceedings to which the company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company."

[20] Next, subsection (2):

"Without limiting subsection (1), in determining whether to grant leave under that subsection, the Court must take the following matters into account:

(a) whether the member is acting in good faith bring proceedings in the name and on behalf of that company;

(b) whether the derivative action is in the interests of the company taking account of the views of the company's directors on commercial matters;

(c) whether the proceedings are likely to succeed;

(d) the costs of the proceedings in relation to the relief likely to be obtained; and

(e) whether an alternative remedy to the derivative claim is available."

[21] And then, for the sake of completeness, subsection (3):

"Leave to bring or intervene in proceedings may be granted under subsection (1) only if the Court is satisfied:

(a) that the company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or

(b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders or members as a whole."

[22] It is of course not for a court to attempt to judicially paraphrase the clear words of a statutory provision, particularly where the words of that provision are cast in such wide terms as s. 184C is. The only matter which the Court must bear in mind is that s. 184C gives it a wide and unfettered power to grant leave to bring a derivative claim, subject, of course, to the limitation that it must be exercised judicially and, therefore, on a case-by-case basis.

[23] I agree with Mr Turner, who appeared with Ms Tamara Cameron, on behalf of the Respondent, that the merits of a claim that the applicant for leave wishes to bring is an important consideration for the Court, particularly in a case such as this. As he correctly stated, while the standard of proof for demonstrating such a head of claim is the ordinary civil standard of proof, i.e., the balance of probabilities, the burden being upon the Claimant to do so, the evidence upon which the Claimant will need to rely to make good those heads of claim, particularly those that are

based on dishonesty, will need to be cogent. However, several points may be made on the merits of the Claim which the Court has to consider as part of its overall discretion in whether to grant leave.

[24] First, the need to consider the merits is not a "threshold" requirement that must be satisfied before the Court goes on to consider any other factor specified in s. 184C that may be relevant. It is undoubtedly an important factor. All other things being equal, a court will not grant leave where a derivative claim is unmeritorious. That is because where leave is granted by the court to bring a derivative claim, it must, under **s.184D(1) of the BCA 2004**, "order that the whole of the reasonable costs of bringing or intervening in the proceedings must be met by the company unless the Court considers that it would be unjust or inequitable for the company to bear those costs." However, s. 184D(2) makes it possible for the court to decide not to grant the indemnity if the court "considers that it would be unjust or inequitable for the company to bear the whole of the reasonable costs of bringing or intervening in the proceedings". In such a case, it may order: (a) that the company bear such proportion of the costs as it considers to be reasonable; or (b) that the company shall not bear any of the costs.

[25] Second, in my judgment, the "merits" test will not necessarily be paramount in every case. Each case will depend on its own circumstances. Where the court decides to grant an indemnity under s. 184D(1), it will be of great importance. Where it does not, it will be of less importance. Where an applicant is prepared to meet both the costs of the company to bring the derivative claim and of any adverse costs order that may be made against the company in pursuing the claim, it is likely to be of significantly less importance. In the present case, the Applicant does not seek the costs indemnity specified in s. 184C(2), though he does not go a stage further and say that he will meet any adverse order for costs made against the Company. If he were to do that – and provide sufficient security to the satisfaction of the Court to meet any adverse order for costs made against the Company – it is difficult to see how the merits of the Claim would feature as significantly in the exercise by the Court of its discretion under s. 184C.

[26] It was common ground that the factors specified in s. 184C, which the Court must take into account, are not exhaustive. It also appears to be common ground that the factors set out in s.184C do not carry more weight than those that are not so set out. So far as these matters are not common ground, it seems to me to be obvious that this must be the case: see, for example, **PJS v News Group Newspapers Ltd [2016] UKSC 26, [2016] AC 1081, [2016] 4 All ER 554**, at **[19]-[20], [33].**

[27] So far as the merits of a proposed derivative claim are concerned, a court can only give a provisional view about those merits, based on the material produced to it. The court regularly does this in other contexts, such as in connection with whether security for costs should be ordered against a foreign or an allegedly impecunious claimant, or whether leave to serve a claim outside the jurisdiction should be granted. It is difficult to see how the court's inquiry can extend any further at this stage.

[28] So far as the application of the "merits" test, is concerned, the court needs to consider "whether the proceedings are likely to succeed." The case of the applicant will often be incomplete in large parts and to expect him to advance all the material upon which he intends to rely, including any expert evidence (which, the court, in the exercise of its power to control expert evidence, may decide not to allow the applicant to adduce in the derivative claim), seems to me to me not just to be unreasonable but wrong. So far as expert evidence is concerned to support the claim, it may, of course, not be possible for the Applicant to demonstrate the likelihood of success without obtaining that evidence, in which case, he must do so. But if he can demonstrate that likelihood without the evidence, it would not be necessary for him to do so, just because it may bolster an already meritorious case[2]. I disagree with Mr Turner so far as he suggests that this is what the Court should do in every case. This type of "front-loading" of costs seems not just inappropriate but unrealistic and unreasonable if it is clear to the court that the claim is "likely to succeed", particularly as much of the information upon which the applicant will rely in the derivative claim may be in the possession of the company and only available to the applicant on disclosure. So far as the latter point is concerned, the respondent to the leave application should also produce material in its possession so the court has available to it all the material upon which it can properly make its determination on the leave application.

[2] For my part, I disagree with the Respondent that expert evidence would be needed to satisfy this Court about the likelihood of success in relation to the Derivative Claim, in order to make good that claim. But for the other matters referred to below, I would not have considered that the Court could not do justice to the Claim without that evidence. I do not read the judgments in **Basab Inc v Accufit Investments Inc BVIC BVIHCMAC2014/0020 (9 November 2015)** or **Glory Advance International Ltd v Merit Fortune Holdings Ltd BVIHC(COM) 2015/0090**, as requiring expert evidence in every case where it might be called by an applicant. What is required is that he should set out sufficient details of the proposed claim to persuade the court that the claim is meritorious. He may refer to the possibility of relying on expert evidence and what that evidence may say, but to require him to produce it at the leave stage does not seem to be necessary, particularly if he is subsequently not granted leave to adduce that evidence.

THE EXERCISE OF THE COURT'S DISCRETION – ANALYSIS AND DISCUSSION

[29] The hearing of the Application was almost wholly occupied by whether the Claim was meritorious.

[30] The Respondent contends that none of the heads of claim have any, or any reasonable, prospect of success. The Respondent relies on several authorities to support its contention. They include the *locus classicus* on the subject in this jurisdiction, **Basab Inc v Accufit Investments Inc BVIC BVIHCMAC2014/0020 (9 November 2015) ("Basab")**, a decision of the Court of Appeal of the Eastern Caribbean Supreme Court, which provides guidance on the meaning of the "merit" factor, i.e., on the issue of the likelihood of whether the derivative claim will succeed.

[31] In that case, **Gonsalves JA [AG]** (with whom the other members of the Court of Appeal agreed) said, at [27] and [37]:

> "The phrase is 'whether the proceedings are likely to succeed'. The operative part of this phrase is "likely". The Court adopts the view that the intention of the legislature must be gleaned from the language used to express it, and that the starting point must be the search for the natural meaning of the clear language used by the legislature. But the proper meaning to be ascribed to the operative word will also depend heavily on its context. In this regard the Court finds the approach taken in **Cream Holdings Limited and Others v Banerjee and Others**[3] to be helpful. In **Cream Holdings Limited**, the House of Lords had to interpret the meaning and application of the word 'likely' as used in section 12(3) of the Human Rights Act 1998 which imposed a threshold test that had to be satisfied before a court could grant interlocutory injunctive relief. The House's approach to determining the threshold established by the word 'likely' is instructive. Section 12(3) read: "No such relief [which might affect the exercise of the Convention right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."
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> …
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> "For the purpose of interpreting 'likely' as used in 'whether the proceedings are likely to succeed' this Court finds the analysis in **Cream Holdings Limited** instructive. This Court would be justified in applying a literal interpretation to the word 'likely', unless this would make section 184C(2)(c) unworkable within the procedural framework established by section 184C for derivative proceedings applications, or would otherwise produce a result that Parliament could not have intended…"

[32] **Gonsalves JA** went on to say, at [39]:

> "Consequently, considering the dictionary interpretation of the word 'likely', and the guidance provided by **Cream Holdings Limited**, this Court determines that the correct meaning of the phrase 'whether the proceedings are likely to succeed' as used in section 184C(2)(c) is whether it is more probable than not that the proceedings will succeed. It

[3] [2004] UKHL 44.

does not require that the applicant demonstrate that success is an absolute certainty, or that the probability of success is very strong. In the court below, Bannister J stated that the nature of the question 'whether the claim is likely to succeed' connotes obviousness. He did go on to explain what he meant by that, that is, in the sense that when the cause of action is explained and the surrounding facts presented, the court can readily see that the claim is indeed likely to succeed. He then continued to give the example of a claim against a director refusing to pay a well documented loan. The use of the word 'obviousness' and the context of Bannister J's explanation informed by the example he gave, suggests to this Court that the learned judge was interpreting 'whether the claim is likely to succeed' as requiring more than it being more probable than not that the proceedings would succeed and that the learned judge was moving into the realm of requiring a strong likelihood, or almost requiring certainty. If that was the learned judge's intention, we believe that was incorrect."

[33] The Court of Appeal also gave guidance on how a court should approach the material upon which it is invited to make a determination on a leave application. On that point, **Gonsalves JA** said, at [40] *et seq*:

> "Inextricably interwoven in the determination of whether the threshold had been met by the appellant, is a determination of what approach the judge was required to take in relation to his consideration of the evidence that was before him …"
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> "In any case, at an application stage, whether and to what extent an examination of the proposed case on the merits is required, must certainly depend on the applicable threshold, and the evidence then before the court. Thus, in **American Cyanamid Co. v Ethicon Ltd.**, it was against the backdrop of the established threshold of 'a serious question to be tried' that Lord Diplock stated at page 407: 'It is no part of the court 's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which will call for detailed argument and mature considerations. These are matters to be dealt with at the trial.' And in **Cameron v Coleman**, When Glendall As J stated at paragraph 23 of his judgment, in the context of an application for permission to bring a derivative action, that on such an application the court is not to conduct an interim trial on the merits of the case, the threshold there was merely an arguable case. For a judge to decide at an application stage whether on a balance of probability, based on the evidence and submissions then before him, the applicant will succeed at the trial, must require him to read and evaluate such evidence and submissions."

[34] **Gonsalves JA** went on to conclude, at [42] *et seq*:

> "In relation to the level of examination of the evidence required, the threshold (that of determining whether the proceedings are likely to succeed) would require a full and proper examination of the evidence then before the court. The Court agrees with the appellant that the potential nature of derivative claims, especially those that may be both complex and defended, do not predispose themselves to a cursory review and require the court to evaluate the evidence before it and the arguments advanced by both parties in order to determine 'whether the proceedings are likely to succeed'. Bearing this threshold in mind, it is difficult to envisage how this test can be properly applied without the court carrying out a proper evaluation of the evidence then before it."

> "The perceived danger of the possibility of engaging in a half-baked trial is in the circumstances a misconception. It not at this stage a trial. Notwithstanding this, the evaluation of the evidence then before the court cannot be half-baked – it must be complete. It is the statutorily established threshold that determines the level of evidence that must be placed before the court by an applicant, and also the level of judicial analysis of all the evidence currently before the Court."
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> "In the present case, Bannister J [the first-instance judge] took the position that between the two extreme case scenarios, he was not required to attempt to conduct an inquiry similar to that which might be conducted on an application for summary judgment – still less a mini trial.
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> It is the Court's position that the learned judge was incorrect in stating that the court should not attempt to conduct an inquiry, or to imply that the court should not conduct an evaluation of the material currently before it. All of this is assuming of course, that in relation to an applicant's proposed pleadings, a viable claim in law has first been disclosed."

[35] What appears to me to be clear from the passages in **Basab**, cited above, are the following:

(a) the Applicant must place before the Court all the material that he considers will demonstrate that the test in s. 184C(2)(c) is made out.

(b) the Respondent will be entitled to place any material before the court that supports its case.

(c) In deciding the merits of the case, the court must analyse the material placed before it by both parties. The analysis will include going through the material in detail to decide the likelihood of success, but it should not go on to make findings on factual matters that are in dispute. However, it is entitled to reject matters (factual or otherwise) that are in dispute between the parties where it is clear that those matters would not withstand proper scrutiny by the court on the test that it has to apply ("likelihood of success"), in the same way as it can do in an application for summary judgment or security for costs[4]. This would usually be where the matters relied upon by the applicant were inherently inconsistent, weak or tenuous.

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[4] See, for example, **King v Stiefel [2021] EWHC 1045 (Comm), [2022] 1 All ER (Comm) 990, per Cockerill J, at [21] and [22]**: 'The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that — even bearing well in mind all

[36] Though not specifically mentioned in **Basab**, in my judgment, the respondent should make available to the court all the evidence that may be relevant in the court's determination of the likelihood of success of the proposed derivative claim, whether that evidence supports, or undermines, its case. If the applicant is required to put all the material he relies upon in support of the claim before the court, so must the respondent, and both must disclose all relevant evidence and information to the court. On the basis that modern litigation is now required to be conducted with each party putting his or her "cards on the table" and being open with the court and the other party, the parties must not withhold evidence or information that may affect their case, whether that information or evidence is helpful or adverse to him. If they fail to do so, without good reason, the court should be entitled to draw an adverse inference in relation to that failure, i.e., to conclude, for the purpose of the merits test, that there is no evidence on the matter in support or in opposition to the issue, or none that would withstand the proper scrutiny of the court.

[37] While fully appreciating the observations of the Court of Appeal that the leave application should properly consider the merits of the case on the material before it, it is also very important that the leave application should not, as this one has, descend into a mini-trial on the merits of the claim. The Application was listed by the court for a day (which was in itself excessive). More than one and a half days were occupied with hearing the Application. There is a serious risk that if applications of this nature are not properly managed they may spiral out of control. In a case as reasonably straightforward as this one on the facts, I would not expect the application to take more than two hours to hear, provided the judge has had some previous reading time to consider the papers. The court should be able to decide on the leave application in that time. The remarks of **Lord Denning MR in Wallersteiner v Moir (No. 2) [1975] 2 All ER 849 at 859** are particularly apposite to refer in this respect (though the suggested procedure in that case for bringing an application for leave is now regulated by statute both in England and Wales and this territory):

> "In a derivative action, I would suggest this procedure. The minority shareholder should apply ex parte to the master for directions, supported by an opinion of counsel, as to whether there is a reasonable case or not. The master may then, if he thinks fit, straightaway approve the continuance of the proceedings until close of pleadings, or until after discovery or until trial (rather as a legal aid committee does). The master need not, however, decide it ex parte. He can, if he thinks fit, require notice to be given to one or two of the other minority shareholders —as representatives of the rest — so as to see if there is any reasonable objection. (In this very case another minority shareholder took this very point in letters to us.) But this preliminary application should be simple and

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of those points — it would be contrary to principle for a case to proceed to trial … So, when faced with a summary judgment application it is not enough to say … that something may turn up."

inexpensive. It should not be allowed to escalate into a minor trial. The master should simply ask himself: is there a reasonable case for the minority shareholder to bring at the expense (eventually) of the company? If there is, let it go ahead." (Emphasis supplied).

[38] While these observations must now be read in the light of the decision in **Basab,** they are just as valid now as they were when Lord Denning made them. The short point here is that the court should be able to decide a leave application on the material before it. It should not engage in speculation about what material may or may not exist that it would like to see and should resist granting adjournment for additional material to be placed before it, save in the most obvious case.

[39] For reasons that will be obvious later in this judgment, I do not need to decide every point that has been raised by the parties in the Application in determining whether the heads of claim formulated by the Applicant, for the purposes of the Claim, are "likely to succeed". That is because whatever the underlying factual merits of the case, the Respondent will have a complete answer to some of the heads of claim, as a matter of law, even if one accepts the entirety of the case of the Applicant; and as regards the remaining heads of claim, it is difficult to see how, even taking the Applicant's case at its highest, he would have any, or any reasonable, prospect of success in the Derivative Claim. It follows that I do not need to deal with the other bases upon which the Respondent contends that the Claim is unmeritorious.

THE BASIS OF THE PROPOSED DERIVATIVE CLAIM

[40] The Applicant contends that the following are *de jure* or shadow directors of the Company: Control, Mr Gaskell, Mr Leech and Mr McKenzie (referred to herein collectively or to any two or more of them as "the Directors").

[41] So far as any head of claim that the Applicant wishes to bring relates to the liability of a director of the Respondent for non-fraudulent conduct, art. 14 of the Articles of Association of the Respondent would provide the defendant to such a claim with a complete defence.

[42] The relevant provisions of art. 14 are in the following terms:

> "14.1 Subject to the limitations hereinafter provided the Company shall indemnify against all expenses, including legal fees, and against all judgments, fines and amounts paid in settlement and reasonably incurred in connection with legal, administrative or investigative proceedings any person who: (a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that the person is or was

a director of the Company; or (b) is or was, at the request of the Company, serving as a director of, or in any other capacity is or was acting for, another body corporate or a partnership, joint venture, trust or other enterprise.

14.2 The indemnity in Regulation 14.1 only applies if the person acted honestly and in good faith with a view to the best interests of the Company and, in the case of criminal proceedings, the person had no reasonable cause to believe that their conduct was unlawful."

[43] Article 14 is cast in extremely wide terms. It exculpates a director from any liability "in connection with legal, administrative or investigative proceedings any person who, *inter alia*, is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that the person is or was a director of the Company." The only limitation to this is that the director must have "acted honestly and in good faith" with a view to the best interests of the Company.

[44] This type of indemnity would almost certainly be void under s. **239 of the Companies Act 2006 of Great Britain** ("the CA 2006")[5]. However, there is no equivalent of that provision in the **BCA 2004**. Rather, s. **132 of BCA 2004** makes it clear that an indemnity provided to a director of a BVI company, such as that contained in art. 14, is valid[, but such an indemnity is only available if] the person acted honestly and in good faith and in what he or she believed to be in the best interests of the company.

[45] The terms of art. 14 are clear. There is no basis for giving it a restricted construction of the type contended for by the Applicant. This was made clear in **Emerald Bay Worldwide Limited v Barclays Wealth Directors (Guernsey) Limited** ("Emerald Bay"), Guernsey Court of Appeal, Judgment 02/2013, 9 January 2014. Mr Woolgar submits that this decision is not binding on me and, of course, it is not. However, the analysis of the equivalent provision of art. 14 in **Emerald Bay** is not just compelling but is incontrovertible from the literal words of that provision. There is no need to strain the construction of art. 14 in the way in which Mr Woolgar invites me to do. The

[5] See **s. 239(1)-(3) of the CA 2006**: "(1) Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void; (2) Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or of an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void [with certain exception not relevant in the present context]; and (3) This section applies to any provision, whether contained in a company's articles or in any contract with the company or otherwise…"

literal words are unambiguous. It follows that even if I disregarded **Emerald Bay**[6], I would still come to the same conclusion that any non-fraudulent liability on the part of a director of the Respondent is excluded by that article.

[46] This deals with any non-dishonesty related claim against the directors of the Company (including Mr Leech). However, it is appropriate for me to deal briefly with the allegation that Mr Leech was a shadow director of the Company.

[47] The Applicant seeks to make Mr Leech liable as a shadow director of the Respondent for certain breaches of duty alleged to be owed by him to the Respondent. He contends that the definition of the expression "director" in **s. 2 of the BCA 2004** makes that claim possible.

[48] There cannot be a successful derivative claim against any defendant who is alleged to be a "shadow director" of the Company in this jurisdiction.

[49] The definition of "director" in s. 2 is in the following terms:

> "director", in relation to a company, a foreign company and any other body corporate, includes a person occupying or acting in the position of director by whatever name called."

[50] The words "includes a person occupying or acting in the position of director by whatever name called" contain the classical definition of a *de facto* director. That definition includes persons: (a) who were defectively appointed under the company's constitution or the general law but have acted as if duly appointed; (b) those who were once appointed but have ceased to hold office under the company's constitution or the general law but have continued to act as if still in office; and (3) who were never appointed but have assumed the position of director in the company's dealings with third parties and/or in relation to its property or assets.

[51] The expression 'de facto director' has appeared in decided cases throughout the history of incorporated companies, particularly those incorporated in Great Britain under the Companies Acts, i.e., the CA 2006, and its forebear legislation. The cases were examined by **Lord Collins of Mapesbury JSC in Re Paycheck Services 3 Ltd; Revenue and Customs Commissioners v Holland [2010] UKSC 51**. As he pointed out at **[58] *et seq***, the expression was used in **Foss**

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[6] See also the decision of the Privy Council in **Viscount of the Royal Court of Jersey v Shelton [1986] 1 W.L.R. 985** in which the Privy Council held that a director was not liable to compensate the company for causing it to enter into a transaction that was *ultra vires*, describing the effects of an indemnity in terms which were narrower than art. 14 as having the effect that the company had no "cause of action against a director in respect of a matter against which the company has agreed to indemnify him."

v Harbottle (1843) 2 Hare 461, 67 ER 189, where it was held that those involved in the internal management of the company who, with the acquiescence of shareholders, had acted as the directors of the company, though not duly appointed, were to be regarded as the board of the company capable of conducting business, in particular litigation, on its behalf (and could not be restrained from doing so by some shareholders, despite the defect in their appointment).

[52] The concept of "shadow directorship" is different from *de facto* directorship. It is entirely the creature of statute. Though the expression "shadow director" is not used in the BCA 2004, part of the formulation of the expression "director" in s. 6 of the BVI Insolvency Act 2003 ("BVI IA 2003") contains the same or similar wording to the expression "shadow director", as defined in the CA 2006 and the Insolvency Act 1986 of Great Britain ("the IA 1986").

[53] That part of the formulation of the expression "director" in s. 6 (1)(b) and (2) of the BVI IA 2003 which is similar to the formulation to the expression "director", as it is used in the CA 2006 and the IA 1986, is in the following terms:

> "(1) …
>
> (b) a person in accordance with whose directions or instructions a director or the board of a body corporate may be required or is accustomed to act; and
>
> (c) a person who exercises, or is entitled to exercise, or who controls, or is entitled to control, the exercise of powers which, apart from the memorandum or articles, would fall to be exercised by the board."
>
> "(2) …. Notwithstanding subsection (1):
>
> (a) a person is not to be regarded as a director of a body corporate by reason only that a director or the board act on advice given by him or her in a professional capacity …".

[54] The expression "shadow director" first appeared as a defined term in s 63 of the Companies Act 1980 of Great Britain, although the words of the definition had been used in various statutes since s. 3 of the Companies (Particulars as to Directors) Act 1917 added them (absent the professional advice proviso) to the definition of 'director' in various sections of the Companies (Consolidation) Act 1908.

[55] I am unable to accept the Applicant's submission that the definition of the expression "director" in the BCA 2004 should be given the extended meaning for which he contends. Whether words similar to those contained in the expression "director" in s. 6 were deliberately or inadvertently

excluded from the BCA 2004 does not appear to me to be material. The fact is that the definition in s. 2(1) does not extend to a "shadow director" and the literal words of that provision do not include a person in accordance with whose instructions the director or a significant part of the board is accustomed to act[7]. Even straining the plain words of s. 2(1) as extensively as I could (and there is no basis, in any event for me to do so because the literal words of s. 2(1) are clear), I could not come to the conclusion that the provisions of the BCA 2004 alleged to have been breached by Mr Leech encompass any liability on his part as a shadow director. This is particularly so as the **BCA 2004** was amended on various occasions after it was enacted and the draftsman of that Act did not think it necessary to extend the definition of the expression "director" to include a shadow director. It would be re-writing s. 2(1) if I were to give it the meaning contended for by the Applicant.

[56] It follows that I do not need to decide whether the formulation of the duties of a shadow director in **Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch)** or **Vivendi SA v Richards [2013] EWHC 3006 (Ch)** is correct, or how the decision of **Trower J in Standish v Royal Bank of Scotland plc [2019] EWHC 3116 (Ch)**, and other cases[8] impact on that issue. I should add that even if s. 2(1) extends to a shadow director, there is no evidence (the burden being on the Applicant to prove that Mr Leech was a shadow director) that the board, or a functional majority of the board, acted or were accustomed to act on Mr. Leech's instructions in relation to the Project or any part or parts of it[9]. In addition, it seems to me to be clear that absent dishonesty or bad

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[7] It should be noted that a person may be a shadow director, that is to say, a person in accordance with whose directions or instructions the directors of a company are accustomed to act, but this need not be the entire board of directors. As Lewison J in **Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch)** said, a person would fall within the definition of "shadow director" if a functional majority of the board acted or were accustomed to act in accordance with his directions or instructions. The functional majority of the board, in this context, means a majority of the board who can, by their votes, carry a resolution of the board and thus decide what is to happen in the company's business or to its assets.

[8] See, for example, **Instant Access Properties Ltd (in liq) v Rosser [2018] EWHC 756 (Ch), Morgan J**.

[9] It is not necessary for the directions or instructions necessary to constitute a person a shadow director of a company to extend over all or even most of the corporate activities of the company: see, for example, **Secretary of State for Trade and Industry v Deverell [2001] Ch 340, at 355B**, per **Morritt LJ** (as he then was); **Re Paycheck Services 3 Ltd, Revenue & Customs Commissioners v Holland [2010] UKSC 51, at [91] (Lord Collins JSC), at [109]–[110] (Lord Walker JSC),** and at **[127] (Lord Clarke JSC)**; and **Smithton (formerly Hobart Capital Markets) v Naggar [2014] EWCA Civ 939, at [32]**, per **Arden LJ.**

faith, the indemnity in art. 14 would apply to such a director. The indemnity would, of course, also apply, for the reasons stated above, if the Applicant sought to bring Mr Leech as a defendant to the Claim as a *de facto* director as an alternative to seeking to establish that he was a shadow director[10].

[57] So far as any head of claim that the Applicant wishes to bring relates to the liability of any person for fraud or dishonesty, I agree with the Respondent that there is insufficient evidence for the claim to have an, or any reasonable, prospect of success.

[58] The claims for dishonesty are intended to be brought against RE Capital, CAF6, and ESF.

[59] The Applicant alleges that those three defendants are liable for knowing receipt and dishonest assistance in connection with the following: (1) RE Capital on account of excessive management fees received by it; (2) CAF 6 in connection with the "Mezzanine Loans"[11], on account of "excessive" interest paid under them; and (3) ESF in connection with the "ESF Loans"[12], also on account of "excessive" interest paid under them.

[60] The underlying basis of the claim in relation to these loans was that the directors authorised CLL UK's entry (alternatively, failed to prevent CLL UK's entry) into these loans, in circumstances where lenders were connected with one or more directors of CLL UK and where the rates of interest under those Loans were significantly higher than they should have been, as a result of the development management failures concerning the Project.

[61] So far as the claim for dishonesty is concerned, art. 14 does not, of course, relieve a director from liability for such a claim.

[62] The basis upon which the claim for dishonesty is intended to be made is summarised in para. 42 of the Applicant's skeleton argument in the following terms:

> "The claims against RE Capital, CAF6, and ESF are pleaded on the basis of BVI's knowing receipt and/or dishonest assistance. The basis for the necessary mental elements in these claims is straightforward, and depends on attributing the knowledge

[10] As to whether it is possible to pursue a claim against a person as a shadow director or, in the alternative, de facto director, see **Smithton (formerly Hobart Capital Markets) v Naggar [2014] EWCA Civ 939**.

[11] This was a loan of £14m to CLL UK at a rate of 9% p/a for two years. The Mezzanine Loan was extended several times by variation agreements, and the interest rate increased from 9% to 11% over that period.

[12] These were made by ESF to the Company.

of Mr Leech and Mr Gaskell to RE Capital, CAF6 and ESF. The legal analysis of the knowing receipt claims is that (i) as each of the relevant agreements was contrary to CLL BVI's interests, and that fact was known to RE Capital, CAF6 and ESF, those agreements are voidable; (ii) it follows that sums paid under those void agreements are recoverable, subject to (iii) an obligation to make counter-restitution which will be equal to the amounts which could have been properly charged by those third parties."

[63] This is as much as the Applicant can say about the claim based on dishonesty.

[64] The absence of a properly pleaded case on dishonesty, at this stage, is not fatal to the grant of permission. One would not expect the Applicant to be held to what he says in the draft Particulars of Claim about any allegation of dishonesty[13]. If leave is granted, he would have the time to get his tackle in proper order and plead his case on dishonesty in the way in which the authorities make it clear he is required to do. However, information about this allegation in the affidavit relied upon in support of the leave application goes nowhere near to satisfy me that a claim for dishonesty could be maintained by the Applicant and, if it was, that it would be successful.

[65] In his first affidavit sworn on 14 September 2024, the Applicant deals in detail with the background to the Project, his investment in it, and what went wrong with it. At paras. 60 and 61 of his first affidavit, he summarises his various claims against the defendants to the proposed derivative claim. It is worth setting out the relevant excerpts of what he says about these:

> "60 I understand that directors of BVI companies owe several duties to the Company under the Act. Those duties include:
>
> a. To act honestly and in good faith and in what the director believes to be in the best interests of the Company;
>
> b. To exercise the powers as a director for a proper purpose;
>
> c. To exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account (without limitation) (i) the nature of the company, (ii) the nature of the decision, and (iii) the position of the director and the nature of the responsibilities undertaken.
>
> 61 As set out in the Draft English Pleadings (paragraphs 33-40), Control, Mr Gaskell, Mr McKenzie and Mr Leech have breached those duties. In summary:
>
> a. Control breached its duties by the grant of the Management Agreement to GMG Real Estate and subsequently to RE Capital, on terms which were substantially uneconomic and/or favourable to GMG Real Estate and RE Capital.
>
> b. The directors authorised CLL UK's entry (alternatively, failed to prevent CLL UK's entry) into the Mezzanine Loans. The rates of interest under

[13] The draft Particulars of Claim are exactly what they say – they are draft only at this stage.

the Mezzanine Loans were significantly higher than the rate of interest payable under the CAF6 Loan; further, the Mezzanine Loans were only necessary as a consequence of the various failures of development management summarised above, including the return of equity to CLL's investors in April 2018. Accordingly, the Mezzanine Loans benefitted CAF6 at the expense of the Company (because CLL UK, the Company's wholly owned subsidiary, was put to a detriment by paying disproportionately high rates on interest), in circumstances where CAF6 was a related entity of the directors, GMG, and/or RE Capital.

c. The directors authorised CLL UK's entry (alternatively, failed to prevent CLL UK's entry) into the ESF Loans, in circumstances where ESF and CLL UK were connected parties. The rates of interest under the ESF Loans were significantly higher than all other debt being paid into CLL UK, and ESF Loans benefitted ESF at the expense of CLL UK. As with the Mezzanine Loans, ESF Loans were only necessary as a result of the development management failures concerning the Project. d. Mr Gaskell and Mr Leech failed to supervise and intervene as necessary in the negligent management of the Project by GMG Real Estate and subsequently RE Capital, notwithstanding the fact that they were aware of such mismanagement.

d. Mr Gaskell and Mr Leech failed to supervise and intervene as necessary in the negligent management of the Project by GMG Real Estate and subsequently RE Capital, notwithstanding the fact that they were aware of such mismanagement."

[66] The Applicant then goes on to state the nature of CLL BVI's claim against others involved in the failure of the Project. There is no reference to any claim based on dishonesty in the rest of that affidavit, other than what is said in para. 31(i) of the draft Particulars of Claim, which is exhibited to it, that Control, Mr Gaskell, Mr McKenzie and/or Mr Leech were under a duty by virtue of s. 120 of the BCA 2004 to act honestly and in good faith and in what they believed to be is in the best interests of CLL BVI; and para. 32 of the draft Particulars of Claim which alleges that they were in breach of that duty and the other duties owed to CLL BVI.

[67] Paragraph 26 of the Applicant's second affidavit sworn on 13 December 2024 provides the following additional information about the claim:

> "Mr Gaskell also seeks to defend RE Capital and GMG Real Estate's position on the proposed third party claims … As to this: a. Mr Gaskell complains that dishonesty is not pleaded for the dishonest assistance claim ... because the DPOC refers to "knowing assistance". However, in this context, knowledge is dishonesty, because knowledge (of receiving property in breach of fiduciary duty) is what establishes dishonesty."

[66] Section 120(1) of the BCA 2004 is in the following terms:

> "a director of a company, in exercising his or her powers or performing his or her duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company."

[68] This provision is similar to **s. 172 of the Companies Act 2006** of Great Britain, though s. 172 is more elaborately formulated than s. 120(1) of the **BCA 2004**.

[69] There is no express or inherent requirement in the duty set out in s. 120 that a director must have acted dishonestly if he is to be in breach. Where he does not do so, he will be exempt from liability under art. 14.

[70] So far as dishonesty is asserted against a director or any other person under this head of claim, there is no evidence about how that person has acted dishonestly. What I have set out above is the most that is said about why the claim against the directors involves dishonesty.

[71] This head of claim cannot even get off the ground. What is said against the directors by the Applicant is little more than a bare assertion. It is not supported by any particulars about how the proposed defendants to the Claim who are alleged to have been dishonest were, in fact, dishonest. Nor does it seem to me to be possible for an inference of dishonesty to be made against them based on the paucity of information that is provided by the Applicant.

[72] It is not usually appropriate for an allegation simply to insinuate dishonesty. Where it is clear that the underlying allegation is one of dishonesty, it is necessary for the allegation to say so expressly, clearly, and unequivocally and provide full particulars in support: see **Hussain v Amin and Charters Insurance Ltd [2012] EWCA Civ 1456 at [18] and [19], per Davis LJ**.

[73] In ***Property Alliance Group Ltd v Royal Bank of Scotland*** **[2015] EWHC 3272 (Ch)**, at **[39]–[40]**, **Birss J** (as he then was) stated:

> "Assertions of fraud and dishonesty are easy to make but difficult to prove and can cause a major increase in the cost, complexity and temperature of an action. The court's approach is not intended to stop soundly based allegations of fraud or dishonesty from being made. It is intended to make sure that improper and unfounded assertions are not permitted and to make sure that the party against whom the allegation is made knows what case they have to meet."

[75] Based on the information and material thus far provided to this Court, the likelihood of any claim based on dishonesty succeeding is remote. The Court should not grant leave to bring such a claim where the risk of an adverse costs order, if the claim should fail, would fall entirely on CLL BVI.

[76] Nor can I see any basis for a claim in negligence against RE Capital and/or Mr Gaskell and/or Mr Leech or any other proposed defendant. The failure to adduce expert evidence at this stage to support such a claim does not appear to me to be fatal. As I have already said, an application for leave should not descend into a mini-trial of all the issues that arise in the proposed claim. However, some indication of how it is alleged there is negligence and how it is alleged to have caused loss is essential. There is none here.

[77] There is no evidence, even by reference to the usual industry standards, of how the alleged acts constitute a breach of the duty of care. Nor can I see a causative link between the breach and any loss suffered by CLL BVI. I agree with the Respondent that the most that can be said about the complaints that the Appellant makes is some form of commercial misjudgement about certain aspects of the Project. That does not, by itself, give rise to a breach of any duty of care.

[78] It must follow that, based on my above analysis, the prospect of any head of claim succeeding is remote.

[79] I am not sure that I understand the relevance of the point about "reflective loss" raised by the Applicant. So far as it is suggested that I should grant leave because a claim for reflective loss is unlikely to be successful, then I agree with that submission to this extent: I see little prospect of a claim for reflective loss succeeding, based on the principles laid down by the Supreme Court in **Sevilleja v Marex Financial Ltd [2020] UKSC 31**. However, it does not seem to me that the presence or absence of such a claim has any relevance to the grant of leave.

[80] That makes it unnecessary for me to deal with the several other bases upon which the Respondent asserts the Claim is unlikely to be successful. As I indicated to Mr Turner, in the course of my exchanges, I am not sure that I agree with all the points he makes. But one point on which he must be correct is how claims which are essentially those that belong to CLL UK cannot be pursued by CLL BVI[14].

[81] I happen to think that Mr Turner is correct to say that to the extent that any company has suffered any loss, it has to be CLL UK, not CLL BVI, and to grant the Applicant leave would mean allowing it to pursue a claim which is vested in the UK company, not the BVI company.

[14] Whether they could be considered to be "double derivative claims" and could be pursued under what appear to be the established common law principles for bringing such claims is outside the scope of the Application. In any event, it is not for this Court to decide.

[82] On the basis that the Court should not grant leave, based on a case that it regards as weak, particularly where the Respondent risks having to bear any of the costs of the derivative claim itself if it is unsuccessful, there is no need for me to consider any other factors specified in s. 184C(2). However, it is appropriate for me to mention each of them, and some additional factors not included in s. 184C, briefly.

OTHER FACTORS

Member acting in good faith

[83] I do not believe the Respondent to be suggesting that the Applicant is not acting in good faith. The Applicant has lost a substantial amount of his investment in CLL BVI. In addition, he is content not to seek the indemnity in costs specified in s. 184D. This does not suggest to me that he has any motive other than to hold the proposed defendants to the Derivative Claim to account for their conduct.

Derivative claim in the interests of CLL BVI

[84] Section 184C(2)(b) requires the Court to consider whether the Derivative Claim is in the interests of the CLL BVI, "taking account of the views of the company's directors on commercial matters." This factor has to be looked at independently from the "merits" of the claim because, in one sense, the commercial viability of a claim will also depend on the merits of the claim.

[85] There is no evidence of the board of directors of CLL BVI having considered the appropriateness of bringing a claim, based on "commercial matters". The Respondent fails to set out anywhere either in the written evidence lodged in opposition to the Application or the skeleton argument what matters it took into account in coming to this decision. There was a reference to the Respondent having commissioned an independent report about the commercial viability of a claim being brought but that report has not been finalised and is not, therefore, before the Court. Nor is there any evidence about whether the creditors will be paid their debts in full on the realisation of the Project and, if so, the likely dividend paid or payable to the members of CLL BVI. This would have enabled the Court to reach some conclusion as to whether the commercial viability of a proposed claim warranted leave being granted. The Court must not accept a respondent's conclusion about the commercial viability of a claim in the absence of clear evidence. That is because it will often be the case that the defendants to the proposed derivative claim will be the majority shareholders (also having control of the company at board level), or those associated with them, and they are unlikely to commission an independent report on the

viability of the claim. In the present case, there is no evidence of any independent consideration of the commercial appropriateness of the Derivative Claim.

Costs of the Derivative Claim

[86] Even without the costs' indemnity under s. 184D, CLL BVI's costs for bringing the Derivative Claim are estimated to be over £1 million. This, together with the poor merits of the Derivative Claim, must be a factor against the grant of leave. While the Applicant does not seek the indemnity in s. 184D, and this is a factor that must be taken into account, even though it is not expressly referred to in s. 184C, the possibility of CLL BVI having to pay the costs of the proposed defendants if they are successful in defending the Claim is an important countervailing factor.

Alternative remedy

[87] I understand it to be common ground between the parties that there is no alternative remedy available to the Applicant that would obviate the need to bring the Derivative Claim.

Wrongdoer Control

[88] I understand it to be common ground between the parties that the Court has to take into account whether CLL BVI is being improperly prevented from bringing its claim.

[89] Under common law, a court could only sanction a member to bring a derivative action in limited circumstances if there was "wrongdoer control", i.e., if those alleged to have wronged the company had obtained a benefit for themselves at the expense of the minority.

[90] The Respondent contends that this requirement continues to apply, even though it is not expressly mentioned in s. 184C. The Respondent describes it as a residual factor that this Court must take into account, stating that "it remains an important part of the inquiry as part of the Court's residual discretion."

[91] The Respondent refers to the decision in **Smith v Croft (No. 2) [1988] Ch**, in which Knox J stated that for leave to be granted under the common law test, it was necessary to establish not only that the claims would not be sued on, but that wrongdoers were improperly preventing the claims from being sued on, observing:

> "Ultimately the question which has to be answered in order to determine whether the rule in **Foss. v. Harbottle** applies to prevent a minority shareholder seeking relief as plaintiff for the benefit of the company is 'Is the plaintiff being improperly prevented from bringing these proceedings on behalf of the company?' If it is an expression of the corporate will of the company by an appropriate independent

> organ that is preventing the plaintiff from prosecuting the action he is not improperly but properly prevented and so the answer to the question is 'No.' The appropriate independent organ will vary according to the constitution of the company concerned and the identity of the defendants who will in most cases be disqualified from participating by voting in expressing the corporate will."

[92] In **Smith v Croft (No 2**), the court was unconvinced that a just result could be achieved by a single minority shareholder having the right to involve a company in an action for recovery of compensation for the company if all the other minority shareholders were, for disinterested reasons, satisfied that the proceedings would do more harm than good. The court also ruled that, in the absence of evidence that the views of the disinterested members were based on knowledge of all the facts, it would be inappropriate to give weight to those views for the purpose of a decision on whether to grant leave.

[93] Leaving aside the merits of the claim, that is not the position here. The Respondent does little more than say, at para. [142] of its skeleton argument that "there is no evidence to support [the Applicant's] case that there is 'wrongdoer control'."

[94] It is difficult to see how "wrongdoer control" can be said to be absent here.

[95] In **Prudential Assurance Co Ltd v Newman Industries Ltd (No.2) [1982] Ch 204 at 219**, the Court of Appeal left open the precise width of the test of control in the following terms:

> "It is commonly said that an exception to the rule in **Foss v. Harbottle** arises if the corporation is 'controlled' by persons implicated in the fraud complained of, who will not permit the name of the company to be used as plaintiffs in the suit: see **Russell v. Wakefield Waterworks Co., L.R. 20 Eq. 474, 482**. But this proposition leaves two questions at large, first, what is meant by 'control', which embraces a broad spectrum extending from an overall absolute majority of votes at one end, to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy."

[96] This is not a case of an individual shareholder feeling unhappy about having lost his investment. Other minority shareholders support a claim against the proposed defendants, and there is thought to be some connection between some of the shareholders and the proposed defendants, such as to defeat any attempt by all the "independent" shareholders to bring the Derivative Claim.

[97] In my judgment, therefore, the 'wrongdoer control' test is met.

[98] However, because of the merits of the Derivative Claim, I must decline leave.

Indemnity against adverse Costs Order

[99] In my judgment, if the Claimant were, in addition to not seeking the indemnity in s. 184D, also agreeable to make good any costs awarded against CLL BVI, with sufficient security to ensure that this would happen, I would have been prepared to grant him leave[15], subject, of course, to hearing from the Respondent with any further submissions that it might wish to make. My provisional view, without having heard detailed arguments from Mr Turner, is that the Applicant should not be precluded from pursuing an unmeritorious claim on behalf of CLL BVI if he wishes to, provided he knows that he, not CLL BVI, would be exposed to the risk of paying the costs of such a claim.

[100] There may, of course, be other ways that he might be able to claim compensation on behalf of CLL BVI, as there might be if such a claim was being considered in England and Wales. However, that is a matter for the Applicant.

CONCLUSION

[101] The Application is dismissed.

[102] The parties are invited to submit an agreed order to reflect this judgment. Subject to what the parties say, I propose to hand judgment down remotely on a date to be fixed without requiring either Mr Woolgar or Mr Turner to attend. The time estimate for it will be 15 minutes unless substantive issues arise from the judgment that need to be resolved by me.

[103] I am grateful to both counsel for the clarity of their submissions and for the helpful way in which they presented their cases before me and also to the legal firms instructing them. I would have

[15] Even if this involved the Court treating this case as an exceptional case: see **Cinematic Finance Ltd v Ryder [2010] EWHC 3387 (Ch)**, at **[14]**, per Roth J: "I would not go so far as to say that it could never be appropriate for a derivative claim to be brought by a shareholder holding the majority of the shares in a company. A judge must be cautious about using the word 'never' when faced with a statutory discretion and when this is not one of the enumerated circumstances in section 263(2) in which permission must be refused. And faced only with the facts of the instant case, it is impossible to envisage all the factual circumstances that might arise in other cases. But in my judgment, only in very exceptional circumstances could it be appropriate to permit a derivative claim brought by a shareholder in control of the company. For my part, I find it difficult to envisage what those exceptional circumstances might be." Although Roth J had to consider the matter by reference to the ability of a majority shareholder to bring a derivative claim, it seems the principle may equally apply here.

been prepared to give an ex-tempore judgment in this case but was not able to because Mr Woolgar had a flight to catch and I had to deal with other cases following the completion of this case.

Abbas Mithani KC

High Court Judge

By the Court

Registrar