



Neutral citation number: [2023] EWHC 1771 (Ch)

Case No: CR-2021-002428

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London EC4A 1NL
Date: 13 July 2023

**IN THE MATTER OF ARNBROW LTD (REG NO. 04166470)
AND IN THE MATTER OF WESTRIDGE ESTATES LIMITED (REG NO. 09279820)
AND IN THE MATTER OF THE COMPANIES ACT 2006**

B E T W E E N :

1. MARY KATHRYN LESLIE
(in her personal capacity and as a trustee of the Mary Lawrence Childrens Settlement)

2. DAVID ARTHUR RULE
(as a trustee of the Mary Lawrence Childrens Settlement)

Claimants

- and -

1. ROBERT JAMES BALL
2. MELANIE BALL
(as personal representative of the estate of the late Norman William Ball)

3. WESTRIDGE ESTATES LIMITED

4. ARNBROW LTD

Defendants

Before Mr Peter Knox K.C.
(Sitting as a Deputy Judge of the High Court)

MS CLARE STANLEY K.C. and MR JAMIE HOLMES (instructed by **Trowers & Hamlin LLP**)
appeared on behalf of the Claimants

MR JAMES McWILLIAMS (instructed by **Charles Russell Speechlys LLP**) appeared on behalf of the
First Defendant

Mr ALEC McCLUSKEY (instructed by **TWM Solicitors LLP**) appeared on behalf of the Second Defendant

The Third and Fourth Defendants were not represented and did not appear

Hearing date: 11 May 2023 (with further submissions on 6 June 2023)

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30 am on 13 July 2013 by circulation to the parties' representatives by email and by release to the National Archives

Mr Peter Knox K.C.

1. In these proceedings, the Claimants bring a "double derivative" claim, on behalf of the third defendant (Westridge) and the fourth defendant (Arnbrow), against the first two defendants (Robert and Melanie). By order made on 27 May 2022, Adam Johnson J, in the absence of all the Defendants, gave permission for the time being to the Claimants to continue the claim on the companies' behalf. The Claimants now make a further application, as envisaged by that order, for an order that they be indemnified, in the terms discussed below, by Arnbrow or Westridge both in respect of the costs which they have incurred and shall incur in pursuing the claim on their behalf, and also in respect of any adverse costs order that might be made against them at the end of proceedings. Neither Arnbrow nor Westridge (nor Robert or Melanie) have sought to resist the continuation of Adam Johnson J's grant of permission, as they could have done, but they resist the application for an indemnity.
2. The first claimant (Mary) and Robert are brother and sister. Melanie is the widow of another brother, who was called Norman, who died in April 2019, and she was the executrix of his estate and inherited his shares in Westridge. Mary, Robert and Norman were the children of Norman Ball (senior), to whom I shall refer as "Father". Mr David Rule, the second claimant, is a co-trustee with Mary of a trust set up in 1987 for the benefit of some of her children. The trustees have altered over the years, Mr Rule having been appointed only in September 2019, but Mary has always been one of them. For convenience I shall refer to this as "the Trust".
3. The matter has come about as follows.
4. The Claimants claim that in 2008, Robert and Norman in breach of fiduciary duty caused Arnbrow to transfer, for no value or at an undervalue, three parcels of land in the Isle of Wight, which had amongst other things holiday houses built on them, to companies which the two of them owned; and that thereafter they profited from further wrongful dealings with those three parcels and their proceeds. At the time, Arnbrow was owned by a company which, for convenience, has been called "Bullen Estates" in the hearing before me, but since 2015 it has been owned by Westridge, which in all material respects is Bullen Estates' successor company.
5. The Trust, Robert and Norman each owned almost one third of the relevant shares in Bullen Estates at the time of the alleged wrongful transfers, a small balance being owned by Father. As a result of a subsequent divestment by Father, the transfer of the business to Westridge, and Norman's death, the position is now that the Mary and the Trust (together), Robert and Melanie own the shares in

Westridge equally. The Claimants accordingly claim that Robert and Melanie (as executrix or in her personal capacity) hold the traceable proceeds of Robert and Norman's breaches on trust for Arnbro, and they also claim from them an account, equitable compensation and related relief.

6. Simultaneously, the Claimants are bringing an unfair prejudice petition against Robert and Melanie (both as executrix and as shareholder in Westridge, having inherited from Norman). This was issued at the same time as the derivative claim, and it includes, amongst its allegations of unfairly prejudicial conduct, an allegation that in breach of fiduciary duty to Bullen Estates and latterly to Westridge they failed to cause Arnbro (as the wholly owned subsidiary) to take steps to reverse the wrongful 2008 transfers and subsequent dealings, so as to restore Arnbro to the position it should have been in had the alleged breaches not been committed. The petition also claims an order that Robert and Melanie buy out the Claimants' shares in Westridge at a fair value, without a minority discount, with a premium to reflect the loss suffered by Westridge as a result of the unfairly prejudicial conduct, including the failure to take steps to restore Arnbro to the position it should have been in.
7. The Claimants' position can be summarised as follows. First, given that the grant of permission to bring the claim still exists and has not been resisted or revoked, I must proceed on the basis that they have been and remain properly authorised by the Court to bring the derivative claim on behalf of Arnbro and Westridge, and that it is not open to the Defendants now to go behind this. Second, the usual rule, absent exceptional circumstances which do not apply here, is that where minority shareholders have been authorised by the Court to bring a derivative claim on a company's behalf, the Court should also order, pre-emptively, an indemnity both in respect of the costs which they have incurred and will incur, and also in respect of any costs order that may be made against them, at least up to an identifiable stage in the proceedings when the point can be reviewed. Here, they seek an indemnity only up to the completion of inspection after disclosure, when they accept the matter should be reviewed. Third, they say that it is possible to identify which costs are referable solely to the derivative claim (for which they claim a full indemnity), which are common to both claims (for which they claim an indemnity at 50%), and which are referable only to the petition (for which, of course, they claim no indemnity).
8. The Defendants reply, first, that notwithstanding Adam Johnson J's order, it is open to me to find that it is unnecessary for the Claimants to bring the derivative claim, because they could have brought all the claims within the unfair prejudice petition. They also say that a lot of new evidence has come to light since the order, so I should give it little weight. Therefore, for these reasons alone, I should refuse the pre-emptive indemnity. Second, they say that in any event all the allegations of breach of fiduciary duty, and the question of the extent to which funds should be restored to Arnbro, fall to be decided in the unfair prejudice petition as well as in the derivative claim. Therefore, the costs which the Claimants incur in making these allegations, and the risk of an adverse costs order if they lose, are all costs or a risk which they are incurring for their own direct benefit. Further, on the facts, the court cannot be satisfied to "*a high degree of assurance*" that after trial the court will order Westridge to indemnify the Claimants. So for both these reasons, the usual rule, if such it is, does not apply, and Arnbro should not be required to give a pre-emptive indemnity: indeed it would produce manifest unfairness to apply it in such circumstances. Third, they say that all the past or future costs on either side on the derivative claim are also referable to the unfair prejudice petition which is pursued for the Claimants' sole benefit. So there should be no indemnity in respect of any part of the derivative claim costs.

9. Accordingly, there are three main issues:
- (1) Is it open to me to reject the indemnity application simply on the footing the derivative claim is insufficiently supported by the facts, or unnecessary?
 - (2) Does the usual rule, that a company should provide a pre-emptive costs indemnity when claimants bring a derivative claim with the court's authority for the company's benefit, also apply to this case, where, as said, the claimants bring a simultaneous unfair prejudice petition which seeks to prove, in whole or at least in part, the same allegations as are made in the derivative claim for their own personal benefit? And anyway, does it apply only where the court is satisfied to a high degree of assurance that an indemnity after trial would be appropriate, and if so, what is the consequence in this case?
 - (3) Is the overlap in issues between the derivative claim and the unfair prejudice petition such that, in substance, all the costs incurred on the former have also been and will also be incurred on the latter? Or are there some costs which can properly be treated as referable only to the former, and therefore susceptible in principle to a pre-emptive indemnity?
10. Before turning to these issues, I first summarise the background (which I take largely from the parties' statements of case), and then consider how the statements of case put the various claims and defences.

The background

11. After the second world war, according to Robert, Father established a construction business with his brother James (known as Uncle Jimmy), and their own father. This built up a portfolio of properties, mainly on the Isle of Wight.
12. On 4 September 1957, Father and Uncle Jimmy established Bullen Estates (the name was originally Westridge Estates Ltd, but to avoid confusion I call it Bullen Estates). For the next fifty years or so this company operated as the main holding company for the extended Ball family companies and their property business. That property business included managing a portfolio of three properties in the Isle of Wight, known as Pondwell, Tollgate and Salterns, on which holiday camps are said to have been developed in the 1950's and 1970's.

The shareholdings in Bullen Estates

13. In the late 1970's or early 1980's, Father and Uncle Jimmy gifted substantial shareholdings in Bullen Estates to their respective children. As a result of that and later changes in the shareholdings, of the relevant 1,260 shares in the company, Robert, Norman and Mary held 417 shares in the company, and Father just nine.
14. It appears to be common ground that in 1985 Mary fell out with Father and her brothers when she announced that she intended to divorce her then husband; and that at Father's instigation, her 417 shares were settled on the Trust for the benefit of some of her children. Mary says that in the 1990's she was reconciled with Father, and (as it seemed to her) with Norman, but never with Robert.

15. Arnbrov was incorporated in February 2001, with an issued share capital of one ordinary share of £1, which was owned by Bullen Estates. The Pondwell, Tollgate and Salterns properties were then transferred to Arnbrov; and Arnbrov was regarded as being owned, through Bullen Estates, by Father's side of the family rather than Uncle Jimmy's. Father was a director of Arnbrov from its incorporation. Robert became a director from August 2005, and Norman from July 2006. It appears to be common ground that from around this time, both Robert and Norman participated in the management of Arnbrov and Bullen Estates. Mary, however, did not, nor was she appointed a director of either company.
16. In 2006, Bullen Estates was restructured, with the result, according to Robert, that the 1,260 shares which he, Norman, the Trustees and Father owned were designated "A" shares as opposed to "B" shares, with the "A" shares being entitled to the profits from Arnbrov. This, as I understand it, is said to have formalised the previous arrangements, by which their side of the family owned Arnbrov, and Uncle Jimmy's side of the family owned another subsidiary called Westridge I.O.W. Ltd. On 10 May 2010, Father divested himself of his nine "A" shares in Bullen Estates, giving three each to Robert, Norman and Mary, so as to bring their totals to 420, 420 and 420 (for Mary and the Trust combined). Mary says that in her case this evidences the reconciliation between herself and Father.

The 2008 transfers and subsequent dealings with the three parcels

17. On 20 June 2008, Arnbrov transferred the three parcels (Pondwell, Tollgate and Salterns) to three special purpose vehicles ("the Pondwell SPV", the "Tollgate SPV" and the "Salterns SPV") each of which was owned by Robert and Norman. The total stated sale price was £2,275,000, but Arnbrov appears to have agreed to defer payment by the mechanism of lending the money back to the three SPVs, secured by legal charges over the parcels and a debentures over the SPVs' undertakings. In the event the full sum of £2,275,000, together with interest, was not paid off until February 2022. The price for Pondwell was £560,000; for Tollgate £715,000; and for Salterns £1 million.
18. It is these transfers, and Robert and Norman's subsequent dealings with the parcels and the shares in the SPVs, which form the basis of the complaints in the derivative claim. As discussed further below, the Claimants say that the transfers were for no value, or at a gross undervalue, and carried out at Robert's and Norman's instigation for their own personal benefit. Robert disputes this, and, save for certain specific defences, Melanie puts the Claimants to proof on it (she says she has limited knowledge of these matters). They say that the transfers were agreed by Father and carried out at his instigation, for proper commercial reasons and at a fair value; and that they were recorded in the 2008 accounts approved by Arnbrov's board on 20 April 2009.
19. Subsequently, on 30 September 2009, Robert and Norman, according to Robert, resigned as directors of the three SPV's and sold their shares in them to Catton Holdings (Isle of Wight) Ltd ("Catton Holdings"). The price was (a) approximately £1 million in cash, plus (b) a further sum of up to £2 million to be settled by the issue of loan notes by Catton Holdings, but this was conditional upon either (i) planning permission being obtained for the Pondwell and Tollgate sites, or (ii) the sale of any bungalows at the Salterns site; plus (c) a further sum in cash payable by way of earn out, to the extent that planning permission was obtained for more than 20 units at the Pondwell site. As security for payment of the deferred part of the price (i.e. (b) and (c)), Robert and Norman were granted charges over the three parcels of land.

20. According to Robert, Catton Holdings thereafter refurbished the units on the sites, with a view to selling them as holiday homes, but it was unable to make a success of things and it came under pressure both from its own lenders and from Arnbro, who looked to Catton Holdings to pay the still unpaid purchase price owed to it by the SPVs. Accordingly, Robert says, after lengthy negotiations, a series of transactions was entered into in September 2014, under which:
- (1) Robert and Norman released the Salterns SPV and the Tollgate SPV from their obligations under the charge over the parcels which they took when they sold the SPVs in September 2009;
 - (2) Catton Holdings varied and partly redeemed the loan notes that had been issued to Robert and Norman as part of the price under the sale of the SPVs;
 - (3) The Pondwell SPV was sold back to Robert and Norman, in consideration of their taking on all three SPVs' liabilities to Arnbro under the original sale agreement.
21. In the derivative claim, as I discuss further below, the Claimants claim an account from Robert and Melanie in relation to the proceeds of sale, and the proceeds of the charges, which Robert and Norman received from these transactions involving Catton Holdings. They also claim an account in relation to certain other benefits which they say Robert and Norman received from their ownership of the Pondwell SPV in 2017 and 2018 after it was transferred back to them (see paragraphs 65 to 67 of the Particulars of Claim).

The restructuring in 2014 to 2016

22. On 11 February 2015, a special resolution was passed to wind up Bullen Estates. Its liquidators then transferred its share in Arnbro to Westridge, and it was dissolved in 2016. Westridge had in the meantime been incorporated on 24 October 2014 with an issued share capital of one share of £1, and on 11 February 2015, it allotted a further 1,259 shares, with the result that 420 shares were issued to Robert, 420 to Norman and 420 to the Claimants (417 to the Trust and three to Mary): that is to say, in the same proportions as the "A" shares had been held in Bullen Estates. It appears to be common ground that the restructuring was completed by 2016, and according to Robert its purpose and effect was further to formalise the split in Bullen Estates' business between Father's side on the one hand, and Uncle Jimmy's on the other. By now, I should add, Uncle Jimmy had died in 2005, and Father in December 2015.
23. It appears to be common ground that Robert has at all times been a director of Westridge, and that Norman was from 31 July 2017 until his death in April 2019. Father does not appear to have been a director before his death in December 2015, nor has Mary ever been a director or taken an active part in the company's management.

Events leading to these proceedings

24. After Father's death, there was a probate dispute between his children, which was settled in November 2016. But, as a result of that, Mary, she says, approached solicitors and began to investigate the circumstances which have led to her derivative claim. In the meantime, Westridge

ceased to pay dividends from 2016 to 2020 after Robert (she says, but he denies) told her that no more would be paid. (Dividends had been paid by Bullen Estates and Westridge before then.)

25. On 25 April 2019, Norman died, and his shares in Westridge passed to Melanie as executrix and as beneficiary under his Will (probate was granted on 10 February 2020). Melanie says that she had had no real involvement in the business, nor did Norman discuss his financial and business affairs with her in detail.
26. Shortly afterwards, in July and August 2019, Mary's former solicitors, on her own and the Trust's behalf, complained to Robert and Melanie that she had been excluded from the business, and asked them to provide an account of Robert's and Norman's dealings as directors of Arnbro and Westridge. She threatened a derivative claim and an unfair prejudice petition if no satisfactory response was received. Melanie said she was unable to assist, given Norman's death, and Robert refused to spend time "*trawling through*" the past until Mary's complaints were clarified. There then appears to have been a lull in correspondence until 4 August 2020, when Mary and the Trust's current solicitors resumed their complaints. There was then pre-action correspondence until the institution of these proceedings.
27. On 9 October 2020 and 19 October 2021, Westridge's board, Robert says, resolved to declare an interim dividend, in each case of £100,000. The Trust's and Mary's one third share (in the individual sums of £33,093.12 and £238.08) was paid to them shortly afterwards. Mary has cashed these sums, but reserves her position as to whether the dividends were properly declared. Dividends were also paid to Melanie and Robert.

The pleadings

28. On 22 December 2021, the Claimants issued the derivative claim and the petition.

The derivative claim

29. The derivative claim complains that in breach of fiduciary duty to Arnbro, Robert and Norman authorised the three 2008 transfers to their own SPVs for no value or at an undervalue. As a result, they profited, at Arnbro's expense, from (a) the difference between the value of the three parcels (which the particulars put at £16.9 million based on a CBRE valuation in March 2021) and the lower price said to have been paid by the three SPVs on the 2008 transfers; (b) the further sums they received when they sold their shares in the three SPV's to Catton Holdings; (c) the sums received by the Pondwell SPV (after its retransfer to them) on a sale of a plot of land it held, and from successful adverse possession and planning applications in 2017; (d) the loans granted by Arnbro to the three SPVs to buy the three parcels and charges which secured them; and (e) other miscellaneous items. Accordingly, they claim:

- "1. A declaration that [Robert and Melanie] hold all traceable proceeds of their breaches of fiduciary duty and/or trust as pleaded herein on trust for Arnbro and consequent orders and/or relief accordingly; and/or
2. An account of all monies due and owing between [Robert and Melanie] and Arnbro and consequent declarations, orders and/or relief accordingly; and/or

3. All necessary accounts and inquiries as to Robert and Norman's stewardship of Arnbro's assets; and/or
 4. Equitable compensation ...”
30. The rest of the prayer claims standard consequential relief, and also an order that the Claimants be indemnified out of Arnbro's, alternatively Westridge's, assets in respect of the legal costs of the derivative claim.
 31. Robert and Melanie deny the claim. In summary, Robert says that the 2008 transfers and all subsequent transactions involving the three parcels were approved by Arnbro's board (including Father), to whom all relevant conflicts of interest were declared. Further, they were at a fair value, as evidenced by a contemporary valuation report prepared by Gully Howard for Arnbro dated 4 March 2008, which valued the three parcels of land at a total of £1,935,000, consisting of (a) £1,625,000 for the holiday homes on the three sites, and (b) £310,000 for the Wishing Well Public House on the Pondwell site. Further, Robert relies on Catton Holdings' lack of material success (he says) in running the sites after they were transferred to it. And he says that the CBRE valuation at £16.9 million is completely inaccurate, because it is a retrospective desktop valuation eleven years after the event, without even an inspection of the sites, that fails to take into account the (disadvantageous) lease to which they were then subject, their generally poor state of repair and lack of amenities (before Catton Holdings developed them), and the limited nature of the then planning permissions. As for Melanie, she broadly relies on the same points as Robert, albeit she has no first hand knowledge of the matters in question. She also pleads “*plene administravit*”, that is to say, by the time the claim was made, she had already administered Norman's estate, so it is now too late to sue her whether as executrix or as beneficiary.
 32. In their Replies, the Claimants take issue with Robert's and Melanie's defences. In particular they do not accept the reliability of the Gully Howard valuation, on the footing that it made a number of incorrect assumptions about the parcels and the lease to which it was subject, and that it appears to have been produced for tax purposes not a sale. Further, it is contradicted, they say, by the high prices later achieved by Catton Holdings of individual units. Further, they point out that Robert did not seek to rely on it in pre-action correspondence. They add that no relevant board minutes have been disclosed for the 2008 transfers.

The unfair prejudice petition

33. The unfair prejudice petition pleads that Westridge was at all material times a quasi-partnership between Robert, Norman, Mary and the trustees, and that in breach of the obligations of mutual trust and confidence (a) Robert and Norman arranged the restructuring of Bullen Estates and the transfer of its assets to Westridge without telling Mary and the Trust anything about it or even issuing share certificates to her; (b) Robert and Norman, after Father's death in December 2015, excluded Mary from Westridge's affairs and administration, by providing her with no material information about it; and (c) Robert told Mary in January 2016 (as said above) that it would not pay any dividends, and then caused no dividends to be paid until October 2020.
34. In addition, in paragraph 32, as part of the section under the heading “Factual background as to Bullen Estates, prior to the Restructure”, the petition pleads:

“The Petitioners have by a separate Claim Form on 22 December 2021 issued a (double) derivative claim on behalf of [Westridge], on behalf of Arnbrov The Derivative Claim alleges *inter alia* that in June 2008, Robert and Norman, in breach of their fiduciary duties to Arnbrov, transferred assets of substantial value (worth at least £16,990,000) from Arnbrov for no value and in any event at an undervalue to companies wholly owned and controlled by Robert and Norman. The Petitioners will seek to have the Derivative Claim case managed and heard together with this Petition, and will rely upon what is pleaded in the Derivative Claim as part of the background context to this Petition. They will further rely on the failure of Robert and Norman at all material times since the incorporation of the Company to take any or any adequate steps on behalf of the Company in its capacity as shareholder of Arnbrov to procure that Arnbrov (a) take steps to unwind those transfers for the benefit of Arnbrov, and/or (b) sue Robert and Norman for breach of fiduciary duty and breach of trust and the other relief sought in the Derivative Claim.”

35. Paragraph 52 adds, as part of the section under the heading “Breakdown of the relationship”:

“In addition, the Petitioners’ [sic] rely upon the conduct of Robert and Norman (prior to his death, and thereafter Melanie acting as his personal representative and/or on her own account) concerning Bullen Estates and/or Arnbrov as follows.

52.1 As particularised in the Derivative Claim, that including: breaches of fiduciary duty to Arnbrov, including on the basis of conflicts of interest, and multiple breaches of trust from 2008 to 2020, concerning millions of pounds of assets (and/or the proceeds thereof) held by Robert and Norman on behalf of Arnbrov, which they wrongly caused to be paid from Arnbrov to companies within their exclusive ownership and control.

52.2 Further, that Robert failed to take any or any adequate steps in his capacity as a director of Bullen Estates, the sole shareholder of Arnbrov until February 2015, to procure that Arnbrov (a) take steps to unwind the 2008 Transfers (as defined and particularised in the Derivative Claim) for the benefit of Arnbrov, and/or (b) sue Robert and Norman for breach of fiduciary duty and breach of trust and the other relief sought in the Derivative Claim.

52.3 Further, that at all material times since the Company became the parent company of Arnbrov, Robert and Norman (until his death) have repeatedly failed to take any or any adequate steps in their capacity as directors of the Company to procure that its subsidiary Arnbrov (a) take steps to unwind the 2008 Transfers (as identified and particularised in the Derivative Claim) for the benefit of Arnbrov, and/or (b) sue Robert and Norman for breach of fiduciary duty and breach of trust and the other relief sought in the Derivative Claim.”

36. I should add that, notwithstanding the headings to the sections in which these paragraphs appear, it is clear (as Ms Stanley K.C. accepted) that the Claimants are substantively relying upon Robert and Norman’s failure to remedy the wrongs complained of in the derivative action as part of the unfairly prejudicial conduct on which they rely in the petition, and not as mere background. This is clear

from paragraph 65 of the petition, which, under the heading “Unfair prejudice and relief sought”, concludes:

“In the premises, the affairs of the Company are being or have been conducted in a manner which is unfairly prejudicial to the interests of the members generally or some part of its members (including the Petitioners) and/or the facts and matters set out hereinabove are so prejudicial, and seek relief as follows ...”

37. The petition concludes with the prayer:

“(1) That [Robert and/or Melanie] and/or [Westridge] (with a reduction in capital accordingly) do purchase the Petitioners’ shares in [Westridge] at a fair value to be determined by this court or an independent valuer, with no discount for a minority shareholder, with a premium to reflect the loss suffered by [Westridge] as a result of the matters of unfair prejudice pleaded herein, and the matters pleaded and particularised in the Derivative Claim, and with interest, or damages equivalent to interest.

(2) Such further or other orders accounts and directions as may be necessary.

(3) Further or other relief.

(4) Alternatively, that such other order be made as the Court thinks fit.”

38. On the face of it, therefore, the petition incorporates the entirety of the facts which will have to be considered in the derivative claim, albeit in the context of an allegation of a failure to remedy the wrongs rather than their original commission; and it seeks an order that Robert and Melanie buy out the Claimants’ shares at a value which takes into account the compensation due to Arnbrov under the derivative claim. The only difference is that it does not, at least expressly, seek an order (as the derivative claim does) that Robert and Melanie actually pay compensation to Westridge as part of the buy out mechanism. I say “at least expressly”, because on the face of it it would be open to the court to do this anyway under the general claims in paragraphs (3) and (4) of the prayer.

39. So far as the petition incorporates the derivative claim, Robert and Melanie repeat their defences in that claim, and Mary and the Trustees repeat their replies in it, but adding in paragraph 20.4 of the reply to Robert’s defence that the transfers complained of are relevant to the petition as “*establishing a course of conduct over time whereby Robert and Norman: (a) failed to inform the Trustees and Mary of significant decisions; (b) failed to follow proper legal procedures concerning Bullen Estates, [Westridge] and Arnbrov.... (c) repeatedly breached their duties as directors ... and (d) failed to take any steps to restore assets (or their value) misappropriated from Arnbrov to the continuing detriment of Mary and the Trustees as significant minority shareholders of [Westridge] (see for example paragraph 52 of the Petition)*”.

40. As to the rest, Robert and Melanie both deny that Westridge is a quasi-partnership, and they both say that Norman acted on Father’s instructions (Robert adding that he did too). And Robert specifically denies that Mary was not told about the restructuring, or that she had been excluded from participating in Westridge, or that dividends should have been declared between 2016 and 2019. As

for Melanie, she denies that since Norman's death she has acted in any way improperly, and she relies on laches and acquiescence. The Claimants join issue with Robert and Melanie on these points.

The judgment of Adam Johnson J.

41. S.260 to 265 of the Companies Act ("the Act") provide for the procedure by which normal, or "single", derivative claims are to be brought. In particular, the claimant wishing to sue on behalf of the company of which he is a shareholder must first obtain permission from the Court to do so (see s.261(1) of the Act). S.261(2) goes on to provide: "*If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission ... the court .. (a) must dismiss the application*". If it allows it to go ahead, then it may require the company to attend and to give evidence at a further hearing (s.261(3)), and at that further hearing it may either give permission to continue, or dismiss the claim.
42. It is common ground before me that although the Claimants' claim is a double derivative one (i.e. they claim as shareholders of Westridge on the footing that unremedied wrongs have been committed against its subsidiary Arnbro, and therefore not one to which the Act applies, nonetheless the court retains its previous common law jurisdiction to allow such claims to proceed: see, for example, *Boston Trust Co Ltd. v. Verhoef* [2022] BCC 1 at paragraphs –9 - 20. Further, as I understood the position, it is common ground that the same principles apply as in the case of a single derivative claim brought under the Act, and the same procedure applies: see again, the *Boston Trust* case, supra.
43. So here, after the issue of the derivative claim and the petition, ICC Judge Jones ordered that the question of whether permission should be granted to continue it be listed for an oral hearing, that is to say, at a first stage hearing. In doing so, the judge noted that it was unclear why permission should be granted when the same relief appeared to be sought under the petition, which potentially provided an alternative remedy for the Claimants. The matter was referred to the Chief ICC Judge, who gave directions to transfer the application to the Chancery Judges Listing so it could be dealt by a High Court Judge.
44. Accordingly, the question came before Adam Johnson J. on 27 May 2022, when he granted permission to continue the claim and to join Robert and Melanie and the companies to it. In his judgment, he noted that the Claimants were relying on the fraud on the minority exception set out in *Wallersteiner v. Moir (no. 2)* [1975] QB 373, and that they had to satisfy five requirements. As to the first, he held that they had standing to bring the claim because they held a third of the shares in Westridge which owned Arnbro, the victim of the alleged wrongs. He continued:

"Second, I am satisfied there is a *prima facie* case on the merits. What is alleged is that in 2008 Robert and Norman Ball (D1 and D2) while directors of Arnbro, procured the transfer away by Arnbro of three parcels of land, either for no consideration or at any rate at a substantial undervalue. The valuations relied on by the Claimants are supported by CBRE (this has some limitations being a "*desktop*" valuation only but is still material). The transfers had unusual features: they were to newly incorporated SPVs and Arnbro is recorded in its accounts as having loaned them the purchase price. The SPVs appear to have been in the control of Robert and Norman. On the available evidence, it is properly arguable (1) that no

sufficient declarations of interest were made under s.317 Companies Act 1985, as in force at the time, (2) that there was no proper ratification or authorisation on a suitably informed basis, and (3) that the transfers involved breaches of fiduciary duty by Robert and Norman, in their capacities as directors of Arnbro. There is an obvious limitation point, but it is properly arguable that no limitation issue actually arises since the case falls within Limitation Act 1980 s(21)(1)(b).

Third, I am satisfied there is a *prima facie* case that the fraud on a minority exception is engaged. That does not mean fraud in the strict sense. It is sufficient if there is a *prima facie* case that the Defendants have personally benefited at Arnbro's expense. There is such a case here given the evidence that Robert and Norman were the owners of the transferee SPVs at the time of the transfers. There is also a *prima facie* case of wrongdoer control, both at the Arnbro level and at the Westridge level

Fourth, I am satisfied there is a *prima facie* case that Arnbro suffered a loss as a result of Robert and Norman's conduct.

Fifth, I am persuaded as a matter of discretion that the Court should permit the claims to continue. I consider that an independent board of directors *could* conclude that it was appropriate to bring proceedings. [Emphasis in italics added.] The transfers in question, as noted, had unusual and unexplained features which support the conclusion that *prima facie* there was wrongdoing which deserves investigation. The costs involved are likely to be significant, but the sums involved are also material and there is evidence that the enforcement prospects are good in the event of a successful claim. Costs are presently being borne by the Claimants who do not yet seek an indemnity. This is unusual but does not seem objectionable in principle. There is an obvious issue as to how the claims fit into the wider picture of an apparently serious falling out between family members, but on the face of it they are viable and are supported by an independent trustee, Mr Rule. The Claimants have been slow to bring the claim, but on the other hand, there is evidence they have been hampered by a lack of engagement by the Defendants, and an unwillingness to provide information and documents. Finally, there is the point that the present claim sits alongside an unfair prejudice Petition in which the present Claimants are the Petitioners. They seek relief in their capacity as the minority shareholders in Westridge. This invites the question whether the present application should be dismissed because there is an adequate alternative remedy. I am not persuaded that it should be. At common law, the received wisdom is that the existence of an adequate alternative remedy is not an absolute bar to relief (per Lawrence Collins in *Konamaneni v. Rolls Royce* [2002] 1 W.L.R. 1269). There is a good case for saying here that although the two sets of proceedings spring from the same root, and involve overlapping background facts, they are not truly alternatives, but instead are complementary to each other. The Petition seeks relief on the basis of a general breakdown in the relationship between the family members; the present action, meanwhile, is more targeted and is directed to specific acts of wrongdoing in relation to a subsidiary. The proposal is that they should be case managed together, in a complementary way, and can be made to dovetail together, including in the sense that determination of the present action will facilitate proper valuation of the Petitioners' shares in Westridge [in] the event the Petition is successful and a buy-out order is made. At any rate, as a matter of discretion I do not see any compelling reason based on this factor to refuse the application at this stage."

45. Accordingly, Adam Johnson J joined each of the defendants to the application to continue the claim (that is to say, for a second stage hearing, at which they could give evidence). He ordered that the Claimants' application for a pre-emptive indemnity be heard at the same time as the second stage hearing.

The law on pre-emptive indemnities for minority shareholders

46. Pursuant to Adam Johnson J's order, Robert and Melanie were served with the application to continue the derivative claim, and a hearing was fixed for the indemnity application, which took place before me on 11 May 2022. Although the order (albeit not expressly) gave them the opportunity to resist the continuation of his grant of permission at the indemnity hearing before me, neither of them chose to do so, and they focussed their fire solely on the indemnity application. However, in doing so, they did suggest, or at least appear to suggest, that I should not give any weight to the facts that the order had been made, and that its continuation was not resisted. This is the point that gives rise to the first issue. However, before I turn to the arguments on this and on the second issue, it is convenient to discuss the law about pre-emptive indemnities.
47. CPR Part 19.19, which, like other relevant rules in Part 19, applies by analogy to double derivative claims, provides:

“Derivative Claims – costs

- (1) The court may order the company, body corporate or trade union for the benefit of which a derivative claim is brought to indemnify the claimant against liability for costs incurred in the permission application or in the derivative claim or both.”

The cases relied on by the Claimants

48. The origin of CPR rule 19.19 is the Court of Appeal's decision in *Wallersteiner v. Moir (no. 2)*, on which Ms Stanley K.C. placed considerable reliance. Its first incarnation was RSC Order 15, rule 12A(13), which was introduced by the Rules Committee in 1994. Because of Ms Stanley's reliance on this case, and her contention that I should treat later first instance cases with caution or indeed as wrong, I consider both this case, and later cases, in some detail.
49. As set out by Lord Denning MR at p389 under the heading “*Mr. Moir's anxiety as to future costs*”, Mr Moir, a minority shareholder in a substantial public listed company (Hartley Baird Ltd), had discovered that Dr Wallersteiner, who owned 80% of the shares, had been guilty of misconduct in the management of the company's affairs. (The facts about the companies appear more fully from *Wallersteiner v. Moir (no. 1)* [1974] 1 W.L.R. 991.) He tried to get the Department of Trade and Industry, and then the Ombudsman, involved, without success. He was “*abruptly cut off*” when he raised his complaints at a shareholders' meeting. After ten years of fighting his case, he had come to “*the end of his tether*”, he had expended all his funds, and he would see nothing from a judgment for £250,000 which he had already obtained by way of derivative counterclaim for Hartley Baird, and its subsidiary H.J.Baldwin & Co. He now needed money to cover the costs to pay for an inquiry as to damages suffered by Hartley Baird, to enforce the £250,000 judgment, and to deal with certain remaining issues on which Dr Wallersteiner was given leave to defend and a possible appeal to the House of Lords. As Lord Denning MR continued:

“Even if he wins all the way through, no part of it will redound to his own benefit. His few shares might appreciate a little in value, but that is all. In this situation he appeals to this court for help in respect of the future costs of this litigation. If no help is forthcoming, all his efforts will have been in vain. The delaying tactics of Dr. Wallersteiner will have succeeded. Mr Moir will have to give up the struggle exhausted in mind, body and estate.”

50. Lord Denning MR went on to say that the court was so concerned that it had asked the Law Society to intervene, who had suggested three ways in which Mr Moir could be protected, either (a) an indemnity from the company, (b) legal aid, or (c) contingency fee. The Court of Appeal unanimously held that (a) was the appropriate way forward (although Lord Denning MR would have allowed a contingency fee as well).
51. In upholding the first contention, Lord Denning MR held, at pp 391-2:

“[T]he minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of the agency. This indemnity does not arise out of a contract express or implied, but it arises on the plainest principles of equity. It is analogous to the indemnity to which a trustee is entitled from his cestui que trust who is sui juris: see *Hardoon v. Belilios* [1901] A.C. 118 and *In re Richardson, Ex parte Governors of St. Tho’as’s Hospital* [1911] 2 K.B. 705. Seeing that, if the action succeeds, the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf. If the action succeeds, the wrongdoing director will be ordered to pay the costs: but if they are not recovered from him, they should be paid by the company, and all the additional costs (over and above party and party costs) should be taxed on a common fund basis and paid by the company: see *Simpson and Miller v. British Industries Trust Ltd.* (1923) 39 T.L.R. 286...

But what if the action fails? Assuming that the minority shareholder had reasonable grounds for bringing the action - that it was a reasonable and prudent course to take in the interests of the company - he should not himself be liable to pay the costs of the other side, but the company itself should be liable, because he was acting for it and not for himself. In addition, he should himself be indemnified by the company in respect of his own costs even if the action fails. It is a well known maxim of the law that he who would take the benefit of a venture if it succeeds ought also to bear the burden if it fails. *Qui sentit commodum sentire debet et onus*. This indemnity should extend to his own costs taxed on a common fund basis.

In order to be entitled to this indemnity, the minority shareholder soon after issuing his writ should apply for the sanction of the court in somewhat the same way as a trustee does: see *In re Beddoe, Downes v. Cottam* [1893] 1 Ch. 547, 557-558. 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).but this preliminary application should be simple and 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.”

52. These observations were made before, and appear to have been the progenitor of, the statutory two stage process now found in the 2006 Act. It appears that the reason, or at least one of the reasons, why Lord Denning recommended this two stage process was precisely to enable a minority shareholder to obtain an advance indemnity from the company, by getting an order of the court authorising him to bring it on its behalf, which would in turn justify an advance indemnity against his costs in doing so. (At the time, there was no requirement to obtain the court’s authority to bring a derivative claim .)
53. At p399B-E, Buckley LJ observed that a plaintiff in a minority shareholder’s action is personally liable to his own solicitor for costs and is exposed to the risk of being ordered to pay the taxed (i.e. assessed) costs of any defendant. He is thus in the same position as any other litigant, even though he is suing on a cause of action vested in the company, and he himself has no right to recoup his costs out of the company’s assets without the court’s assistance. He continued at 399F:

“The fruits of any judgment recovered in such an action belong to the company, but the expenses of recovering them, except so far as they may be recovered from some other party, fall not upon the company but upon the plaintiff. If the action fails the plaintiff is at risk of being ordered to pay the defendant’s costs as well as his own.

These are considerations which are calculated to deter a minority shareholder from suing a fraudulent or oppressive majority. It is, I consider, clearly undesirable that in such a case a minority shareholder should be inhibited in this way. The question is how the court can best dispel or minimise the inhibition.”

54. He went on to discuss the three approaches that had been mentioned, and to reject the legal aid and contingency fee approach. He also rejected, at p403C-D, the notion that an advance order should be made protecting Mr Moir against being ordered to pay Dr Wallersteiner’s costs, observing “*I have never known a court to make any order as to costs fettering a later exercise of the court’s discretion in respect of costs to be incurred after the date of the order. I cannot think of any circumstances in which such an order would be justified*”. At p403E to 404B, he continued:

“But there are circumstances in which a party can embark on litigation with a confident expectation that he will be indemnified in some measure against costs. A trustee who properly and reasonably prosecutes or defends an action relating to his trust property or the execution of the trusts is entitled to be indemnified by his principal against costs incurred in consequence of carrying out the principal’s instructions The next friend of an infant plaintiff is prima facie entitled to be indemnified against costs out of the infant’s estate..... It seems to me that in a minority shareholder’s action, properly and reasonably brought and prosecuted, it would normally be right that the company should be ordered to pay the plaintiff’s costs so far as he does not recover them from any other party. In all the instances mentioned the right of the party seeking indemnity to be indemnified must depend on whether he has acted reasonably in bringing or defending the action, as the case may be: see, for example, as regards a trustee, *In re Beddoe*, *Downes v. Cottam* [1893] 1 Ch. 557. It is true

that this right of a trustee, as well as that of an agent, has been treated as founded in contract. It would, I think, be difficult to imply a contract of indemnity between a company and one of its members. Nevertheless, where a shareholder has in good faith and on reasonable grounds sued as plaintiff in a minority shareholder's action, the benefit of which, if successful, will accrue to the company and only indirectly to the plaintiff as a member of the company, and which it would have been reasonable for an independent board of directors to bring in the company's name, it would, I think, clearly be a proper exercise of judicial discretion to order the company to pay the plaintiff's costs. This would extend to the plaintiff's costs down to judgment, if it would have been reasonable for an independent board exercising the standard of care which a prudent business man would exercise in his own affairs to continue the action to judgment. If, however, an independent board exercising that standard of care would have discontinued the action at an earlier stage, it is probable that the plaintiff should only be awarded his costs against the company down to that stage."

55. At p404C to 405A, Buckley LJ went on to suggest a procedure, in similar but not identical terms to Lord Denning MR, by which the minority shareholder could put a proposed derivative claim before the court and obtain its authority to proceed with the action. At p404B he continued:

"The plaintiff, acting under the authority of such a direction, would be secure in the knowledge that, when the costs of the action should come to be dealt with, this would be upon the basis, as between himself and the company, that he has acted reasonably and *ought prima facie to be treated by the trial judge as entitled to an order that the company should pay his costs*, which should, I think, normally be taxed on a basis not less favourable than the common fund basis, and should indemnify him against any costs he may be ordered to pay to the defendants. Should the court not think fit to authorise the plaintiff to proceed, he would do so at his own risk as to the costs. A procedure on these lines could, I think, be adopted without any amendment or addition to the rules of court, although it might well be thought desirable that an appropriate rule should be made. In the present case I think that we should here and now authorise Mr Moir to proceed with the prosecution of the outstanding issues on his counterclaim down to the close of discovery or until further order in the meantime. He will in this way obtain the greatest measure of immunity from future costs down to that stage of the proceedings which, I think, the court can give him. When that stage is reached, the position can be further considered in chambers." (Emphasis in italics added.)

56. Two things are to be observed about this:

- (1) Buckley LJ was saying only that, as a result of the court's authority, the plaintiff, or claimant, ought "*prima facie*" to be entitled to an indemnity when the trial judge comes to determine costs. There was no hard and fast rule to this effect.
- (2) Relatedly, he was not saying that the mere grant of authority to bring a derivative claim meant that a claimant should necessarily have an advance costs indemnity as well, although he appears to have envisaged that in Mr Moir's case this was what should happen up to disclosure.

57. Scarman LJ agreed. As he put it at p407A:

“The indemnity is a right distinct from the right of a successful litigant to his costs at the discretion of the trial judge; it is a right which springs from a combination of factors – the interest of the company and its shareholders, the relationship between the shareholder and the company, and the court’s sanction (a better word would be “permission”) for the action to be brought at the company’s expense. *It is a full indemnity such as an agent has who incurs expense in the authorised business of his principal.* As a general rule, I would expect an application for leave to bring proceedings at the expense of the company to be made at the commencement of the action; but, as Lindley L.J. in *In re Beddoe* at p.557 recognised in relation to a trustee’s action on behalf of the trust estate, if at the end of the case the judge should come to the conclusion that he would have authorised the action had he been applied to, he can even then allow the plaintiff his costs on a full indemnity basis against the company. In my opinion, Mr Moir should have his indemnity not only against costs already incurred by him on behalf of the two companies but also against costs to be incurred up to and including discovery, after which he should obtain the future directions of the court.” [Emphasis in italics added.]

58. In the result, Scarman LJ concluded “*that Mr Moir have the leave of the court to prosecute his counterclaim at the expense of the two companies to the extent and subject to the limitations proposed by Buckley L.J.*”, and this was the order that was made (p409C-G).
59. In my judgment, three important points emerge from this case.
 - (1) The purpose of the rule which allows a court to order an indemnity, and therefore an advance indemnity, from the company to minority shareholders, is to ensure that they are not deterred from bringing proper complaints on its behalf, because they themselves stand to benefit from such an action only indirectly. Hence the Law Society was specifically asked to intervene to help find a problem to Mr Moir’s dilemma, and hence too Buckley LJ’s comments at p399F.
 - (2) The reason why the minority shareholder should, at least *prima facie*, be entitled to an indemnity for his costs when authorised by the court to bring an action on the company’s behalf, is that in such circumstances he is to be regarded as the company’s agent acting on the company’s business, regardless of his indirect interest in the result. See in particular, Lord Denning MR’s and Scarman LJ’s analyses recited above.
 - (3) The test for deciding whether to authorise a minority shareholder to bring an action in the company’s name is whether it would be reasonable for an independent board of directors to do this (see in particular Buckley LJ’s comments at p403E to 404B). However, it does not follow from the grant of the court’s authority that the minority shareholder will necessarily be entitled to an indemnity from the company at the trial, or to an advance indemnity up to any particular point. Hence Buckley LJ’s comments at p404.
60. The next case on which Ms Stanley K.C. relied was *Jaybird Group Ltd v. Greenwood and others* [1986] BCLC 319. This case was in many respects close to the facts of the present case, in that it was one in which the minority shareholders had 40% of the company (Thomas Withers Security Equipment Ltd – “Withers”), who were opposed by the majority who held 60%. It was said that the

directors and majority shareholders had wrongfully diverted a very profitable deal to another company. The minority sought an advance order that Withers pay their costs of the proceedings, and indemnify them against any costs they might be ordered to pay the defendants, up to disclosure. Mr Michael Wheeler Q.C. summarised the essential principle which emerged from *Wallersteiner v. Moir* (no. 2) as:

“.. would an honest, independent and impartial board of Withers in the circumstances disclosed in the evidence before this court consider that it was in the interest of the company to pursue down to discovery and inspection claims which Jaybird were pursuing as a minority shareholder in Withers? If the answer to that question is yes, then counsel for the plaintiff said the court should give the relief sought down to the close of discovery and inspection.”

61. Ms Stanley K.C. drew my attention to Gore-Browne on Companies (Issue 178, 2023) at 18[32], which says that this way of putting the test “*firmly ties this decision to the requirement under the Companies Act 2006 for the court to consider the importance a person acting in accordance with the s 172 duty would attach to the claim, and the views of members with no personal interest in the matter (as set out in s 263(3)(b) and s 263(4))*”. However, as I discuss below in the context of *Bhullar v. Bhullar*, the test under the 2006 Act for pursuing a claim would appear to be slightly lower than that put forward by Michael Wheeler Q.C., namely, *could* an independent director consider it to be in the company’s interest to pursue the claim, rather than *would* he or the board do so.

62. At p327g, Mr Michael Wheeler Q.C. turned to the majority shareholders’ argument that the case was quite different from *Wallersteiner v. Moir*, because Mr Moir in that case had only a “*minute interest in the companies*” and was a person who had largely exhausted his resources, whereas the plaintiff in *Jaybird* needed no protection. But the judge rejected this argument. As to the insufficient resources point, he held that there was nothing in *Wallersteiner v. Moir* that limited the principle to impecunious claimants; and as to “*minute interest*” point, he said: “*One has only to consider the case where, unlike the present case, there are a number of minority shareholders of varying degrees of interest. I would not for one moment expect the court to be influenced by the consideration as to which of those possible plaintiffs had in fact been chosen to present the derivative action*” (p328a-b). He went on to consider the defendants’ further argument that, looking at the case realistically, the plaintiff was bringing it for his own benefit rather than the company’s, which would make an advance indemnity inappropriate. As to this, he simply observed:

“But here again I find nothing in *Wallersteiner v. Moir* to require me of necessity to take any such element into account, or, if I do take it into account, for it to be a decisive element against the making of any order.”

63. He went on to say, having considered the evidence, a p328h:

“Suffice it to say that at the end of the day the conclusion which I have reached without hesitation is that it would not only have been reasonable for an independent board of Withers to commence this action but on the evidence before me they would, I suspect, have been failing in their duty if they had not done so.”

64. And at p329i, he concluded:

“In view of the conclusion I have reached on the present state of the plaintiff’s case, it seems to me, consistently with the principles laid down in *Wallersteiner v. Moir*, that I should make an order in the terms of counsel for the plaintiff’s draft.”

65. Not surprisingly, Ms Stanley K.C. emphasises this decision, because it shows that it is not necessarily a knock-out answer for Robert and Melanie to say that the present case is really just a dispute between quasi-partners. Nor, she contends, is impecuniosity a pre-condition (or normal pre-condition) for an indemnity against the other side’s costs, or for a “pay as you go” order.

66. Ms Stanley K.C. relied on four other authorities.

67. First, in *Iesini v Westrip Holdings Ltd* [2010] BCC 420 Lewison J observed at paragraph 125:

“Thus in my judgment Mr Michael Wheeler QC was right in *Jaybird Group Ltd v. Greenwood* [1986] B.C.L.C. 319, 327 to say that an indemnity as to costs in a derivative claim is not limited to impecunious claimants. The justification for the indemnity is that the claimant brings his claim for the benefit of the company (and ex hypothesi under the new law the court has allowed it to proceed). Once the court has reached the conclusion that the claim ought to proceed for the benefit of the company, it ought normally to order the company to indemnify the claimant against his costs”.

68. However, this was said obiter in the context of a discussion whether the claimant’s claim in that case should proceed by way of unfair prejudice petition rather than by derivative action, the argument being that it should proceed by way of unfair prejudice petition because it was generally disadvantageous to a company to have it proceed by way of derivative action, precisely because normally it would be required to indemnify the claimant.

69. Further, as I discuss below in the context of *Smith v. Croft* [1986] 1 W.L.R 580, when Lewison J said that impecuniosity was not a pre-condition of “an indemnity as to costs”, he was not, as I understand it, disagreeing with Walton J’s point that it is incumbent on the minority shareholder who seeks not just an advance indemnity from the company against future costs, but an order requiring it actually to pay him as the case goes along (i.e. a “pay as you go” order), to show that it is genuinely needed.

70. Second, Ms Stanley K.C. relies on *Wishart v Castlecroft Securities Ltd* [2010] BCC 161, in which Lord Reed, in delivering the Inner House opinion, carried out a detailed review of the relevant provisions of the 2006 Act (which applies very similar provisions to Scotland as to England); of the Law Commission report which had led to it; and of *Wallersteiner v. Moir* (no. 2). He observed at paragraph 71 that:

“As we have explained, the rationale of indemnification in respect of the expenses of litigation, as between trustees and the trust estate, or other fiduciaries and those on whose behalf they are acting, is that the party who has incurred the expense has not been acting for his own benefit but for the benefit of the estate or person in question. A minority shareholder who brings derivative proceedings on behalf of the company is ordinarily entitled to indemnification because the same rationale applies. We can understand that, on the facts of cases such as *Mumbray* or *Halle*, the view may be taken that derivative proceedings are

inappropriate, on the basis that the shareholder is in substance acting for his own benefit rather than for the benefit of the company and should therefore pursue an alternative remedy. Where, however, the court has decided that a shareholder should be allowed to bring proceedings in the interests of the company and on its behalf, it appears to us to follow that the shareholder is in principle entitled to be indemnified by the company in respect of his expenses and liabilities (subject to the qualifications which we have previously mentioned), and that his personal interest in the outcome, as a shareholder, is not a good reason for denying him that indemnity.”

71. Ms Stanley understandably relies in particular on the last sentence, starting “*Where, however, the court has decided that a shareholder should be allowed to bring proceedings in the interest of the company ...*”; but this must be read in the context of the earlier passage, in particular the first sentence, which reiterates the point in *Wallersteiner v. Moir* (no. 2) that the basis of the indemnification is that the minority shareholder “*has not been acting for his own benefit but for the benefit of the estate*”. Further, in an earlier passage of the judgment, at paragraph 56, the Inner House cited with approval Hoffmann LJ’s judgment in *McDonald v. Horn* [1995] I.C.R. 685 (a case in which a beneficiary of a pension fund sought an advance indemnity, like a minority shareholder could), in which Hoffmann LJ held that:

“In both cases a person with a limited interest in a fund, whether the company’s assets or a pension fund, is alleging injury to the fund as a whole” [p698];

And

“The power to make a *Wallersteiner v Moir* order in a pension fund case should in my view be exercised with considerable care. The judgment of Walton J in *Smith v. Croft* [1986] 1 W.L.R. 580 contains a useful reminder of the dangers of too easily making orders which allow minority shareholders to litigate at the cost of the company....

The need for caution in making such orders does not mean that the judge or master should undertake a close examination of the merits of the dispute. The question is whether the plaintiffs have shown a sufficient case for further investigation.” [p700]

72. Further, and importantly, at paragraph 68, Lord Reed observed, in relation to whether an advance indemnity should be ordered, that if a finding is to be made, when leave is granted, as to the shareholder’s entitlement to such an indemnity, the court must take into account “*the extent to which the court can assess in advance, the reasonableness of his having incurred any particular liability or expense, and therefore the appropriateness of an indemnity*”. He continued:

“The dangers of the court’s writing a blank cheque for the shareholder as to the amount of expenses which he can incur in the derivative proceedings are obvious. That has a number of implications. *First, the court must be satisfied that it is necessary for such an order to be made prospectively, rather than the shareholder’s entitlement to indemnification being considered after the expenses have been incurred. We do not however doubt that there may in appropriate cases be compelling reasons for finding the member entitled to be indemnified at the stage when leave is granted: in particular, as Buckley L.J. explained in Wallersteiner v. Moir* (No. 2) at 399, minority shareholders may require the assurance of a prospective

order so that they are not deterred from bringing derivative proceedings, where such proceedings ought to be brought, by the risk of incurring their own expenses but also a liability for the expenses of the defenders. Secondly, in cases where a prospective finding is appropriate, it makes sense for such findings to be made on a staged basis” [Emphasis in italics added.]

73. In the event, the Inner House upheld the Outer House’s decision to order a limited advance indemnity up to the procedural hearing in the case, both in respect of the minority shareholder’s own costs and any adverse costs order, on the basis that the Outer House had jurisdiction to make the indemnity which it had made (jurisdiction having been the main challenge to the order), and that the Inner House could “*interfere with the exercise of discretion [by the Outer House] only on limited grounds*” (see paragraph 69). This led to their comments in paragraph 71, recited above (that is, where the court has decided that the shareholder should be allowed to bring proceedings it appears to follow that in principle he is entitled to an indemnity). In paragraph 72, they concluded that although the Lord Ordinary’s approach had in some respects been erroneous “*We are not persuaded that we should interfere with the Lord Ordinary’s assessment that a prospective finding of entitlement to indemnification is also appropriate*”.
74. In short, although *Wishart* upheld the general principle that a minority shareholder should have a costs indemnity from the company after trial when he has properly brought a claim in the company’s interest, it did not hold that he should, either as of right or even normally, be granted a pre-emptive indemnity to this effect: although, given the way the arguments had been presented, it upheld the Outer House’s decision to grant one. On the contrary, it appears to have suggested a test, for a pre-emptive order, that such order should be “*necessary*” (see paragraph 68, recited above). Although the specific context in which this was said was whether an order should be made at the same time as permission to sue is granted, there is nothing to suggest that a different principle is supposed to apply at a later pre-trial stage of the proceedings.
75. Finally, Ms Stanley K.C. relied on *Boston Trust Company Ltd v Szerelmey Ltd* [2020] EWHC 3042 (Ch), and on *Korchevtsev v Severa* [2022] EWHC 2324 (Ch). In the former case, Charles Morrison sitting as a deputy judge of the High Court said at paragraph 36: “*On my assessment of the authorities, where the Cs have been given permission to bring proceedings in the interests of certain companies and on their behalf, they should in principle be entitled to be indemnified by those companies in respect of their costs.*” And in the latter, Leech J granted an indemnity in a case involving two equal 50% shareholders. Whilst he accepted it was “*unusual to order an indemnity in circumstances where the Claimant and the First Defendant are equal shareholders*” (referring to *Halle v. Trax* and *Bhullar v. Bhullar*, *infra*) he balanced against that “*the fact that I have reached the conclusion that an independent director would have considered it important to continue the claim to recover the Group’s assets.*” (See paragraph 110.) However, in neither case was the claimant bringing a simultaneous unfair prejudice petition relying on the same facts as the derivative claim in order to secure an enforced buyout; and in both, the court appears to have been satisfied that the strength of the claimants’ case meant not just that an independent board of directors acting reasonably *could* authorise continued proceedings, but that it *would* do so (see further below).

The cases relied on by the Defendants

76. Although the Defendants did not directly refer me to it, I should first refer to *Smith v. Croft* [1986] 1 W.L.R. 580, which was a decision to which Morgan J. adverted in *Bhullar v. Bhullar* [2016] B.C.C. 134, on which the Defendants placed considerable reliance.
77. In *Smith*, minority shareholders obtained an order *ex parte* from the master requiring the company to indemnify them against their costs in the action until the conclusion of discovery and inspection. Subsequently, the master granted them liberty to tax their bills at three monthly intervals, limited to 60%. The company appealed against both orders, and the minority shareholders against the order limiting their costs to 60%.
78. Walton J allowed the company's appeals, and dismissed the minority shareholders' appeal.
79. At p.583, he observed of the questions before him.

“They raise, very acutely, the practical workings of the procedure so suggested by the Court of Appeal in *Wallersteiner v. Moir (No. 2)* [1975 Q.B. 373. It is, of course, not for me to question the correctness of the decision of the Court of Appeal in *Wallersteiner v. Moir (No. 2)*, but I may observe that the justice of an order which may throw upon a company which, in the event, is proved to have no cause of action whatsoever against the other defendants, who may prove to be completely blameless, the entire costs of an action which it did not wish to be prosecuted, is extremely difficult to comprehend. The real injustice of the situation lies in the encouragement which the Court of Appeal gave to the application for such an order being made at the commencement of the action, at a time when, of necessity, the plaintiffs believe that they have a good case, and will with hand on heart swear that they have, and before the completion of discovery and inspection, which may well show that their beliefs, though honestly held, are not in fact well founded. It is to be observed that in *Wallersteiner v. Moir (No. 2)* the application was made at a late stage in the proceedings, after Mr. Moir (who was the plaintiff by counterclaim) had already substantially succeeded, but who had no power and shot left to finish the battle. The manifest justice of such an order in favour of a person in such a position is plain enough.”

80. At p587G, he went on to consider the questions that were likely to arise in practice on such applications for a pre-emptive indemnity, and observed:

“I preface my consideration of these matters, a consideration made in the course of a normal case, without any special feature for consideration, but against the general background of the use which could be made of this procedure, in the light of the fact that it is obvious that the court ought not to make such an order where there is any real possibility of its producing real injustice by doing so.”

81. Having then considered these questions, and the facts of the case (which he held did not justify an indemnity at all), he concluded at p597D:

“The rationale for a *Wallersteiner v. Moir (No. 2)* [1975] Q.B. 373 order is to ensure that the plaintiff in a minority shareholders' action should not be prevented from pursuing an obviously just case through lack of funds, or fear that he may, for some reason, fail at the end

of the day and be at risk as to costs which he cannot possibly pay. It has to be acknowledged that the making of such an order may turn out to have imposed on the company a liability which ought never to have been imposed upon it. Therefore, one should be very careful not to extend that liability. Early payment – i.e. before the conclusion of the trial – does indeed impose an additional liability. That may become necessary: if, for example, the plaintiff is a person who literally has no resources of his own, then it may well be that an order for interim payment should be made in order to ensure that the action proceeds at all. Without the supplementary order, the original order may stand in danger of being stultified.

It therefore appears to me that in order to hold the balance as fairly as may be in the circumstances between the plaintiffs and defendants, it will be incumbent on the plaintiffs applying for such an order to show that it is genuinely needed, i.e. that they do not have sufficient resources to finance the action in the meantime. If they have, I see no reason at all why this extra burden should be placed upon the company. And in this connect I think the master ought to take a very broad view. The present action is as much for the benefit of [the minority shareholder] as it is for the nominal plaintiffs, and I think the master ought to have taken their resources into consideration.”

82. The general thrust of these passages is clear: the court should not make a pre-emptive costs order where there is a real possibility that it will produce injustice.
83. As mentioned above, Lewison J in *Iesini* (supra) commented on Walton J’s observations in this last passage, in discussing the differences between unfair prejudice petitions and derivative claims. At paragraph 124, he noted the argument of Michael Todd Q.C., who appeared for some of the defendants, to the effect that they supported the “*proposition that a claimant must demonstrate a genuine need for an indemnity before the court will order one. However, that is not what Walton J said ...*” He observed that Walton J’s comments were said only in the context of the appeal as to whether there should be an interim payment by the company on account of costs, and then recited the passage from Walton J’s judgment starting “*Early payment*” and ending “*... placed upon the company*”. He then commented, at paragraph 125, in the passage recited above, but repeated for convenience here:

“Once the court has reached the conclusion that the claim ought to proceed for the benefit of the company, it ought normally to order the company to indemnify the claimant against his costs”.

84. Although I do not have to decide this point, it does not appear to me that Lewison J was going so far as to dissent from Walton J’s proposition that, at least normally, a claimant who seeks a “pay as you go” order from the company, actually requiring it to pay funds up front before trial (as opposed to having the benefit of an advance indemnity without such payment), should satisfy the court that such order is genuinely needed, because of the burdens it will inevitably place on the company up to trial.
85. In *Halle v. Trax* [2000] B.C.C. 1020, a 50% shareholder (Mr Halle) accused the other (Mr Bressington) of diverting a business opportunity away from the company in breach of fiduciary duty to it. He brought a derivative claim against the other and sought a pre-emptive indemnity from the company. The master granted permission to bring the claim, but refused to make a pre-emptive costs order. Mr Halle appealed on the costs point, but Sir Richard Scott V.C. dismissed the appeal. First,

Mr Halle was not a minority shareholder, and Mr Bressington was not in control of the company. Sir Richard Scott V-C then added:

“I can see no difference in substance, bar one point in the action that is now being brought in the derivative form and a straightforward action by a partner against his co-partner, complaining of breaches by the defendant partner of duties he owed the joint venture and his joint venture partner. Miss Nicholson emphasised, rightly, that BWM is a separate corporate entity. It is not the same as an unincorporated partnership enterprise. That is right; it is not. But in considering where the equity lies between Mr Halle and Mr Bressington, I am bound to say I can see no difference of substance at all. It would be unfair to Mr Halle, if, having successfully brought his action against Mr Bressington, and having obtained an order for the payment of some sum of damages to BWM, he were to find himself obliged to bear some part of his properly incurred costs of that exercise. But he is very unlikely to be in that position. First of all, he can expect to obtain an order for costs against the unsuccessful defendant, Mr Bressington. Secondly, he would in my view, be entitled to a lien to recover his costs out of the fund, namely the damages, produced by his expenditure of those costs. But if the action should fail, it seems to me that it would be quite unfair to Mr Bressington that his investment in BWM should have to bear one half of the costs of Mr Halle’s unsuccessful action. That seems to me to be quite wrong.”

86. Although of course there are differences on the facts between *Halle v. Trax* and the present case, and doubt has been expressed in later cases on the proposition that Mr Halle could have a lien over the damages awarded to the company if his derivative claim succeeded, it is another instance of the court being unwilling to order a pre-emptive indemnity in a derivative claim when there is a real possibility that it will produce injustice, that is to say, by lumbering the defendant’s share in the company with the costs of the action even if he wins.
87. In *Bhullar v. Bhullar* [2016] B.C.C. 134, Morgan J, from paragraphs 47 to 69, reviewed the authorities on the subject, including *Smith v. Croft* and *Halle v. Trax*, and others where a pre-emptive indemnity was refused because it was not inevitable that the claimant would obtain an indemnity after trial. The facts of the case were somewhat complicated, but the important point is that although Morgan J granted permission to the minority shareholder (Inder) to continue the claim (a double derivative one) against his brother Jat, he refused to make an order for a pre-emptive indemnity.
88. There are two further important points. First, having reviewed the authorities, Morgan J noted, at paragraph 67, that as the *Wallersteiner v. Moir* (no. 2) jurisdiction has developed, the court is now asked a slightly different question in deciding whether to grant permission to bring a derivative claim, namely “*whether an independent board of directors could think that it should bring the claim. In the present case, I have held that such a board could think that but I have not addressed myself of the question whether the company should bring the claim*”. (Emphasis as in the original.) This echoes what Lewison J held at paragraph 86 of *Iesini* (supra), namely that the requirement in s.263(2)(a) of the 2006 Act to refuse permission applies only where “*no director acting in accordance with s.172 would seek to continue the claim*”. And this indeed is the test which Adam Johnson J. applied in the current case when granting permission.
89. Second, on the question of a pre-emptive indemnity, Morgan J held, at paragraph 69:

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

90. At paragraph 70 he continued:

“There is a further consideration in this case. If Inder brought s.994 proceedings against Jat, both Inder and Jat would be in the same position in that they would both be on risk as to costs. Based on my earlier findings, this is a case where Jat positively wished there to be a formal split between himself and Inder and Inder accepts that a formal split is desirable. Inder has explained in his evidence that the justification for derivative proceedings is that those proceedings will determine certain points in dispute between himself and Jat and then Inder and Jat can negotiate (or litigate under s.994) so as to bring about a formal split or for s.994 proceedings. Inder and Jat should be treated equally and each of them should be on risk as to costs. I do not consider that I should make an order which gives Inder a considerable advantage at the possible expense of Jat.”

91. Accordingly, Morgan J declined to make a pre-emptive order for an indemnity, both on the “*high degree of assurance*” point, and on the point that such an order would be inappropriate when there was a prospect of a consequential unfair prejudice petition being brought by the claimant.

92. Finally, the Defendants rely on the judgment of Zacaroli J. in *Tonstate Group Ltd v. Wojakowski* [2019] B.C.C. 990. This was another double derivative claim, and the court granted permission for it to be continued. The claimants also sought a pre-emptive order not just for an indemnity, but for payment of all costs incurred to date and in future to be paid to them as the action went along (i.e. a “pay as you go” order: see paragraph 6). After a review of the authorities, Zacaroli J turned to the facts, and accepted that while the actions were properly brought on behalf of the companies, the “*economic reality*” was that the companies were in wind-down, with a view to the remaining assets being distributed to the shareholders, there being only one substantial asset left, being a hotel in Cardiff and some cash. Zacaroli J continued at paragraph 15:

“In other words, the companies here have no substantive continuing purpose other than to be wound down for the benefit of their shareholders. In these circumstances, while it is true that the claims are for the benefit of the companies, the dividing line between benefit to the

companies and benefit to Mr Matyas as a shareholder is far less obvious that it might be in other cases. I consider the approach to be followed is that identified in *Halle v. Trax* and *Bhullar*: can I be confident that the court would at the end of the proceedings – and whatever the outcome – burden the companies and thus, to the extent that he is a 50 % shareholder, Mr Wojakowski with the costs of pursuing them? As to this, if Mr Wojakowski were to succeed, I find it virtually impossible to conceive the court would consider burdening any part of his interest in the companies with the costs of pursuing the claims against him. It would, to adopt the language of the Vice-Chancellor in *Halle v. Trax*, be quite wrong.”

93. Zacaroli J went on to deal with the claimants’ point that the order they were seeking was without prejudice to the court’s ability at the end of proceedings to adjust the indemnity, so that if Mr Wojakowski won, his economic interests in the companies would not be burdened with any part of the claimants’ costs; such that all the claimants were really seeking was the use of the companies’ assets up to trial in order to fund their costs on an interim basis. But the judge was not prepared to make any such order, as there was no evidence that the claimants could not fund without an indemnity. Although such evidence was not a precondition to an indemnity “*it is a relevant consideration to put into the balance when considering the potential unfairness of burdening Mr Wojakowski’s interest in the companies with the claimants’ costs*” (see paragraph 17). Accordingly, no pre-emptive order was made, as it would be “*unfair to Mr Wojakowski that his investment in the company should be burdened with any part of the companies’ costs of the unsuccessful action*” (paragraph 19).

The first issue: should I disregard Adam Johnson J’s order or give it little weight?

94. I turn now to the first issue. Ms Stanley K.C.’s position is that Adam Johnson J. has authorised the Claimants to bring the derivative claim, and that therefore I must decide the indemnity point on the basis that the claim is being properly brought on behalf of Westridge.
95. In my judgment, this submission is correct, and I reject the Defendants’ arguments to the contrary, on the basis that the derivative claim is unnecessary (because the relevant allegations could have been included in the unfair prejudice petition), or is insufficiently strong.
96. First, as a matter of principle, once the court has granted its authority to a minority shareholder to bring an action on behalf of a company, and that authority has not been set aside, it follows that the claimant is properly bringing the claim as the company’s agent. Therefore, here, the Claimants, having obtained the requisite authority, must be taken to have satisfied the minimum requirements for bringing it. In particular, they must be taken to have satisfied the requirements, as Adam Johnson J. put it, that “*an independent board of directors could conclude that it was appropriate to bring proceedings*”, and that they should not be prevented from doing so on the footing that there is an adequate alternative remedy which could be pursued by way of unfair prejudice petition alone. These findings were in my judgment essential to the grant of permission, and so the Defendants cannot now challenge them without setting the grant aside. No doubt, they can raise points which have arisen from subsequent evidence as reasons why it would be inappropriate to grant an indemnity, but they cannot attack the foundation of the permission itself.
97. Further, as to the argument that the derivative claim is unnecessary, I accept Ms Stanley K.C.’s submission that although all the allegations in the derivative claim could, at least in theory, have been

advanced in the unfair prejudice petition, this would not have been the natural or the proper way of presenting the case. First, the alleged wrongs in the 2008 transfers and subsequent dealings were in virtually all respects committed before Westridge even existed, and they were wrongs against Arnbrov as a subsidiary of Bullen Estates. Second, the relief claimed in the derivative proceedings is for an order that the Defendants reimburse Arnbrov itself, which will accrue not only to the benefit of all the shareholders, but also its creditors. Third, as pointed out by the Lord Millett NPJ in *Waddington Ltd v. Thomas* [2009] 2 B.C.L.C. 82., a decision of the Hong Kong Court of Final Appeal (paragraph 77), unfair prejudice proceedings are concerned to bring mismanagement to an end, and derivative actions are concerned to provide a remedy for misconduct, and “*the derivative action is the proper vehicle for obtaining such relief where the plaintiff’s complaint is of misconduct rather than mismanagement*”. This passage was cited with approval by the Court of Appeal in *Taylor Goodchild Ltd v. Scott Taylor and another* [2021] EWCA Civ 1135 at paragraph 32.

98. Further, I do not accept that merits of the claim are substantially different from how they would have appeared to Adam Johnson J. Mr McWilliams, for Robert, pointed out that the judge did not have before him the contemporaneous Gully Howard March 2008 valuation for the three parcels of £1,935,000, which, he said, completely undermines the 2021 CBRE desktop valuation of £16.9 million. In my judgment, there is force in this point, but it only goes so far.

(1) First, after the 2008 transfers, Catton Holdings do appear, at least according to paragraph 16.2 of the Claimants’ Reply, to have been able to sell (or develop and sell) eight units on the Tollgate land from 2011 to 2019 for at least £100,000 on each occasion, including twice for around £200,000, that is to say, for a total of £1.3 million or so, when, according to the Gully Howard valuation, the 28 units had a total value of just £375,000; and 14 units on the Salterns land were sold, from 2011 to 2020, for prices which totalled about £1.5 million, when, according to Gully Howard, the 77 units on the land had a value of just £1 million. Robert says that this was after the units had been developed by Catton Holdings, but it still leaves a question on the Gully Howard valuation.

(2) Second, it appears to be accepted by Robert that the Gully Howard valuation mistakenly assumed that the parcels were subject to a long and disadvantageous lease, when in fact they were not (that lease had recently come to an end, and had been replaced by a short lease).

99. Perhaps more importantly, after the close of pleadings, the Claimants obtained, pursuant to a third party disclosure application, a report prepared by Messrs Savills on 29 July 2008, in other words, an almost exactly contemporaneous valuation, which had been prepared after an inspection of the three parcels for the Clydesdale Bank, in connection, it seems, with a proposed loan to Catton Holdings. The report considers the parcels in detail, and is 43 pages long single spaced. It gave a total market value for the three parcels of £5.93 million to £7.63 million. More particularly (a) it valued the three parcels at £5.3 million if no further certificates of lawful use and development were granted, or at £7 million, if certificates of lawful use and development permitting year-round residential use were granted; (b) it valued a disused crab shack restaurant on the Tollgate land at £250,000, and (iii) it valued the Wishing Well pub on the Pondwell land at £380,000. On any footing, this far exceeds the Gully Howard valuation.

100. Robert criticised this report on the basis that (a) it was not produced by Savills' local office; (b) it wrongly assumed that Catton Holdings had offered £5.5 million for the three parcels, when all it agreed to pay when it purchased the three SPVs in 2009 was £1 million up front, with only a conditional payments thereafter, (c) as Savills accepted, the market for such properties was extremely restricted, and the valuation was conducted by reference to estimated future profits rather than on the basis of the profits that had been made in the past, and (d) Catton Holdings was unable to make a success of the properties.

101. However, none of this in my judgment would lead me, were it open to me, to differ from Adam Johnson J's assessment that a reasonable independent board of directors *could* cause Westridge to pursue the derivative claim on Arnbro's behalf. Given in particular the Savills report, there is plainly a *prima facie* case that the parcels were transferred at a substantial undervalue, such as to give rise to the inference that Robert and Norman (and perhaps Father) acted in breach of fiduciary duty in transferring them to the three SPVs at a price of just £1.935 million with a deferred purchase price which was not fully repaid until 2022.

The second issue: is the rule in *Wallersteiner v. Moir* appropriate in a case such as this?

102. Ms Stanley K.C.'s submissions on this can be summarised as follows.

- (1) It was appropriate to bring the claims in question by way of derivative claim, not unfair prejudice petition (see *Taylor v. Goodchild* cited above).
- (2) The basis of the rule in *Wallersteiner v. Moir* (no. 2) is that the minority shareholder whom the court has authorised to bring the claim for the company is to be regarded as its agent, and he is entitled to an indemnity as such, even though he has an indirect interest in the result. So too, this applies when he has an interest in the result by reason of a simultaneous unfair prejudice petition. So far as the cases suggest otherwise, they are wrong: the furthest they go (for example *Bhullar v. Bhullar* and *Tonstate*) is that the rule does not apply where soon the company is likely to cease trading and the shareholders to divide its assets. In particular, it is irrelevant if a pre-emptive order might bring about an inequality of arms in the unfair prejudice petition.
- (3) It is wrong in principle, and inconsistent with *Wallersteiner v. Moir* (no. 2), for the court to require to be satisfied to a high degree of assurance, before it makes a pre-emptive order, that an indemnity would be the proper order to make after the trial.
- (4) Even if this higher test is right, the court should on the facts be satisfied to a high degree of assurance that on the conclusion of the proceedings the court will grant the Claimants an indemnity.

103. Whereas I accept the first proposition for the reasons I have already given (the derivative claim was the proper way to bring these proceedings), I reject the other three, and accordingly in my judgment this is not an appropriate case for the granting of a pre-emptive indemnity to the Claimants.

104. As to the second proposition, the principle established by the Court of Appeal in *Wallersteiner v. Moir* (no. 2) was simply that where a minority shareholder is authorised to act as agent on the company's behalf, then he is usually entitled to an indemnity from the company, because in doing so he is acting as its agent and for its benefit. Although he has an indirect interest in the result by reason of his minority shareholding, this is to be ignored. This makes good sense, in such a case because there is only one objective which he is asking the court to help him to achieve, namely, the benefit of the company as a whole. But this has no application where, simultaneously, he is bringing an unfair prejudice claim which substantially involves the same allegations, for his own personal benefit, and with a view to the court ordering the majority shareholders to buy him out at market price, taking into account the enhanced value the company will have if those allegations succeed. In such a case, he is properly to be regarded not just as the company's agent, but also a principal in his own right. *Wallersteiner v. Moir* (no. 2) has nothing to say about what order should be made when this is the case. On the contrary, not only its facts, but the language of the judgments are premised on the point that Mr Moir was seeking relief only as an agent, without any immediate consequential benefit for himself.
105. Further, it is apparent from paragraph 70 of *Bhullar v Bhullar* recited above, that it would be wrong, where the result of a derivative claim is to be used as the basis for a later unfair prejudice petition, for the court to order a pre-emptive indemnity in the derivative claim, because this would give the minority shareholder a considerable advantage (that is to say, in the proceedings taken as a whole) over the majority, when they should be "*treated equally and each of them should be on risk as to costs*". *A fortiori* where, as here, if the Defendants defeat both claims, they would be entitled, in the usual course of events (a) to an order for payment of all their costs on the petition (and therefore all the costs on the incorporated derivative claim), and (b) to contend that none of them, so far as material, should be apportioned to those incurred by it on the derivative claim, in the event that Claimants sought an indemnity from the company on the derivative claim.
106. Further, I agree with Mr McCluskey, for Melanie, that such an order would produce a manifest inequality of arms, and would be contrary to the overriding objective in CPR 1.1 of dealing with a case fairly. First, it would be contrary to the usual rule that in an unfair prejudice petition, a company's assets are not to be used for either of the fighting shareholders' benefit. Second, it would mean that, even if Robert and Melanie defeated the unfair prejudice claim, their interest in Westridge would still be saddled with the Claimants' costs, which in turn would skew negotiations to resolve the unfair prejudice claim heavily in the Claimants' favour. I note, in this context, that according to Ms Stanley K.C. the Claimants have already incurred costs of some £250,000, and it appears to be common ground that the trial is likely to be long and expensive. Further, to judge from the statements of case, the wrongful transfer allegations are likely to be for the highest sums, and to take up most of the time at trial.
107. I should add that I do not accept that Morgan J's comments in paragraph 70 of *Bhullar v. Bhullar* are premised on the point that the company in question was going to be wound down: on the contrary, what concerned him was the prospect of the unfair prejudice petition itself being based on findings made in the derivative claim. Further, I cannot see any good reason why it should be necessary to show that the business is soon going to be wound down, if the minority shareholder is positively asking to be bought out. The important point is that, in such a case, he is seeking an immediate personal benefit from the proceedings, and a forced termination of his current relations

with his co-shareholders. That is quite sufficient to make it unjust to order a pre-emptive indemnity, which will obviously improve his hand in any negotiations for the buyout on the unfair prejudice petition.

108. I should say in this context that after the hearing, the parties, after a request from the Claimants, put in further written submissions on 6 June 2023 on whether, as had been floated at the hearing by the Defendants, their intention was to wind down Westridge and Arnbroow after the completion of what is known as the Westridge Farm development. However, in his written submissions for Robert, Mr McWilliams said that the building work was not even likely to begin until 2025, and he and Mr McCluskey disavowed any contention that the company should soon be wound up on a solvent basis.

109. Finally, on Ms Stanley K.C.'s main points, I cannot see why an entirely independent board of directors, faced with litigation between shareholders in which one was seeking an order for a buy out on the basis of allegations in a derivative claim, would regard it as being in the company's best interests to offer an advance indemnity to that shareholder. It seems to me that their proper, perhaps hard-nosed, commercial response to a request for such would be that as the shareholder was pursuing the same allegations for his own direct benefit, and was able to fund the same from his own resources, then they would await the event and see what happened at trial, and see what to do then. In particular, I do not see why, in these circumstances, they would offer an advance indemnity even if he lost hands down at trial in pursuing those allegations, just because he was also pursuing them for the company's benefit as well.

110. I should also deal with two subsidiary points Ms Stanley K.C. makes. First, she says that the Claimants could, in theory, have kept the unfair prejudice petition up their sleeve, so that (subject to the "*high degree of assurance*" point), they could have improved their position on this application; and that they should not be penalised for having been candid with the court. But given that their evident intention was to bring an unfair prejudice petition, they were in any event obliged by the rule in *Aldi Stores v. WSP Group* [2008] 1 W.L.R. 748 to reveal this to the court: so, acting properly, they never could have improved their position by keeping the petition up their sleeve. Further, she says that there is unlikely to be much hardship involved in the making of a pre-emptive order now, because the costs of taking the matter up to disclosure are just £50,000. However, the Claimants are also seeking an indemnity for the costs so far incurred, which, as I have said, are in the region of £250,000. Further, I agree with Mr McCluskey that there is a point of principle involved in this application, which needs to be decided, and once it has been decided it will no doubt set the tone for any future applications.

111. Accordingly, for these reasons alone, I reject Ms Stanley K.C.'s second proposition, and therefore (given my findings on the third issue below), I reject this application.

112. Given these findings, it is unnecessary to express a view on Ms Stanley K.C.'s third and fourth propositions, but in case the matter goes further, I do so briefly.

113. First, on the third proposition, in my judgment it is not inconsistent with the ratio in *Wallersteiner v. Moir* (no. 2) that the court should be required to be satisfied to a high degree of assurance, before granting a pre-emptive indemnity, that an indemnity would be the appropriate order

to make after trial. For the reasons already given (the overall strength of Mr Moir's case, and he had exhausted all his funds), the question simply did not arise in that case. Further, this conclusion is consistent with *Smith v. Croft* (the court must not make an order which carries the real possibility of injustice) on the former common law position, and with the Inner House's judgment on the 2006 Act in *Wishart* (it must be "necessary" to order a pre-emptive indemnity).

114. Further, there would be surprising consequences if this conclusion is wrong. Whatever the position beforehand, it is apparent from *Bhullar v. Bhullar* that under the 2006 Act, all that a minority shareholder has to show in order to obtain authority to act for the company (subject to satisfying the other requirements of s.260 to 265 of the 2006 Act) is that an independent board of directors *could* reasonably authorise proceedings (rather than "*would*"). There will therefore be cases where there will be considerable room for debate as to the strength of his case when he obtains authorisation, and therefore whether the company should be called on after trial to provide an indemnity. It follows in my judgment that the *Bhullar v. Bhullar* test is correct. In this context, I note that both in *Jaybird* (see p.328h) and in *Korchevtsev v. Severa* (see paragraph 111), the court was indeed satisfied not just that an independent board *could* have authorised the derivative proceedings, but that it *would* have done (indeed in *Jaybird* it would have been a dereliction of duty not to do so); and that in *Boston Trust v. Szerlemy* (supra), the court appears to have been satisfied that the facts met the *Bhullar v. Bhullar* test (see paragraphs 47-48, reciting that case, and paragraphs 37 to 40 for the facts).

115. Second, on the fourth proposition, applying the *Bhullar v. Bhullar* test, I cannot say, on the material which I have been asked to consider (principally the skeletons, the pleadings and the valuation reports) that I feel a high degree of assurance that the Claimants would obtain an indemnity from the company after the trial. Although, as I have said, there is clearly a *prima facie* case, it has to be borne in mind that Father was a director of Arnbrov at the time of the 2008 transfers, and it seems entirely plausible that he would have known about and approved them, and have known about and waived Robert and Norman's conflict of interest. If so, the board knew of and approved them and the self-dealing claim (taken on its own) will bring no practical benefit. Further, according to Mary, she and Father were by this stage reconciled with one another, and so on the face of it there is no reason to suppose that he would have authorised a deal which was unfair to her; and the transfers were recorded in the 2008 accounts and were not the subject to contemporaneous challenge. Further, although there are criticisms of the Gully Howard valuation, the same applies to the Savills report (see above), so I cannot say at this stage that the transfers were probably at a substantial undervalue, or such as to give rise to a probable inference of dishonesty which the Claimants intend to prove. If the Defendants defeat these allegations (and I cannot say that they are very unlikely to do so), then in my judgment there is a good prospect that the Claimants would not be granted an indemnity after trial in relation to the derivative claim.

116. I should emphasise, of course, that what I say in this judgment is limited to pre-emptive indemnities: it is not in any way intended to affect the Claimants' right to apply for an indemnity from the company after trial, if the court thinks it appropriate.

The third issue: to what extent is there an overlap between the derivative claim and the petition?

117. It will be apparent from what I have already said that in my judgment there is a complete overlap, or at least almost complete overlap, between the allegations in the derivative claim and in the petition, because as I have said the petition expressly incorporates all those allegations, albeit in

the form of saying that the Defendants failed to take proper steps to reverse the 2008 transfers and subsequent dealings. But to prove that case, the Claimants of necessity will have to prove in the petition that the 2008 transfers and subsequent dealings were wrongful in the first place, and therefore prove what is alleged in the petition. I accept, as I have said, that the remedy claimed is not the same, because the derivative claim seeks restoration direct to Arnbro, but the petition claims that the price of the buyout should reflect the loss suffered by Westridge (i.e. through Arnbro) as a result of the derivative claims. But I cannot see that this difference will add anything material to the cost of the derivative proceedings.

118. As I have said in the introduction, the Claimants say that there are some issues which are exclusive to the derivative claim, and some which are common to that claim and the petition, and they have drawn up a long list of issues to identify them (at page 692 to 700 of the application bundle). But the issues which are said to concern the derivative claim alone (for example, what was the consideration for the 2008 transfers, and what was the full market value of the parcels at the time), for the reasons I have given, will all have to be considered as part of the petition.

119. Accordingly, for these reasons, notwithstanding Ms Stanley K.C.'s persuasively presented submissions, I dismiss this application.