

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY DIVISION**

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

Date: 7 May 2020

Before:

**Mr Stephen Houseman QC**  
**(sitting as a Deputy Judge of the High Court)**

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Between :

(1) BOSTON TRUST COMPANY LIMITED **Claimants**  
(2) BOSTON FIDUCIARY MANAGEMENT  
LTD  
(in their capacities as trustees of Erutuf Trust)

- and -

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

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Ms Anna Dilnot (instructed by Osborne Clarke LLP) for the Claimants  
Mr Stuart Adair (instructed by Brachers LLP) for the First to Third Defendants  
Mr Timothy Carlisle (instructed by Woodroffes Solicitors) for the Fifth Defendant  
Mr Ulick Staunton (instructed by Thomas Snell & Passmore LLP) for the Sixth Defendant

Hearing dates: 22 & 23 March 2020  
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**APPROVED JUDGMENT**

## Stephen Houseman QC (sitting as a Deputy Judge of the High Court):

### A. Introduction

1. This is an application by the Claimants (together, “**Boston**”) for permission to continue these proceedings as a common law derivative claim on behalf of the First to Third Defendants (together, “**Operating Companies**”).
2. Boston allege that four discrete claims are vested in one or more of the Operating Companies as against the Fifth Defendant (“**Mr Verhoef**”) and one or more of the Sixth to Tenth Defendants (together, “**Recipient Companies**”) as the case may be. Boston claim that by reason of indirect minority shareholdings in each of the Operating Companies through the Fourth Defendant (“**Tellisford**”) they are sufficiently interested in vindicating such claims on a derivative basis on the grounds of the well-established exception to the rule in *Foss v. Harbottle* known as a fraud on the minority.
3. So-called ‘first stage’ permission was granted *ex parte* by Mr Charles Hollander QC sitting as a Deputy Judge of the High Court on 25 September 2019 in respect of the four heads of claim, permission having been denied in respect of a fifth head of claim at that stage. A personal and proprietary freezing injunction was sought but refused on the same occasion. Proceedings were commenced on 1 October 2019. The continuation of permission, so-called ‘second stage’ permission, now arises for determination.
4. It is common ground that the court has power to permit pursuit of a multiple derivative claim at common law, notwithstanding the enactment of the Companies Act 2006. The present case involves a ‘multiple derivative’ context due to the interposition within the relevant corporate ownership structure of at least one intermediate entity between Tellisford and the Operating Companies. I describe below the ownership structure so far as relevant.
5. The Draft Order attached to the application notice sought permission to continue this derivative action up until service of witness statements. At the hearing, counsel for Boston clarified that permission was sought without limitation as to scope or duration, although there was some discussion about the possibility of granting conditional permission to which I return below. On the assumption that permission is granted, Boston also seek a costs indemnity in respect of their pursuit of these proceedings on a ‘pay as you go’ basis up to service of witness statements in the first instance. That consequential matter will be dealt with separately as and when appropriate.
6. The permission application was resisted by the Operating Companies, Mr Verhoef and the Sixth Defendant (“**Szerelmey UK**”) through separate counsel

at the hearing. With some judicial encouragement, the represented defendants coordinated their submissions so as to avoid duplication. There is no material difference in their interests or analysis for present purposes. This does not impact the substantive inquiry as to whether the boards of each of the Operating Companies are independent of the majority stakeholder, Mr Verhoef.

7. As regards the unrepresented defendants, with the exception of Tellisford (which is neutral) the interests of the four other Recipient Companies appear to align with those of the represented defendants in the sense that wrongdoing is denied across the board. Neither the Ninth Defendant (“**Tusk**”) or the Tenth Defendant (“**Joinery**”) has made any response to or taken any step in these proceedings. I refer to the defendants collectively unless there is a specific need to differentiate between them or their positions.

## **B. Background**

8. The present dispute concerns the Szerelmey group of companies which conducts a reputable stone restoration and repair business in the UK. The ultimate principal stakeholders in the Operating Companies are two individuals, Earl Krause and Mr Verhoef. Mr Verhoef took care of the Szerelmey business whilst Mr Krause took care of another jointly-owned business in South Africa. All relevant corporate entities are incorporated in England and Wales.
9. Mr Krause and Mr Verhoef have been in business together for almost 60 years. They started their first business shortly after leaving school in 1960. When approaching retirement they sought to hand over to their respective offspring. It was that process of generational succession which, I am told, prompted the underlying dispute between them from around mid-late 2015 onwards. This proposed derivative action arises out of and forms part of that wider underlying dispute between principal stakeholders.
10. Mr Krause and Mr Verhoef and their respective family members enjoy (discretionary) beneficial interests in the relevant corporate entities through their own separate trust arrangements. It is for this reason that I describe them as (principal) stakeholders rather than shareholders. The primary holding concerns A shares with voting rights in Tellisford. The board of Tellisford comprises four directors with equal representation: Mr Krause and his son, Anton, on the one hand; Mr Verhoef and his wife, Celia, on the other hand.
11. Mr Krause and his family are potential beneficiaries under an Isle of Man discretionary trust known as “Erutruf”. A question arises, addressed below, as to the identity of the trustee(s) of Erutruf, there being separate disputes as to whether Boston were validly appointed as replacement trustees and whether they can establish title to any of the certificated shares in Tellisford. The current register of members of Tellisford records 50% of the A shares as held by “Erutruf

Trust IOM”. It is common ground that there is no such legal entity and there is now a pending claim by Boston for rectification of that share register (“**Rectification Claim**”). For ease of reference, I refer to this ownership interest as the “**Erutuf/Krause**” shareholding or stake.

12. Mr Verhoef and his family are beneficiaries under a New Zealand trust represented by VOC Trustee Limited (“**VOC**”). Through that trust arrangement and his ownership of an English company called Warthog Investments Limited (“**WIL**”), Mr Verhoef and his family effectively hold a majority of the voting rights in each of the Operating Companies. For convenience, I refer to this compendiously as the “**VOC/Verhoef**” shareholding or stake.
13. The ultimate ownership proportion in respect of the Operating Companies is roughly 1:2 in favour of Mr Verhoef, namely: 33.33% (Erutuf/Krause) / 66.67% (VOC/Verhoef) in respect of the First Defendant (“**Szerelmey**”) and Second Defendant (“**Szerelmey GB**”); and 26.20% (Erutuf/Krause) / 58.22% (VOC/Verhoef) in respect of the Third Defendant (“**Szerelmey Restoration**”).
14. The differing proportions outlined above arise by virtue of a 21.41% voting stake held by Mr David Maughan in an intermediate holding company, Tellisford UK Limited, which itself owns a 66.67% indirect stake in Szerelmey Restoration. Mr Maughan also held or holds all 10 of the non-voting B shares in Tellisford. Boston contend that he transferred five of those B shares to them. The relevant stock transfer form is dated 9 October 2019, a week or so after commencement of these proceedings. This alleged stake (albeit non-voting) forms part of Boston’s case as to sufficient interest to pursue these derivative claims, addressed below.
15. It is common ground that as between ultimate principal stakeholders, Mr Verhoef is the majority owner of the Operating Companies and has been at all material times. I refer to this ownership structure as the “**Tellisford Structure**”. During the hearing, all parties referred to Mr Krause and Mr Verhoef as if they owned shares, by way of forensic shorthand. I forgive them as I hope they will forgive me for any linguistic shortcomings in this judgment.
16. It is also common ground that historically, by which I mean until the personal dispute emerged between Mr Krause and Mr Verhoef during 2015, the business paid out sums to each of the principals by way of profit share on a periodic basis. This may or may not have constituted or evidenced a legally binding contract between them in their personal capacity. It is suggested by the defendants that personal claims may exist between Mr Krause and Mr Verhoef as part of their contention that pursuit of this derivative action is inappropriate.
17. The Recipient Companies exist outside the Tellisford Structure. In broad outline:

- (i) Szerelmey UK (Sixth Defendant) is wholly-owned by Szerelmey (UK) Holdings Limited (“**Szerelmey UK Holdings**”) which in turn is (recorded as being) owned in equal thirds by VOC, Erutuf and a New Zealand company belonging to Mr Verhoef called Warthog Limited (“**Warthog**”). (Warthog is not to be confused with WIL which is used by Mr Verhoef to hold parts of his interests in the Tellisford Structure.)
- (ii) The Seventh Defendant (“**London Stone**”) is wholly owned by Marmoran (UK) Limited (“**Marmoran**”) which in turn is also (recorded as being) owned in equal thirds by VOC, Warthog and Erutuf.
- (iii) The Eighth Defendant (“**Heritage House**”) is wholly owned by London Stone, and therefore (recorded as being) ultimately owned in equal thirds by VOC, Warthog and Erutuf via Marmoran. This ownership position changed at various points during 2016-2019.
- (iv) Tusk (Ninth Defendant) is wholly-owned by VOC/Verhoef.
- (v) Joinery (Tenth Defendant) is wholly-owned by Shaws of Darwen Limited (“**Shaws**”) which is in turn, along with Heritage House, wholly-owned by London Stone, and therefore (recorded as being) ultimately owned in equal thirds by VOC, Warthog and Erutuf via Marmoran. The ownership of Shaws appears to have changed several times during 2015-2018, having at times been wholly-owned by VOC and/or Mr Verhoef.

I refer to these separate corporate ownership structures compendiously and neutrally as the “**Non-Tellisford Structure**”. There were 11 (now 10) companies in total within this structure.

- 18. Three other entities bearing the Heritage name are/were held in the Non-Tellisford Structure under the ownership of VOC/Verhoef including stakes held directly by Mr Verheof. Two are in administration and the third (“**Heritage Investments**”) has been dissolved. Heritage House was owned by VOC/Verhoef via Heritage Investments and/or Shaws until December 2018.
- 19. There is a dispute as to whether Erutuf, i.e. the trustee(s) of the Erutuf trust, hold or held valid title to any shares in the three parent holding companies in the Non-Tellisford Structure - namely Marmoran, Szerelmey UK Holdings and Heritage Investments (prior to its dissolution). As with the share register of Tellisford, the name “Erutuf Trust IOM” appears as one-third owner in the respective share registers of Marmoran and Szerelmey UK Holdings. This position changed at different times during 2014-2018 as explained below.
- 20. Boston do not accept that they are holders of any such shares. Mr Krause in his evidence says that he did not consent to the transfer of such shares to him (through Erutuf) and has never received any value, in the form of dividends or

otherwise, through such alleged equity stakes. He has no access to corporate financial information and no role or capacity in such entities. Whilst not formally disavowing ownership, Boston's position is that the defendants cannot show that Erutuf's trustees owned such shares and, come what may, such shareholding (even if established) represents no economic value of any kind.

21. The ownership position of the Recipient Companies is an important feature of the alleged substantive wrongdoing in these proceedings. The Particulars of Claim plead four distinct heads of claim (together, "**Alleged Wrongdoing**"). Each one involves a putative claim by one of more of the Operating Companies against Mr Verhoef and one of more of the Recipient Companies, as the case may be. The common theme of all four claims is that Mr Verhoef dishonestly procured the relevant Operating Company to enter transactions or undertake financial obligations or transfer assets for no legitimate business purpose and/or inadequate consideration in a way that was economically detrimental to such company and/or economically beneficial to one or more of the Recipient Companies and hence Mr Verhoef personally.
22. The occurrence of such transactions or payments or transfers between entities in the Tellisford Structure and entities in the Non-Tellisford Structure is not challenged by the defendants for present purposes. They strongly dispute the alleged impropriety or illegitimacy of such inter-group dealings, as well as the central allegation that it was procured or directed dishonestly (or otherwise) by Mr Verhoef.
23. The defendants' position is that all impugned transactions were 'value neutral' for Erutuf/Krause (represented for this purpose by Boston) because what they may have lost through the Operating Companies they gained back through their alleged one-third stake in the Recipient Companies - save for Tusk in respect of which it is not said that Erutuf/Krause had any interest at any material time. This point was described during submissions as the 'swings and roundabouts' analysis or argument. It was deployed prominently at the hearing: as a rebuttal of any inference of dishonest value-extraction on the part of Mr Verhoef as well as preclusion of any net financial loss suffered by Boston (i.e. Erutuf/Krause). The simple point being that Boston was equally interested in both the Operating Companies (Tellisford Structure) and the Recipient Companies (Non-Tellisford Structure) at all material times.
24. I address the impact of the 'swings and roundabouts' point below. At this stage I make some observations about certain features which confront the neutral newcomer to this corporate landscape.
25. A striking feature of the Non-Tellisford Structure is the fact that every company within it (with one exception that is not material) has or had a board comprising just one director. In most cases the sole director was Mr Verhoef, including the

Recipient Companies (save for Szerelmey UK whose sole director is Paul Wisdom) and their respective parent holding companies. In this important sense, it cannot be said that the Non-Tellisford Structure is materially identical or equivalent to the Tellisford Structure. As noted above, the board of Tellisford comprised four directors with equal representation by or for the ultimate principal stakeholders.

26. Another notable feature of the Non-Tellisford Structure is what might be called a sporadic ultimate ownership position in terms of the registration of one-third shareholdings in the parent holding companies in favour of Erutuf/Krause. I have summarised this in broad terms. Taking Marmoran as an example, through which London Stone, Heritage House and (through Shaws) Joinery are now held, the relevant one-third shareholding was shown as allotted to Erutuf on 30 July 2014, then cancelled on 1 January 2017, then reinstated on 31 July 2018. A similar pattern with different dates pertains to Szerelmey UK Holdings, through which Szerelmey UK is held.
27. There is no evidence of Mr Krause or anyone on his behalf having consented to the grant (or relinquishment) of these one-third stakes during the relevant period, which largely coincides with the existence of the dispute between the two ultimate principals. The closest one gets to evidence of his consent to some form of risk-management corporate restructuring is an email dated 28 September 2015 in which Mr Krause indicates his agreement to such proposal on the basis that it preserves both the ultimate ownership split (i.e. roughly 1:2 in favour of Mr Verhoef) and the same directorship profile as the Tellisford Structure: *“the other Directors being Celia Verhoef and Anton Krause”*. Mr Krause asked to see a copy of a *“Family Tree and Shareholders etc”* to be signed by himself and Mr Verhoef *“before concluding the transaction”*. This was never provided or signed.
28. Contrary to such express conditions, Mr Verhoef installed himself as the sole director of the majority of the entities within the Non-Tellisford Structure. There seems little to gainsay the inference that Mr Verhoef created and controls the Non-Tellisford Structure as his own corporate fiefdom, irrespective of the true ultimate ownership position.
29. The dispute between Mr Krause and Mr Verhoef emerged during 2015. The last profit share payment was made to Mr Krause towards the end of that year. Despite being a director of Tellisford, the indirect holding company of each of the Operating Companies, Mr Krause was denied access to corporate financial or other information from around the same time. Mr Verhoef has frankly admitted that the cessation of payments and denial of access to the information or affairs of the Operating Companies was done at his direction in order to exert pressure on Mr Krause personally in their dispute.

30. The Alleged Wrongdoing commenced in earnest at the beginning of 2016, i.e. shortly after Mr Verhoef directed that Mr Krause be excluded from the affairs or profits of the business as summarised above. This chronological coincidence is not lost on the court.
31. There was some discussion between principals (via their respective representatives) during July-September 2017 as to VOC/Verhoef buying out Erutuf/ Krause. In an email dated 7 September 2017, Mr Verhoef's negotiating representative stated that "*Mr Verhoef has always (for more than 20 years) controlled the UK companies*" and has "*an excellent working relationship with the management of the operating companies*". I note that no reference was made in that context to valuing or purchasing Erutuf's purported one-third share in the Recipient Companies.
32. Mr Krause subsequently applied to court for disclosure or provision of relevant information by the Operating Companies, prompted (he says) by his discovery during 2017 of some of the Recipient Companies through searching public records. This application was preceded by a letter dated 16 July 2018 from Mr Krause's solicitors requesting information. Mr Verhoef and Mr Moore gave evidence in opposition to that disclosure application. (As described below, Mr Moore is a director of Szerelmey and Szerelmey GB; Mr Verhoef is a director of both as well as Szerelmey Restoration.) In broad terms, Mr Krause's application succeeded and Mr Verhoef was ordered to pay costs by an order dated 20 December 2018 ("**2018 Disclosure Order**").
33. Information was provided pursuant to that court order in February/March 2019. It is that information, I am told, that prompted and enabled Boston to commence these proceedings in September 2019. Mr Verhoef's counsel acknowledged for present purposes that the denial of corporate information sought by Mr Krause was "*ill conceived*". Mr Verhoef was seeking to exert pressure on Mr Krause after they had fallen out.
34. Boston suggest that the re-instatement of Erutuf's one-third stake in Marmoran (31 July 2018) and Szerelmey UK Holdings (12 December 2018) was an optical or tactical step undertaken at the direction of Mr Verhoef when he appreciated the risk that Mr Krause may prevail in his disclosure application against the Operating Companies. The chronological coincidence is a matter of record.
35. The represented defendants resisted the present application in trenchant terms. This included extensive witness evidence from Mr Verhoef as well as Mr Moore (director of Szerelmey & Szerelmey GB), Mark Chivers (director of Szerelmey Restoration) and Mr Wisdom (director of Szerelmey UK and Group Accountant, who was until January 2016 a director of all three Operating Companies). Mr Moore served four witness statements, including one during the hearing in respect of which no objection was taken as to admissibility.



36. For their part Boston relied on the written evidence of Mr Krause in the form of a substantial affidavit sworn for the purpose of the *ex parte* hearing in September 2019 and two further witness statements made thereafter and responsively to the defendants' witness evidence. As discussed in the context of the standing issue addressed below, Boston served a further witness statement of Samantha Willis during the hearing which deals with Boston's appointment as trustees of Erutuf. No objection was taken to the admissibility of that witness statement and no request for responsive evidence was made by the defendants.
37. I have read all the witness evidence and the key documents referred to in written and oral argument. I observe that this is a hard-fought dispute with no small measure of emotion and distrust on the part of (at least) the ultimate principal stakeholders. No meaningful or mutual attempt has been made to mediate or explore an amicable settlement to date.
38. In so far as evidence or analysis has been provided as to the financial position of one or more entity at any given time, this court is not in a position to reach any firm conclusions on such matters in the present procedural context and nor is it desirable to attempt to do so. The evidential landscape remains inchoate at this interlocutory stage.
39. Finally, in terms of background, Boston commenced the Rectification Claim before the Companies Court less than a week before the present hearing and provided draft Amended Particulars of Claim the following day. The Rectification Claim is resisted by the Operating Companies and Mr Verhoef. I am told that the Operating Companies' resistance is no more than an expression of their resistance to the pursuit of this derivative action, i.e. their position as to the absence of standing on the part of Boston. The Rectification Claim ought to be determined within a few months, I am told. Despite submissions from the represented defendants as to its lack of merit, I say nothing about its prognosis. There is no application before me concerning any proposed amendments to Boston's pleaded case as regards standing or more generally.

### **C. Alleged Wrongdoing**

40. The relationship between ultimate principals broke down during 2015. Mr Krause was effectively excluded from the business by Mr Verhoef and the relevant corporate officers from around that time.
41. As indicated above, there are four distinct heads of claim set out in the Particulars of Claim ("POC") labelled for forensic purposes as follows: Management Fees Claim, Asset Transfer Claim, Loans Claim and Labour Broking Business Claim. The common theme of all four claims is that Mr Verhoef dishonestly procured one or more of the Operating Companies to enter transactions or undertake financial obligations or transfer assets for no

legitimate business purpose in a way that was economically detrimental to the relevant company and/or economically beneficial to one or more of the Recipient Companies, as the case may be. I refer to these (purported) inter-company dealings collectively as the “**Impugned Transactions**”.

42. Szerelmeý is said to be a putative claimant in respect of all four heads of claim, whereas Szerelmeý GB and Szerelmeý Restoration are involved in one claim each, as explained below. The claims are said to be worth in the order of £4.35 million when added together and updated in light of the defendants’ evidence.
43. There is no claim against any of the directors of the Operating Companies, save for Mr Verhoef. Boston have reserved their position. The logical premise of all four heads of claim is that the directors of the Operating Companies committed serious breaches of their fiduciary/statutory duties, primarily the duty to safeguard the interests of the relevant company, by sanctioning or permitting the Impugned Transactions.
44. Mr Verhoef became a registered director of each of the Operating Companies in June 2017. Boston allege that prior to such appointment he effectively controlled their affairs, or at any rate did so for the purposes of the Impugned Transactions, as a shadow director and/or *de facto* director of each company. This central allegation is vehemently contested.

(i) ***Management Fees Claim (POC, paragraphs 45 to 54)***

45. Boston allege that all three Operating Companies have paid or been invoiced a total of £1,422,764 in respect of purported management or consultancy fees for the benefit of Tusk and Joinery during 2016 to 2018. The invoices are said to be false or fraudulent. Mr Verhoef is alleged to have dishonestly procured such inter-company payments so as to siphon cash from the Operating Companies, effectively putting it beyond Mr Krause’s reach or gaze, following deterioration of their personal relationship by late 2015. As noted above, Tusk and Joinery have ignored these proceedings.
46. In summary: Boston allege that Mr Verhoef acted dishonestly in breach of his fiduciary/statutory duties, that he is liable to pay equitable compensation and holds any payments on constructive trust as the transactions are void or voidable, and that Tusk/Joinery are liable to make restitution or pay equitable compensation on the basis of knowing receipt.
47. The Operating Companies and Mr Verhoef deny any wrongdoing. Amongst other things, they deny that the invoicing for management fees was untoward, deny that Mr Verhoef was behind such scheme of transactions, and deny that it made any difference ultimately to Mr Krause because the Operating Companies were always run on the basis of profit-extraction in accordance with the profit

sharing arrangement I have summarised above. Such profit-sharing was habitually described as payment of management or consultancy fees. It is said that the boards of the Operating Companies did not concern themselves in how profit-sharing should be divided between ultimate principal stakeholders.

**(ii) *Asset Transfer Claim (POC, paragraphs 55 to 68)***

48. Boston allege that Szerelmey's key operational assets were transferred to London Stone in April 2016 for £75,000 and then leased back, together with licenses for three trademarks previously transferred to London Stone, for £75,000 per annum. An agency agreement dated 14 April 2016 was entered into by these two companies whereby Szerelmey agreed to purchase all new assets as undisclosed principal for London Stone. Boston allege that these arrangements were manifestly disadvantageous for Szerelmey, going beyond any legitimate risk-management or asset-protection strategy, and were dishonestly procured by Mr Verhoef.
49. In summary: Boston allege that Mr Verhoef acted dishonestly in breach of his fiduciary/statutory duties, that he is liable to pay equitable compensation and/or account for any gains made, that the transfer and lease/licence arrangements as well as the agency agreement are void or voidable, and that London Stone is liable to pay equitable compensation and/or account for any gains made.
50. The relevant defendants (Szerelmey and Mr Verhoef, the latter speaking for London Stone) deny any wrongdoing. Amongst other things, they contend that these asset-transfer arrangements were part of legitimate strategic risk-management in response to potential exposure from Szerelmey's business operations, they deny that Mr Verhoef was the moving force behind this series of transactions or acted dishonestly, and they deny that any or any meaningful loss was suffered by Szerelmey.

**(iii) *Loans Claim (POC, paragraphs 69 to 91)***

51. Boston allege that substantial unsecured loans were made by Szerelmey to Heritage House (£250,000 in September 2017; £200,000 in January 2018) and London Stone (approximately £1.3 million in three tranches during July 2017 to January 2018). The former were used by Heritage House to acquire a property known as Heritage House. The latter were on-lent by London Stone to other Heritage-named entities in the Non-Tellisford Structure, both now in administration, in conjunction with a series of works guarantees provided by Szerelmey in favour of those Heritage-entities.
52. These loans and underlying guarantees given by Szerelmey of work undertaken by Heritage-entities are said to be manifestly disadvantageous for Szerelmey and dishonestly procured by Mr Verhoef after becoming a *de jure* director of

Szerelmey in June 2017. Szerelmey is not in the business of making commercial loans to or guaranteeing the work of associated companies, especially those outside the joint corporate governance regime of the Tellisford Structure outlined above.

53. In summary: Boston allege that Mr Verhoef acted dishonestly in breach of his fiduciary/statutory duties, that he is liable to pay equitable compensation and/or account for any gains made, that the loans are void or voidable, and that Mr Verhoef and/or London Stone or Heritage House are liable in knowing receipt and/or knowing assistance, as the case may be.
54. The relevant defendants (Szerelmey and Mr Verhoef, the latter speaking for London Stone and Heritage House) deny any wrongdoing. Amongst other things, they contend that the loans were legitimate inter-company dealings which remain treated as valuable receivables in Szerelmey's accounts.

*(iv) Labour Broking Business Claim (POC, paragraphs 92 to 99)*

55. Boston allege that a valuable part of the operational business of Szerelmey and Szerelmey GB (referred to albeit tendentiously as the "labour broking" business) was transferred to Szerelmey UK pursuant to a framework agreement dated 31 March 2016. This is said to have deprived Szerelmey and Szerelmey GB of substantial revenues from supplying contract-workers for construction projects. This transfer is said to be manifestly disadvantageous for those two companies and procured dishonestly by Mr Verhoef for his own personal benefit through ownership/control of Szerelmey UK.
56. In summary: Boston allege that Mr Verhoef acted dishonestly in breach of his fiduciary/statutory duties, that he is liable to pay equitable compensation and/or account for any gains made, that the framework agreement and business transfer is void or voidable, and that Szerelmey UK is liable for dishonest assistance.
57. The relevant defendants (Szerelmey, Szerelmey GB, Mr Verhoef and Szerelmey UK) deny any wrongdoing. Amongst other things, they dispute the existence or value of such a business or that Szerelmey UK benefitted from it as alleged. They dispute that Mr Verhoef was the moving force behind any such transfer.

***Disputed Quantum***

58. In relation to some of all of the four pleaded claims, the defendants take issue with the potential quantum in terms of loss sustained by the Operating Companies or gains made by Mr Verhoef or the Recipient Companies in each case. Such disputes are manifestly incapable of resolution at this interlocutory stage and may, should the claims proceed to and succeed as to liability at trial, involve the taking of accounts in order to ascertain the precise financial position for remedial purposes.

## D. Legal Framework

59. There is broad consensus between the parties as to the legal principles applicable to the grant of permission at common law, as reflected in the specific issues for determination set out in Section E below.
60. Broadly speaking, a claimant must show four things:
- (i) sufficient interest (i.e. standing) to pursue such claim(s) on a derivative basis on behalf of the relevant company/ies;
  - (ii) a *prima facie* case (i.e. good prospect of success) in respect of each claim;
  - (iii) each claim falls within one of the established exceptions to *Foss v Harbottle* (1843) 2 Hare 461, in this case the fourth exception: fraud on the minority and wrongdoer control; and
  - (iv) it is appropriate in all the circumstances to permit pursuit of such derivative claim(s).

### *Interlocutory Burden*

61. The applicable standard of proof/satisfaction at this interlocutory stage, at least as regards (ii) and (iii) above, is that of a *prima facie* case. I refer to this for convenience as the “interlocutory burden”.
62. Boston accept that this sits somewhere above the strike out or reverse summary judgment threshold (*vis.* a real or reasonable prospect of success) and is roughly equivalent to showing a good or strong arguable case required in the context of jurisdictional gateways or freezing injunctions. It falls to be assessed by reference to the totality of the evidence before the court: *Abouraya v Sigmund & ors* [2014] EWHC 227 (Ch); [2015] B.C.C. 503 at [53].
63. The precise meaning of this interlocutory burden has evaded articulation, there being no need to gloss or varnish traditional language which is familiar to judges and practitioners: see *Bhullar v Bhullar* [2015] EWHC 1943 (Ch); [2016] B.C.C. 134 at [20]-[26]. Its application is located “*at the furthest end of the spectrum to cases involving a full trial and determination of disputed questions of fact*”: see *Homes for England v Nick Sellman (Holdings) Ltd & anr* [2020] EWHC 936 (Ch) at [61].
64. What is clear is that this court is not required, and nor would it be desirable or even feasible for it to attempt, to resolve disputed issues on a final basis. That is all for the trial judge should the proceedings get that far. This is not an opportunity for any kind of mini trial. Regard must be had to the pleaded case

and any lines of defence articulated through evidence and submission at the permission application.

(i) ***Sufficient Interest / Standing***

65. Part 11 of the Companies Act 2006 (“**2006 Act**”) governs ordinary derivative actions in respect of companies. Section 260(1) makes it clear that a statutory derivative claim may only be brought by “*a member of a company*”.
66. The present case falls outside the statutory regime, being a multiple derivative claim capable of being pursued at common law: *Universal Project Management Services Ltd. v Fort Gilkicker Ltd. & ors* [2013] EWHC 348 (Ch); [2013] B.C.C. 365; *Abouraya* (above); *Bhullar* (above).
67. Standing is therefore determined in accordance with common law principles. The common law test is more functional than formal. The extent of its elasticity and outer edges were matters in contention.
68. Boston recognise that they must establish a sufficient interest in the proceedings, i.e. that they have suffered an indirect or reflective loss: see *Fort Gilkicker* at [16], [24] & [51]; *Abouraya* at [25]. The defendants’ position is that this requires proof of ownership of the relevant shares: the rationale for this exception to *Foss v. Harbottle* being that the minority shareholder would be defeated at a meeting of members convened to consider pursuit of the relevant claims by and in the name of the company.
69. In exceptional circumstances and where the interests of justice so require a sufficient interest can be shown by beneficial ownership rather than legal title to the relevant shares: see *Jafari-Fini v Skillglass Ltd.* [2004] EWHC 3353 (Ch) at [38] & [41]-[43]. In that case, Mr Jafari-Fini sought to bring a derivative action in conjunction with a personal claim against his trustee/nominee, Skillglass, which was also said to be the primary wrongdoer. He was hamstrung by the fact that the legal owner of his shares was his litigation adversary. There were no other means for the substantive grievance to be brought to court. His beneficial ownership was, therefore, found to be enough in such circumstances.
70. It was not suggested by Boston that the phrase “*a person with an interest in the company*” in *Jafari-Fini* at [42] was intended to go beyond the finding in that particular context that the claimant’s beneficial ownership of the shares was sufficient for common law standing. No authority was cited suggesting that any lesser interest or equity in respect of the relevant shares would be enough.
71. Boston placed emphasis on the reference by Briggs J (as he then was) in *Fort Gilkicker* at [51] to “*the law’s search for a suitably interested representative, or champion, of the wronged company*”, to which I return under (iv) below. Boston did not suggest that this formulation dilutes the requirement to show that

the claimant must suffer harm by reason of the wrongdoing to the company. Any suggestion that this formulation extends the ambit of standing at common law beyond ownership of the relevant shares was not advanced with vigour, and I do not regard the words as carrying such a wide meaning.

**(ii) *Alleged Wrongdoing / Threshold Merits***

72. I have already addressed the interlocutory burden. In a case of alleged fraud, as here, much may turn ultimately on inference and credibility, as to which the trial judge will have the benefit of the full evidential landscape tested in the usual way through live testimony.
73. At the interlocutory threshold the court is required to conduct an integrous audit of the pleaded claims by reference to the totality of the evidence. Nobody suggested that each ingredient or element of each claim needs to be individually evaluated by reference to the applicable interlocutory burden as part of an anatomical analysis. The threshold merits assessment is conducted on a claim-by-claim basis. The court should look under the bonnet of each claim, but need not strip down the engine, so to speak.

**(iii) *Fraud / Wrongdoer Control***

74. The fourth exception to *Foss v Harbottle* requires either (a) actual fraud or an *ultra vires* act causing some harm to the claimant through its sufficient interest in the company or (b) personal benefit to the wrongdoer, in each case demonstrated to the interlocutory burden. The significance of this requirement is that the wrongdoer's breach of duty cannot be ratified by a majority vote which depends on the vote of the wrongdoer: see *Abouraya* (above) at [25] specifically approved by the Court of Appeal in *Harris v Microfusion 2003-2 LLP* [2016] EWCA Civ 212.
75. Attempts by claimants to water down this requirement through invocation of the elasticity or ingenuity of the common law have been rejected, most recently in the decision of Zacaroli J in *Homes for England* (above) at [39]-[45]. The exceptions to *Foss v Harbottle* are drawn tightly and policed closely.

**(iv) *Appropriateness / Discretion***

76. Ultimately, the court has to be satisfied that the case is appropriate to be pursued as a derivative action, bearing in mind that this will often (but not always) confer the benefit of cost protection upon the claimant by means of a costs indemnity ordered to be provided by the company. A derivative action is not appropriate when pursued for an ulterior purpose or where there is an adequate alternative remedy - the latter consideration influencing the flexibility at the outer edges of what constitutes a sufficient interest at common law, as observed above.

77. Two related but distinct aspects of this evaluative inquiry call for attention in the present context. The battleground between the parties before me was more about emphasis than substance on both points, although there was acknowledgement that the law is a little unclear in this specific area.
78. *Ulterior Purpose.* It is common ground that a derivative action is not appropriate where it is being pursued for an ulterior purpose or other than in good faith with the objective of vindicating the company's rights.
79. The defendants say this requires the derivative action to be an end in itself rather than a means to an end. Care needs to be taken with that formulation - not least where the claimant has had to demonstrate, by definition, that it has a real economic interest in the outcome of the derivative proceedings. A claimant with its own skin in the game is unlikely to be motivated solely by a sense of altruistic corporate stewardship. It is in this rational commercial light that the reference to a "*champion*" in *Fort Gilkicker* (above) falls to be construed, rather than any romantic notion of a chivalric saviour of the wronged company.
80. The defendants cited the well-known judgment of Peter Gibson LJ in *Barrett v Duckett* [1995] 1 BCLC 243:
- "The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed."*
81. The rational economically-interested claimant may well wish to use the derivative action as a means to further its or another's ends. The real question is whether it (thereby) lacks a bona fide intention to use the proceedings for the benefit of the company in circumstances where the company itself is unable to bring them.
82. Although not applicable, s.263(3)(a) of the 2006 Act refers to the absence of good faith as one of the factors to be taken into account by the court when considering whether to grant permission. The pursuit of a collateral benefit does not in itself render the derivative action inappropriate, so long as the dominant purpose of the proceedings is to benefit the wronged company: see *Iesini & ors v Westrip Holdings Ltd. & ors* [2009] EWHC 2526 (Ch); [2010] B.C.C. 420 *per* Lewison J (as he then was) at [113].
83. The touchstone of good faith was applied in the context of a double derivative claim at common law by Morgan J in *Bhullar* (above) at [45]. Some of the first instance caselaw appears to equate this consideration with abusive litigation. In my judgment, ulterior purpose is different from and broader than abuse of process. The court has an inherent and statutory jurisdiction to strike out any



claim which is an abuse of process (CPR 3.4(2)(b)). An absence of good faith or ulterior purpose in the present procedural context may be shown in circumstances falling short of abusive or oppressive or vexatious litigation.

84. ***Adequate Alternative Remedy.*** The question of ulterior purpose is stitched into the availability of an adequate alternative remedy. A claimant with an adequate alternative remedy, usually in the form of an unfair prejudice petition under s.994 of the 2006 Act, who eschews that claim in favour of a derivative action on behalf of the company, may have some explaining to do when resisting the inference that he has an ulterior purpose.
85. Section 263(3)(f) of the 2006 Act makes the availability of an alternative remedy a discretionary factor for the court when considering whether to grant permission to pursue an ordinary/statutory derivative claim. Whilst this has no application to the common law test for permission, it has coincided with and may explain a more tolerant modern approach to this feature at common law than suggested by the language of Peter Gibson LJ in *Barrett v Duckett* (quoted above). The defendants accept that this feature is no longer an absolute bar.
86. The balance of the modern caselaw at first instance suggests that the availability of an adequate alternative remedy may be an important factor against the grant of permission for a multiple derivative action at common law: see, by analogy, *Iesini v Westrip* (above) at [123]-[126]; *Kleanthous v Paphitis* [2012] EWHC 2287 (Ch) [2012] B.C.C. 676 at [76]-[81].
87. I do not accept, as submitted by the defendants, that the common law regards the availability of an alternative remedy as a ‘powerful factor’ against permission in every situation. All depends on the circumstances, including in particular the adequacy or appropriateness of the available alternative remedy and the proper characterisation of the underlying dispute as a matter of substance and commercial reality. The reference by Newey J (as he then was) in *Kleanthous v Paphitis* (above) at [81] to “*a powerful reason to refuse permission*” has to be approached in context.
88. A key consideration is the appropriateness of the alternative available remedy, most notably an unfair prejudice petition against the majority shareholder(s). Whilst there is no doubt that the court’s remedial powers under s.994 of the 2006 Act (previously s.459 of the Companies Act 1985) are broad and pragmatic, allowing evaluation of the relevant shareholding to be conducted on the basis of assumptions relating to the alleged wrongdoing and any compensatory or restorative remedies in favour of the company to redress such wrongdoing, it does not follow that an unfair prejudice petition is the appropriate procedural mechanism for vindicating the company’s cause of action against the wrongdoer.

89. The availability of a s.994 petition between feuding brothers was not considered to be a good reason for refusing permission to pursue a derivative claim involving allegations of dishonesty on the part of the majority shareholder in *Bhullar* (above) at [41]-[45]. As noted above, this feature was addressed under the rubric of ulterior purpose and good faith.
90. Boston submit that a s.994 petition is not the appropriate procedural mechanism for resolving allegations of serious wrongdoing perpetrated by a majority shareholder against the company: see *SDI Retail Services v King & ors* [2017] EWHC 737 at [83]; *Hollington on Shareholders' Rights* 8<sup>th</sup> ed. at 7-129 *et seq.* Some of the discussion in *Hollington* covers the converse situation in which an unfair prejudice petition is found to be inappropriate or abusive because the underlying allegations are more properly the subject of a derivative action.
91. It is common ground before me that these considerations form part of a broad evaluative analysis focussing on the appropriateness of a claimant pursuing the specific derivative action in question by way of limited exception to *Foss v Harbottle*. This was described as a “wrap around” discretion - one which also takes into account the requirement for the court to be satisfied that a reasonable independent board of the company *could* (rather than *would*) conclude that it was appropriate to bring proceedings against the alleged wrongdoer: *Bhullar* (above) at [38]-[39] citing *Iesini v Westrip* (above) at [85].
92. As to this final requirement, the factors identified as relevant to the court’s objective evaluation through the eyes of the hypothetical independent board of directors include the following: the size of the claim; the strength of the claim; the cost of the proceedings; the company’s ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant’s as well; any disruption to the company’s activities while the claim is pursued; whether prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer).
93. With this legal framework in mind, I turn to consider the issues presented for determination on the present application.

## **E. Analytical Matrix**

94. The parties provided the court with an agreed list of issues reflecting the legal framework summarised above. In respect of each issue the allocation of burden of proof/satisfaction was identified together with the relevant standard of proof/satisfaction.
95. There are 12 issues in total, as follows:

- (1) **Do Boston have sufficient interest to pursue these proceedings on a derivative basis at common law?** Boston have the burden which they accept must be discharged on a final basis, i.e. balance of probabilities. I refer to this as the “standing” issue.
- (2) **Is there an adequate alternative remedy, such as (a) an unfair prejudice petition under s.994 of the Companies Act 2006 or (b) a personal claim between ultimate principal stakeholders?** Boston accept that they bear the (negative) interlocutory burden. Although originally framed in terms of whether Boston have an alternative remedy, this question requires a wider consideration as illustrated by the inclusion of (b) in this issue.
- (3) **Have Boston suffered any loss by reason of the Alleged Wrongdoing?** Boston bear the interlocutory burden. It is accepted that loss for this purpose may be reflective, i.e. by reason of an indirect equity interest in the Operating Companies. This question falls to be answered in relation to each of the four heads of claim in so far as found to satisfy the interlocutory burden (Issues 9-12).
- (4) **Has Mr Verhoef committed fraud or benefitted personally from the Alleged Wrongdoing?** Boston bear the interlocutory burden. Given the nature of the pleaded claims, this question is effectively answered by the outcome of Issues 9-12 below.
- (5) **Are these claims being pursued for an ulterior purpose?** Boston accept that they bear the (negative) interlocutory burden, as with Issue 2 above. The ulterior purpose alleged is that Mr Krause seeks to use these derivative proceedings to leverage a higher purchase price for his stake from Mr Verhoef as part of an over-arching exit strategy.
- (6) **Could a reasonable (i.e. independent) board acting in accordance with its fiduciary/statutory duties conclude that it was appropriate to pursue claims in respect of the Alleged Wrongdoing?** Boston bear the interlocutory burden. It is through this hypothetical objective lens that a range of discretionary factors are brought into play in accordance with *Iesini* and *Bhullar* (quoted above).
- (7) **Are the boards of the Operating Companies independent?** Boston accept that they bear the (negative) interlocutory burden. Although not determined by the outcome of Issues 9-12 below, it seems that success on those issues would materially assist Boston in discharging their burden on the present issue given the nature of the pleaded allegations.

- (8) **Are these proceedings better characterised as a ‘shareholder dispute’ capable of being pursued or vindicated under s.994 of the Companies Act 2006?** The defendants accept that they bear the burden of proof/satisfaction on a final basis. I comment below on how this issue (so defined) fits into Issues 2 & 5 above.
- (9) **Does the Management Fees Claim have *prima facie* prospects of success?** Boston bears the interlocutory burden as to threshold merits.
- (10) **Does the Asset Transfer Claim have *prima facie* prospects of success?** Boston bears the interlocutory burden as to threshold merits.
- (11) **Does the Loans Claim have *prima facie* prospects of success?** Boston bears the interlocutory burden as to threshold merits.
- (12) **Does the Labour Broking Claim have *prima facie* prospects of success?** Boston bears the interlocutory burden as to threshold merits.
96. Issues 2-6 were described collectively as “Exception to the rule in *Foss v Harbottle*”, whilst Issues 7-12 were described as “Issues of fact” - although no genuine questions of fact arise for present purposes.
97. An additional issue (Issue 13) concerned the admissibility of certain parts of the Operating Companies’ evidence in so far as it describes or relates to a conversation said to have taken place between Mr Krause and Mr Moore during a meeting in London on 2 December 2019. Boston contended that such evidence was subject to without prejudice privilege. With the parties’ agreement, I determined that discrete issue after the first day of the hearing, holding that the relevant evidence was not privileged. The reasoning in support of that determination is not repeated in this judgment.
98. The relevance, if any, of that disputed conversation concerns the questions of whether these proceedings are better characterised as a ‘shareholder dispute’ between the two ultimate principal stakeholders (Issue 8) and the impact of that upon Issue 2 and/or Issue 5.
99. There is substantial overlap between Issues 1-12. Whilst the threshold question of standing (Issue 1) might be said to stand on its own, it is connected with Issue 3. The interplay between Issues 2, 5 & 8 is not frictionless: Boston accept the (negative) interlocutory burden on Issues 2 & 5, whereas the defendants accept they have the (positive) final burden on Issue 8. The alleged ulterior purpose effectively presupposes that the present dispute is properly characterised as a personal one between ultimate principal stakeholders (aka ‘shareholder dispute’) and - therefore, it might be said - there is an adequate alternative remedy, primarily under s.994 of the 2006 Act, making it inappropriate to sanction the pursuit of such claims on a derivative basis.

100. Issues 9-12 concern the four heads of substantive claim in respect of which Boston bear the interlocutory burden. In so far as Boston show that each claim is in good standing, given the way they are pleaded, that would suffice to satisfy Issue 4. It would not in itself satisfy Issue 7 as to which Boston bears the interlocutory burden of showing an absence of independence on the part of the boards of each of the Operating Companies, but the nature of the claims as pleaded would tend to undermine any presumption of functional independence.
101. It is common ground that satisfaction of Issue 7 (absence of board independence) would not in itself satisfy Issue 6. Issue 6 raises a distinct hypothetical inquiry conducted on an objective basis, as noted above.
102. It is agreed that the court has a broad discretion, described during the hearing as a “wrap around” discretion, as to whether to grant permission and, if so, on what terms as to scope/duration or other conditionality. I understand that discretion to be centred most naturally within Issue 6 by reference to the *Bhullar* case, although it was acknowledged that the collective impact of Issues 2, 5 & 8 would also find expression within or else infuse the overall evaluation. I deal with Issues 2, 5 & 8 together under the rubric of ‘appropriateness’ as they appear to be facets of that overarching consideration.
103. Issue 1 (standing) might have been a candidate for determination as a preliminary issue, as has occurred in other cases at the permission stage (e.g. *Jafari-Fini*). None of the parties suggested or sought that procedural course. I therefore deal with it as part of the full suite of issues put before me on this application. In dealing with the standing issue, I have regard to materials served and filed to date in connection with the Rectification Claim although I am not required to determine that separate action.
104. With these observations in mind, I turn to deal with the issues summarised above. I approach them in a sequence which accords with the applicable legal framework, namely: Issue 1 (standing); Issues 9-12 (threshold merits); Issue 4 (fraud on the minority); Issue 3 (loss); Issue 7 (board independence); Issues 2, 5 & 8 (appropriateness); Issue 6 (hypothetical board decision / discretion).

***Issue 1 – Boston’s standing to pursue this derivative action at common law***

105. The defendants say that the present proceedings are improperly constituted because Boston lacks standing to pursue them at common law.
106. Boston say that they have sufficient standing in their capacity as trustees of Erutuf whereby they hold 95 A shares and 5 B shares in Tellisford. Boston say this is the position notwithstanding that neither of them is recorded as the holder of any Tellisford shares in that company’s register of members, in respect of which they have recently commenced the Rectification Claim.

107. Boston cannot locate a stock transfer form in respect of the 95 A shares. The stock transfer form in respect of the five B shares dated 9 October 2019 identifies the transferees simply as “*The Trustees of the Erutuf Trust*” and gives no address. This is said to be deficient and ineffective as a matter of law.
108. Boston accepted at the hearing that they cannot show that they are the legal owners of any of the shares at the present time. They say they are beneficial owners of the 95 A shares and the five B shares, by reason of the fact that each set of shares was or must have been the subject of a stock transfer form (i.e. a proper instrument of transfer in accordance with s.770 of the 2006 Act) executed by the relevant (prior) legal owner(s); alternatively, that the (prior) legal owner(s) of the shares could be required to (re-)execute formal stock transfer instrumentation if appropriate, citing *Lewin on Trusts* 20<sup>th</sup> ed. at 17-004.
109. The concept of a trustee holding a trust asset in a beneficial capacity is not an easy one to comprehend on orthodox principles. Trust assets are held for the beneficiaries and it is those beneficiaries who (by definition) enjoy the beneficial interest in such assets. Whilst it is conceptually possible to have a sub-trust, where a beneficiary declares a trust over relevant property, that precludes beneficial ownership on the part of the sub-trustee. If a prior trustee transfers property to a replacement trustee, but the transfer is ineffective or incomplete, that does not alter the identity of the beneficial owners of such trust property. The prior trustee does not hold the property on trust for the new trustee, he holds it on trust all along for the beneficiaries. The position is no different in principle as regards a discretionary trust.
110. **Tellisford A Shares.** Accordingly, I reject the contention, in so far as maintained, that Boston ever acquired or now enjoys any beneficial interest in the A shares. No beneficial interest was enjoyed by the trustees who purported to transfer ownership in such shares to Boston (*nemo dat quod non habet*); and Boston qua trustees could not have acquired or retained any beneficial interest even if so transferred.
111. Boston may have acquired some lesser equitable interest in the relevant shares in their capacity as trustees / transferees, namely an equitable right to seek rectification of Tellisford’s share register or a contractual right (perhaps enforceable by the equitable remedy of specific performance) to require execution of stock transfer instrumentation by the relevant owners / transferors. An equity of this kind reflects the existence of a sustainable right to seek equitable relief in respect of property.
112. The question then arises whether such lesser equitable interest or equity would suffice to constitute a sufficient interest to pursue this derivative action at common law. On the current state of authority, set out in Section D above, I am not satisfied that a lesser equitable interest is sufficient for such purposes. To

so hold would involve extending the law beyond its current parameters. I am not persuaded that there is justification for doing so as a matter of principle or in the circumstances of the present case.

113. **Tellisford B Shares.** The five B shares were (and, it is now conceded, still are) legally owned by Mr Maughan. On the assumption that he did not hold them on trust for anyone else, his intended but defective transfer of such shares to another person or entity might be sufficient to confer beneficial ownership upon a transferee who is not acting as trustee, with Mr Maughan holding legal title on bare trust pending an effective transfer. But where the transferee is a trustee, as Boston say they are and were at all material times, the position is similar (but not identical) to that described in paragraph 109 above.
114. As already noted, common law standing can in certain cases include a beneficial interest in the relevant shares but only in exceptional circumstances and where the interests of justice compel that conclusion. I am not persuaded that such exceptional circumstances exist in the present case even if Boston could show that they are beneficial owners of five B shares.
115. It has always been open to Mr Krause or another beneficiary of the Erutuf trust or Mr Maughan to be named as claimant(s) in these proceedings. That has not occurred and no application for permission to amend to add such claimant(s) has been intimated. Meanwhile, the Rectification Claim is pending for determination. There are other avenues for establishing ownership and, therefore, obtaining standing to pursue this derivative claim. Unlike Mr Jafari-Fini, Mr Krause is not legally hamstrung (see paragraph 69 above). In any event, the B shares carry no voting rights, so would have counted for nothing in any putative shareholders' meeting convened to consider commencing the relevant proceedings (see paragraph 68 above).
116. An anterior question arose at the hearing, namely whether Boston can show that they were validly appointed as trustees of Erutuf. The relevant deed of appointment is dated 3 June 2016 ("**2016 Deed**"). This forms the second in a series of three deeds of appointment, retirement and indemnity - the other two being dated 2 April 2013 ("**2013 Deed**") and 27 June 2018 ("**2018 Deed**") - by which it is said by Boston that they were validly appointed as trustees of Erutuf in place of retiring trustees.
117. The defendants dispute that the effect of these deeds was to appoint Boston as Erutuf trustees, pointing to the absence of protector consent to the replacement of the original trustee under the 2013 Deed as required by the terms of the deed of settlement dated 21 July 2000 ("**2000 Settlement Deed**") and thereafter absence of the original trustee's execution of the 2016 Deed or 2018 Deed. The defendant's challenge on this point echoes their resistance to the Rectification Claim.

118. In response to this challenge, Boston investigated the circumstances of the execution of the 2013 Deed. This was explained through the witness statement of Samantha Willis signed and served during the present hearing. Through that witness statement, and separate written submissions which I directed the parties to file on this discrete dispute during the hearing, Boston contend in summary that there was no valid appointment of any protectors of the trust at the time of the 2013 Deed, that the replacement of the original trustee was therefore effective pursuant to the 2013 Deed in the absence of any protector consent according to the terms of the 2000 Settlement Deed (clause 43), and that the original trustee was accordingly not required to execute the 2016 Deed (or the 2018 Deed, if relevant) in order to transfer trusteeship from the replacement trustees to Boston. Alternatively, the 2016 Deed and 2018 Deed supplied any missing consent retrospectively by way of ratification of the transfer of trusteeship under the 2013 Deed.
119. In light of that evidence and the parties' rival submissions on this point, and in the absence of any prospect of contradictory evidence as to the internal administrative position advanced by Boston, I am satisfied on the balance of probabilities that Boston were validly appointed as trustees of Erutuf pursuant to the 2016 Deed, alternatively the 2018 Deed. Despite doubts expressed in the recitals to the two subsequent deeds, there had been no valid appointment of any protectors of the trust at the time of execution of the 2013 Deed for the reasons outlined in Boston's supplemental evidence and submissions. The trusteeship accordingly passed from the original trustee to replacement trustees pursuant to the 2013 Deed without the need for protector consent in accordance with the terms of the 2000 Settlement Deed dealing with the absence of a protector and the powers of trustees to effect transfer.
120. I make this finding because the point was fully analysed, there is no scope for additional evidence impacting its determination, and by deciding it now that should reduce the issues in dispute on the Rectification Claim. Boston's capacity as trustees of Erutuf is not sufficient to establish standing at common law to pursue this derivative claim. The ownership position will fall to be decided in the Rectification Claim by reference to the state of formal transfer instrumentation and supporting evidence pertaining at the relevant time.
121. In light of my conclusion on the threshold question of standing, the remaining issues do not immediately or necessarily arise for determination. That said, they were all fully canvassed at the hearing and, in light of what I say at the end of this judgment about the appropriate form of order to be made on the present application, their determination at this stage may have practical utility.
122. The premise for the remaining analysis, contrary to my conclusion on the standing issue by reference to the current state of affairs, is that Boston are treated as having sufficient interest in the relevant Tellisford shares.



*Issues 9, 10, 11 & 12 - Alleged Wrongdoing*

123. In my judgment, Boston have comfortably shown that all four heads of claim possess sufficient substance for present purposes. Such claims may not ultimately be worth the pleaded figures; but issues as to quantum are for trial.
124. The twin central allegations that Mr Verhoef dishonestly procured the Operating Companies to enter into the Impugned Transactions and that he thereby benefitted through his ownership and control of the Recipient Companies are sufficiently borne out by the available contemporaneous material. It is important to approach these allegations in their chronological context: a pattern of systematic value-extraction commenced during deterioration of the personal relationship between Mr Krause and Mr Verhoef. The legitimacy or otherwise of the Impugned Transactions can only be assessed properly by reference to the full evidential landscape at trial.
125. With the exception of the Loans Claim, the pleaded allegations depend on establishing that Mr Verhoef was a shadow director or *de facto* director of the Operating Companies during the relevant period prior to his appointment as a registered director in June 2017.
126. The available contemporary evidence meets the interlocutory burden. By way of illustration: Szerelmey's board minutes dated 21 September 2015 refer to Mr Verhoef approving office reorganisation and budget plans, whilst Szerelmey Restoration's board minutes dated 15 March 2016 indicate that Mr Verhoef decided the amount and timing of staff profit share payments. More generally, there is evidence that Mr Verhoef held himself out as chairman of Szerelmey and controlled UK business operations. As noted above, Mr Verhoef's own representatives stated in September 2017 that Mr Verhoef has always controlled the UK business, i.e. the Operating Companies.
127. There is enough to found the inference that Mr Verhoef was the key person with whose directions and instructions a governing majority of the relevant statutory boards were accustomed to acting during the relevant period and in particular as regards the undertaking and implementation of the Impugned Transactions.
128. More specifically in relation to the pleaded claims, by way of illustration from the available contemporary evidence at this interlocutory stage:
- (i) **Management Fees Claim (Tusk & Joinery).** There are board minutes of Szerelmey during 2016 referring to Mr Verhoef approving 'SPS' (staff profit share) and there seems little serious contest about Mr Verhoef being the moving force behind instigating the invoicing of purported consultancy fees in favour of Tusk and Joinery with effect from early 2016. Mr Verhoef directed the cessation of profit-share

payments to Mr Krause and his exclusion from corporate information in late 2015. Mr Verhoef also initiated the system of invoicing for non-existent management or consultancy services in favour of Tusk and Joinery from January 2016. Erutuf's purported one-third indirect stake in Joinery (via Shaws) was registered on 10 December 2018, i.e. ten days before the 2018 Disclosure Order.

- (ii) **Asset Transfer Claim (London Stone).** Mr Verhoef appears to have instigated this transaction in favour of London Stone. An email from the Operating Companies' solicitors (Thrings) to Mr Wisdom on 26 October 2015 referred to "*Gordon*" (i.e. Mr Verhoef) having asked for Szerelmey's tangible relevant assets to be transferred to London Stone and given instructions direct to Thrings. Thrings later noted in an email dated 21 January 2016 that the transaction had "*stalled a little in Gordon's absence*". Erutuf's purported one-third indirect stake in London Stone (via Marmoran) was cancelled on 1 January 2017 and later reinstated on the register on 31 July 2018, i.e. a fortnight after Mr Krause's solicitors sent the letter requesting information which subsequently led to the 2018 Disclosure Order.
- (iii) **Loans Claim (London Stone & Heritage House).** As noted above, these transactions were undertaken by Szerelmey after Mr Verhoef became a registered director in June 2017. The loans made for the ultimate benefit of Heritage entities within the ownership and control of Mr Verhoef are inherently likely to have been at his personal initiation. Szerelmey's board minutes dated 15 May 2017, several weeks before Mr Verhoef joined the board of directors, refer to him having agreed the terms of the loan to London Stone. Erutuf's purported one-third indirect stake in Heritage House (via Shaws and London Stone) was registered on 10 December 2018, i.e. ten days before the 2018 Disclosure Order.
- (iv) **Labour Broking Business Claim (Szerelmey UK).** Mr Verhoef was involved in an early stage in the process of transferring this line of business to Szerelmey UK, including discussions on behalf of Szerelmey and Szerelmey GB with their solicitors, Thrings. This transfer took place in conjunction with the transactions covered by the Asset Transfer Claim, strengthening the inference that both were undertaken at the direction of Mr Verhoef. Erutuf's purported one-third indirect stake in Szerelmey UK (via Szerelmey UK Holdings) was cancelled on 1 January 2017 then later reinstated on the register on 12 December 2018, i.e. one week or so before the 2018 Disclosure Order.

129. The existence of a shadow or *de facto* directorship is ultimately an inquiry as to the behavioural tendencies of the relevant board of directors over a period of time. The court would not expect to see this feature broadcast prominently in

corporate documentation. The fact that Mr Verhoef stood to gain from the Impugned Transactions, and then sought to (re-)instate a one-third registered stake in the Recipient Companies in favour of Erutuf/Krause in the context of the contested application for disclosure during the second half of 2018, is not without significance.

130. Irrespective of the position in relation to each of the Impugned Transactions, the inference of background control or unofficial dominion on the part of Mr Verhoef has a solid evidential basis and gains momentum when the position is looked at in the round in its proper chronological context. I have no reason to believe that the examples of contemporary material relied upon by Boston to support such inference are mere evidential ephemera, although it is possible that the defendants may demonstrate at trial that this is the case. As matters stand Mr Verhoef has a case to answer.
131. For similar reasons, the defendants' suggested justification for the Asset Transfer Claim and Labour Broking Business Claim, i.e. that these transactions formed part of a strategic risk-management exercise in the best interests of the Operating Companies, will fall to be tested in light of the fact that such assets or business (as the case may be) were transferred to companies in the Non-Tellisford Structure without the informed consent of Mr Krause and in the context of the dispute which had erupted between principals. As noted above, Mr Krause's consent to any such re-structuring was expressly conditional upon preserving equal board representation and replicating the composition of Tellisford's board. Mr Verhoef did not honour that express condition.
132. The defendants' suggestion that the Operating Companies' financial obligations which are the subject of the Management Fees Claim were an alternative mechanism for distribution of profits between ultimate principal stakeholders does not sit easily with the available evidence as to the relative size of such payments, still less the fact that invoices were being rendered and paid in respect of non-existent services performed by companies controlled by Mr Verhoef. The notion that an independent board of directors would sanction transactions based on disingenuous invoicing is concerning. The defendants' suggestion that it was not for them to question how the profits were divided up between Mr Verhoef and Mr Krause is not an answer to this claim.
133. The thrust of the defendants' case on threshold merits was that Mr Krause is hallucinating wrongdoing where none exists. No point was taken as to the reasons for Mr Hollander QC's refusal to grant a freezing injunction at the outset of this action in September 2019. Despite the indignant tone of the defendants' evidence and analysis, there is a conspicuous absence of probative contemporary material to answer the claims or dislodge the organic inference of impropriety arising from the structural and chronological matrix.

134. The involvement of independent legal professionals, such as Thrings (solicitors) or Trevor Jones & Partners (auditors), in the preparation and execution of certain transactions does not in itself preclude the existence of underlying impropriety. This court has no means of knowing what information was provided to such independent professionals at the relevant time. They may have innocently (i.e. ignorantly) facilitated the alleged wrongdoing.
135. Approaching this on a claim-by-claim basis, as I have done, I am amply satisfied that Boston have discharged their interlocutory burden in respect of all four heads of claim. I understand that Boston may seek to amend their pleaded case, should this action proceed, to increase certain heads of loss and augment the basis of their challenge to the legitimacy or propriety of certain transactions including the grant of works guarantees during 2015-2016 which are related to the loans made to London Stone as part of the Loans Claim. If standing is sought to be established by Boston, through the Rectification Claim or by seeking to add a beneficiary of the Erutuf trust or Mr Maughan as a claimant, that would also necessitate amendments to the claim form and pleaded case.

#### ***Issue 4 - Fraud on the minority***

136. In light of my conclusion on Issues 9-12 above, and given the way each of the four claims is advanced as against Mr Verhoef and the relevant beneficiary company/ies under his control in each case, it follows that Boston have discharged their interlocutory burden as to showing a fraud on the minority. This is so in terms of both actual fraud on the part of Mr Verhoef and personal gain made by him through ownership and control of the Recipient Companies.

#### ***Issue 3 - Loss suffered by Boston***

137. The premise for this question is two-fold. First, and contrary to my conclusion on Issue 1 above as matters stand, Boston have a sufficient interest in the shares of Tellisford to suffer financial loss, albeit multi-reflectively, to the extent that Tellisford's (indirect) holdings in each of the Operating Companies is diminished by reason of the Alleged Wrongdoing. Secondly, the pleaded claims have sufficient substance even if their precise quantification remains unclear, as I have concluded under Issues 9-12 above.
138. The defendants say that Boston suffer no reflective loss, notwithstanding this premised position. Their main argument is the 'swings and roundabouts' point made by reference to the alleged ultimate ownership split/ratio of both the Operating Companies (Tellisford Structure) and Recipient Companies (Non-Tellisford Structure) outlined in Section B above.
139. I reject the defendants' argument so far as said to prevent Boston discharging their interlocutory burden of showing some reflective loss via Tellisford. It does

not apply at all to Tusk, recipient of substantial sums under the Management Fees Claim. More generally, there is a dispute as to whether the Erutuf/Krause (i.e. Boston) one-third stake in the Non-Tellisford Structure is genuine or valid; and even if shown to be, it does not appear to this court to equate to any corresponding economic value that could be brought into credit to diminish or extinguish the posited loss suffered reflectively by Boston through Tellisford. The Recipient Companies are under the sole control of Mr Verhoef. Mr Krause has no visibility of or access to their affairs. He has to date received nothing from any of them.

140. As for the current financial position of the Recipient Companies and their respective parent holding companies, Szerelmey UK Holdings and Marmoran, the position remains in some doubt on the available evidence. Without clarity as to the financial predicament of such entities, including their liabilities, it is not possible to say that any economic value could flow up through them to Erutuf (Boston). Nothing has been transmitted to date.
141. A separate point was taken in respect of the Loans Claim. The defendants say that loans are balance sheet neutral for the lender (Szerelmey) unless or until the borrower defaults or any loan is written off as a bad debt. Given the circumstances of the lending in question, I am satisfied that some quantifiable loss is sufficiently likely to be established in this context. There is a suggestion by Mr Verhoef that he may be willing to offer a personal guarantee in respect of the borrowers' liabilities under such loans, but this has not been provided.
142. In the circumstances, I am satisfied that Boston have discharged their interlocutory burden on the premises applicable to this question.

### ***Issue 7 - Independence of the boards of the Operating Companies***

143. In light of the above conclusions, and despite the contrary protestations in witness evidence served on behalf of the Operating Companies, there is a sufficient basis to infer that the relevant boards of directors did not operate and are not currently operating independently of Mr Verhoef. This largely flows from the nature of Alleged Wrongdoing including Mr Verhoef's dominant influence in procuring the Impugned Transactions as discussed above. I take on board what is said about the reputable business and prestigious projects undertaken by the Operating Companies. But that does not mean their boards have functioned independently of Mr Verhoef during the relevant period.
144. It is not enough for the directors to turn a blind eye or wash their hands of such matters when, by definition, this may prejudice the interests of the relevant companies to whom they owe fiduciary/statutory duties. The true state of mind of the relevant directors will be investigated at trial by reference to the full

evidential landscape. For present purposes I am satisfied that Boston have discharged their negative interlocutory burden as to absence of independence.

*Issues 2, 5 & 8 - Appropriateness*

145. The thrust of the defendants' position is that the present dispute is in essence a 'shareholder dispute' between ultimate principal stakeholders and that the derivative action is being used inappropriately as a form of 'proxy war' in the geo-political sense.
146. The present claim undoubtedly arises in the context of and as part of a broader dispute between ultimate principal stakeholders. In that descriptive sense it can be characterised as part of a 'shareholder dispute' as the defendants contend. It does not follow that the derivative claims are properly characterised as a 'shareholder dispute' as a matter of substance. There is no juridical creature denominated as a 'shareholder dispute'. It is not a term of art. It is forensic shorthand for the court's evaluation of appropriateness at this permission stage.
147. What matters for present purposes is whether Boston's pursuit of the derivative action is for an ulterior purpose or whether there is an adequate alternative remedy in respect of the Alleged Wrongdoing. Boston have the interlocutory burden, albeit a negative one, on both points. They are related in practice.
148. **Ulterior Purpose.** There may be some wider strategic benefit to the Erutuf/Krause interests through pursuit of this derivative action. Without determining at this stage whether Boston will benefit from a costs indemnity, it does not strike me that pursuit of these proceedings is other than in good faith and for the predominant purpose of restoring economic value that has been wrongfully and dishonestly extracted from the Operating Companies by or at the behest of Mr Verhoef.
149. The logic of the substantive claims is that the relevant boards of directors failed to safeguard the interests of their respective companies. Each company suffered materially as a result. The minority shareholder is entitled to conclude that it best serves the interests of those companies to pursue recovery through litigation. The fact that such recovery, if achieved, may provide indirect economic benefit to the ultimate minority shareholder is largely a product of the requirement to show sufficient interest (Issue 1) and reflective loss (Issue 3) as already observed. Absent a basis for doubting good faith or suspecting ulterior purpose, Boston's pursuit of this derivative action is appropriate.
150. The defendants say that since mid-2017 Mr Krause has desired selling his stake to Mr Verhoef. Mr Moore refers to and exhibits a letter dated 15 July 2017 to this effect. This dialogue was conducted through correspondence during July-September 2017. This substantially pre-dates Mr Krause's court application

leading to the 2018 Disclosure Order and the consequent discovery of information leading to these proceedings being commenced last year. There is no evidence that Mr Krause has sought to use these proceedings as part of a strategy to optimise his exit price by exerting pressure on Mr Verhoef.

151. The defendants place weight on the proposal made by Mr Krause to Mr Moore at their meeting on 2 December 2019. It is said that shows an appetite or agenda on Mr Krause's part to sell his stake in the business. Mr Krause is recorded as having floated the idea of a management buyout of his stake to Mr Moore, suggesting at the same time that the management team might look to buy out the majority owner, Mr Verhoef.
152. Mr Krause has denied making that suggestion in the meeting. Even if he did, it does not show that he was looking to sell his stake to Mr Verhoef. On the contrary, he was exploring the idea of new ownership possibly not involving Mr Verhoef at all. The defendants' reliance on that conversation as evidence that Mr Krause is interested in selling out to Mr Verhoef, and that Boston's pursuit of this derivative action is designed to apply pressure upon Mr Verhoef to bid higher for the Erutuf/Krause stake, is misplaced.
153. In summary, Boston have discharged their interlocutory burden of showing that the pursuit of this derivative action is not in furtherance of any ulterior motive on the part of Mr Krause to leverage his buyout position vis-à-vis Mr Verhoef.
154. **Adequate Alternative Remedy.** For similar but not identical reasons, the availability of potential alternative remedies does not make it inappropriate to pursue this derivative action. The court must assess the *adequacy* of any available alternative remedy or remedies. The concept of adequacy in this context is a synonym or proxy for the evaluative inquiry which I have labelled as appropriateness.
155. The suggested personal claim between Mr Krause and Mr Verhoef relating to unpaid profit-share would, at most, cover some (unspecified) part of the Management Fees Claim on the defendants' own case. The represented defendants - not just Mr Verhoef - were conspicuously careful not to concede the existence of a legally binding or enforceable agreement between principals. I do not regard the theoretical existence of this personal claim as an adequate alternative remedy in respect of the Alleged Wrongdoing.
156. The primary remedy that needs to be considered is an unfair prejudice petition under s.994 of the 2006 Act. Boston accept that such a claim is theoretically available; but draw attention to the fact that the court would need to grapple with whether the Alleged Wrongdoing constituted "*affairs of [a parent] company*" for the purposes of the statutory claim, citing *In re Neath Rugby (No.2)* [2009] 2 BCLC 427 and *Hollington* (above) at 7-52.

157. More fundamentally, Boston contend that an unfair prejudice petition would be a less appropriate legal mechanism for determination of the substantive allegations which involve serious wrongdoing including dishonesty. Unfair prejudice is traditionally seen as more suitable for corporate mismanagement than misconduct, as noted above.
158. There is force in this point. Especially where the underlying allegations involve dishonesty and where a range of (alternative) remedies are sought on behalf of the wronged company, some compensatory and others restitutionary or restorative. A court asked to determine the unfair prejudice claim would have to engage in a full forensic inquiry as to the fraudulent expropriation involved in the Alleged Wrongdoing and then, if ordering company valuations as part of a buyout remedy under s.996, may need to make assumptions as to the asset profile of each company based on quantification of each head of claim and choices between different available remedies for each claim in so far as established at trial. That is not the traditional function or focus of an unfair prejudice petition.
159. I am satisfied in the circumstances, including my conclusion as regards ulterior purpose, that the pursuit of an unfair prejudice remedy is not appropriate or at any rate not materially more appropriate than pursuit of this derivative action, such as to render these derivative proceedings inappropriate or objectionable.

#### ***Issue 6 – Hypothetical Board / Discretion***

160. I am satisfied in all the circumstances that Boston have discharged their interlocutory burden of showing that an independent board of each of the Operating Companies *could* conclude that it is appropriate to pursue claims in respect of the Alleged Wrongdoing. For this purpose, I treat the Operating Companies together and the Alleged Wrongdoing together, although as analysed above not all of the Operating Companies are said to have been the victim of each claim comprising the Alleged Wrongdoing.
161. I have reached this conclusion by reference to the factors identified in *Iesini* and *Bhullar* (quoted in paragraph 92 above). In particular:
- (i) **Size & strength of claims.** The claims are sufficiently strong and large to justify pursuing remedies in respect of the pleaded wrongdoing. The Alleged Wrongdoing involves on its face a scheme of improper expropriation to the detriment of the Operating Companies. The coincidence of coincidences in terms of the chronological and adversarial context calls for proper interrogation through the process of civil procedure.



- (ii) **Legal costs.** Although the costs of these proceedings may be significant, current estimates do not suggest that this is disproportionately expensive litigation given the amounts at stake - even though I have expressed some doubt about its true value. Boston have provided an estimate of their costs to trial (five days) at just over £400,000 plus VAT.
  - (iii) **Affordability.** Given the level of opposition mounted by the Operating Companies to this application and their adversarial stances in respect of the 2018 Disclosure Order and now the Rectification Claim, I have no reason to believe that they lack the means to fund these proceedings. The Operating Companies have not provided up-to-date financial statements. Boston's application for a costs indemnity is for another day but would not affect my evaluation on this point.
  - (iv) **Enforceability.** I have no reason to doubt that Mr Verhoef or (if relevant) the Recipient Companies lack the ability to satisfy a judgment in favour of the Operating Companies. Not all pleaded remedies are monetary: the Asset Transfer Claim and Labour Broking Business Claim involve the avoidance and reversal of allegedly ineffective or vitiable transactions. There is no complete or current financial information for the Recipient Companies. Mr Verhoef appears to have been good for the costs order made against him in the 2018 Disclosure Order.
  - (v) **Financial impact.** I am naturally concerned as to the potential impact upon the Operating Companies if they were to lose the claims and required to pay not only their own costs but also the relevant defendants' costs as well. But this factor does not outweigh (i)-(iv) above, especially where there is no current or complete financial information for those companies.
  - (vi) **Prejudice or disruption.** Finally as regards prejudice or disruption to the Operating Companies' activities, I have in mind the evidence of Mr Moore, Mr Chivers and Mr Wisdom as to the disruption to the Szerelmeý business caused by these proceedings. This includes the non-availability of D&O insurance cover after Boston's solicitors threatened claims against the directors for breach of their fiduciary/statutory duties. I have sympathy for the individuals concerned, but this factor does not in my judgement shift the clear balance in favour of permitting pursuit of this derivative action.
162. As to (vi) above, I observe that on the defendants' own logic, the same serious allegations involving or presupposing the relevant directors' breaches of their fiduciary/statutory duties would need to be tried in the context of an unfair prejudice petition. I have concluded above that a s.944 petition is not an *adequate* alternative remedy for present purposes. But if permission were

nevertheless refused for this derivative claim, and a s.944 petition was commenced, it seems to me probable that the same serious allegations would then be gone through publicly in that legal process. Any distress and disruption cannot be attributed solely to the pursuit of this derivative action.

## **F. Disposition**

163. But for the current position on standing, I would have granted permission to Boston to pursue this derivative action in respect of all four heads of claim. I would have done so with some reservations about the ultimate value of such claims. This might be a case where the court would grant conditional permission or a temporary stay so that the ultimate principal stakeholders could undertake some form of ADR in the near future. They are, after all, old school friends who enjoyed many decades of joint commercial enterprise characterised by mutual trust and respect.
164. There was some discussion towards the conclusion of the hearing as to whether it might be appropriate to stay or adjourn the disposal of the permission application in the event that I were to conclude, as I have, that Boston currently lack sufficient standing in this matter, i.e. in order to give Boston an opportunity to pursue the Rectification Claim and/or seek permission to add another claimant in these proceedings. Boston's counsel suggested as a fall-back that the court could grant permission conditional upon a successful outcome in the Rectification Claim. I can see sense in that as a way forward.
165. I will hear argument from the parties as to the appropriate form of order to make consequent upon handing down of this judgment, including as to costs.