

Neutral citation number: [2021] EWHC 104 (Ch)

Case No: BL-2020-MAN-000094

& CR-2020-MAN-000753

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

INSOLVENCY AND COMPANIES LIST (ChD)

Date: 22 January 2021

Before:

HIS HONOUR JUDGE PEARCE

Between:

DANIEL ROGER HUGHES

Claimant

- and -

(1) NICHOLAS JAMES BURLEY

(2) BURPROP LIMITED

(3) JONATHAN PAUL PHILMORE

(4) NIDA PROPERTIES LIMITED

Defendants

BRAD POMFRET (instructed by **Knights plc**) for the **Claimant**

JOHN VICKERY (instructed by **Irwin Mitchell LLP**) for the **First and Second Defendants**

MICHAEL BOWMER (instructed by **DWF Law LLP**) for the **Third Defendant**

Hearing date: 30 November 2020

JUDGMENT

I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Pearce:

Introduction

1. This is my judgment on the first of the issues that were listed before the court for hearing on 30 November 2020, namely whether the Claimant should have permission pursuant to Section 263 of the Companies Act 2006 (“the 2006 Act”) to continue a derivative action on behalf of the Fourth Defendant against the First to Third Defendants in case number BL-2020-MAN-000094 (“the permission issue”). (It should be noted that, in the heading of some of the documents in this case, the case number has wrongly been given as CR-2020-MAN-000094.)
2. In this judgment, I largely use the parties’ descriptions as in the title to that action. The Second Defendant is a company owed by the First Defendant and those two parties have the same representation. It is not necessary for the most part to distinguish between the arguments advanced on behalf of those two Defendants and the Third Defendant (whose interest is slightly different but who adopts the First and Second Defendants’ case in so far as is relevant), and when in this judgment I use the term “Defendants”, I do so meaning the First, Second and/or Third Defendant. In contrast, the Fourth Defendant, on whose behalf the derivative action is brought and which therefore for the purpose of this application has common cause with the Claimant, is at times described as “the Company”.
3. As well as this application, the Court also has before it:
 - (a) An application by the Claimant in CR-2020-MAN-000753 for inspection of accounting records pursuant to section 388(1)(b) of the 2006 Act;
 - (b) An application by the First Defendant for an administration order in respect of the Fourth Defendant in BL-2020-MAN-000094;
 - (c) An application against the First, Second and Third Defendants for disclosure by the Fourth Defendant in CR-2020-MAN-000094.
4. It is common ground that I should deal with the permission issue before determining the other applications. In the event, there was only time to hear submissions on the issue of

permission to continue at the hearing on 30 November 2020 and accordingly the other issues have been stood over until I have handed down judgment on the permission issue.

5. For the purpose of dealing with this application, I have the following witness statements:
 - (a) From the Claimant, statements dated 13 August 2020, 13 October 2020 and 20 November 2020. (There are further statements from the Claimant dated 24 September 2020 and 2 November 2020, both dealing with disclosure issues.)
 - (b) From the First Defendant, statements dated 3 August 2020, 5 September 2020 and 21 October 2020.
 - (c) From the Third Defendant, a statement dated 11 November 2020.

Background

6. The Claimant is by profession an architectural consultant. He was involved in design and project management work in the redevelopment of the First Defendant's house between 2017 and 2019. Their experiences during this work led to an agreement to carry out further development projects. The First Defendant appears to have had substantial capital available to him, having sold his interest in a successful business and in September 2018 discussions began as to further work together.
7. The concept of the new business was that the First Defendant would provide the capital, whilst the Claimant would provide day-to-day project management. The vehicle for this business was to be a limited company in which they were to be directors and equal shareholders. The First Defendant would loan money to the company to enable it to fund the purchase and development of properties. The intention was that, upon completion and sale of the developed properties, the First Defendant would be repaid the amounts that he had loaned, together with interest at the rate of 5% per annum, and that, following repayment of any other costs and expenses, the Claimant and First Defendant would share the profit from the developments equally.
8. It is common ground that the Claimant was to draw £50,000 from the company. It is however in dispute whether this was, as the Claimant says, an annual salary, which was part of the development costs, or, as the First Defendant says, a director's loan, initially of up to £50,000, later increased to £75,000, to be repaid from the Claimant's share of the profits.
9. During the negotiations, the Claimant and First Defendant had a meeting with solicitors, Dootsons, on 3 October 2018. The attendance note of that meeting records various things of significance:

“[The Claimant] is currently carrying out work for [the First Defendant] and the large extension that has been done is not far off completion. They have decided to set up a joint venture to do similar work for other clients... They have identified a gap in the market between the small and big developers. They will buy in the name of a Company. Its initial share capital will be nominal. The deal will be financed by [the First Defendant] for a loan to the Company which will be secured on the property. The company will be a 50/50 shareholding. Services will be provided by Directors but there will be no obligation on Directors to provide any capital or services...”

10. The Fourth Defendant was incorporated as the vehicle for the business on 19 October 2018. Three properties (collectively “the Properties”) in Cheshire were identified and purchased:

- (a) In January 2019, Tabley Court, Knutsford (“Tabley Court”);
- (b) In April 2019, West Road Garage, Weaverham (“Weaverham”);
- (c) In October 2019, 49 – 53 Hob Hey Lane, Culcheth (“Hob Hey Lane”).

In the case of each, the First Defendant advanced funds that were secured by a charge upon the property. The terms of the charges are typical, but two of them deserve mention as relevant to issues in this case:

“6.2 At any time after this security has become enforceable or if at any time the property appears to the lender to be in danger of being taken in execution by any creditor of the mortgagor or to be otherwise in jeopardy, the lender may and without notice to the mortgagor:

6.2.1 appoint any person to be a receiver of the property or any part of it, and

6.2.2 remove any such receiver, whether or not appointing another in his place,

and may at the time of appointment or at any time subsequently fix the remuneration of any receiver so appointed

...

9 Neither the Lender nor any receiver appointed by the Lender, by reason of entering into possession of the Property, is to be liable to account as mortgagee in possession or for anything except actual receipts, or to be liable for any loss upon realisation or for any default or omission which mortgagee in possession might be liable.”

11. The First Defendant, at paragraph 11 of his first witness statement, sets out what he says was the financial plan for the Properties in broad terms as follows:

	Acquisition Price	Estimated Development Costs	Estimated Development Value	Gross Profit
Tabley Court	£1,298,000	£1,600,000	£3,900,000	£1,000,000
Weaverham	£563,000	£900,000	£2,000,000	£600,000
Hob Hey Lane	£1,168,000	£1,100,000	£3,100,000	£800,000
Total	£3,029,000	£3,600,000	£9,000,000	£2,400,000

The Claimant has not disputed these broad figures.

12. By 2020, there was some disagreement between the Claimant and the First Defendant about issues relating to budgeting and costs. The Claimant's case is that he considered it undesirable to have more than one development taking place simultaneously, unless in addition to his services, a quantity surveyor was employed. The First Defendant did not agree to this and as a result it was left to the Claimant and him to monitor costings. However, on the Claimant's case, the developments were progressing adequately and were broadly in line with expectations in the first quarter of 2020.
13. On the other hand, the First Defendant says that there were significant issues with the Claimant not providing the necessary information to review the progress of the developments. Further, he says that there was no significant progress in the projects from about October 2019 to February 2020 notwithstanding spending continuing at the rate of about £100,000 per month. By the end of this period, the First Defendant says, "*it was clear to me that the project was significantly over budget and behind timelines*" (paragraph 18 of his witness statement of 3 August 2020).
14. A meeting took place between the Claimant and First Defendant in either late February or early March 2020. The Claimant puts the date as 7 March 2020, the First Defendant as "*on or around 28 February 2020*" (paragraph 20 of the First Defendant's first statement). It appears likely that the Claimant's date is accurate, given an email from Ms Lauren Harrison, the First Defendant's daughter, who worked as a bookkeeper for the Fourth Defendant, dated 6 March 2020, which refers to providing relevant information "*to go through tomorrow*", this being an apparent reference to the meeting of which both the Claimant and the First Defendant speak, but at this stage it is neither possible nor necessary to make a finding in this regard. It is of note to the Claimant's case that Ms

Harrison says in the email, “*overall roughly in line with the plan...*” The Claimant relies upon this as evidence that there was no great issue about the costings.

15. Of the meeting (which, as I say, he dates as 7 March 2020), the Claimant says, “*when we discussed budgeting the next day, matters became quite heated, culminating in (the First Defendant) threatening to ‘withdraw funding’. I said that I would discuss further once they both calmed down and left the meeting*” (paragraph 19 of the first witness statement). Thereafter, the Claimant says that his understanding was that he and the First Defendant agreed that a quantity surveyor should in fact be engaged and that developments were proceeding until the COVID-19 pandemic intervened. This led to a meeting on 19 May 2020, when the First Defendant said that “*he wanted to ‘draw a line under this’, by which he was obviously referring to our joint venture. He said that he had decided he wished to continue the business with his family*” (paragraph 21 of the Claimant’s first witness statement).
16. The Claimant says that the First Defendant threatened to fight “*vigorously*” if the Claimant did not leave voluntarily and offered him £15,000 for his shares in the company, The Claimant further states that the First Defendant said that, if an agreement was not reached, he would put the company into liquidation. Whilst he accepts that discussions took place about the sale of the Claimant’s shares, it was not possible to reach an agreement.
17. The First Defendant’s account of the meeting was that he and the Claimant had a “*significant disagreement*” and, following the meeting agreed that they could not continue to work together, their ways of working being incompatible. They agreed to complete the projects but then cease working together. However, the COVID-19 pandemic meant that they had to close the sites in April 2020. The First Defendant says that he thereafter requested a deliverable plan from the Claimant to complete the developments, but that the Claimant repeatedly put off delivering such a plan and that therefore they needed to part ways forthwith.
18. The First Defendant says at paragraph 25 of his first statement, “*We both agreed that the company and the sites were less in present total value than the amount of the debt outstanding to me, but that the developed value ought to give a material profit. However, without my funding the project would not be deliverable.*” The First Defendant therefore made two proposals in a discussion on 19 May 2020 – either the Claimant could sell his shares in the Fourth Defendant to the First Defendant; or the First Defendant would, in his capacity as creditor of the Fourth Defendant, demand repayment and seek to place the company into liquidation. Discussions followed in which the Claimant counter-proposed

that he be paid £100,000 for his shares in the Fourth Defendant. An agreement was reached that a payment of £25,000 be made to the Claimant in addition to his receiving the amount which, on the First Defendant's case, was outstanding on his loan account. This, on the First Defendant's case, gave a total value to the Claimant of about £80,000. However, this agreement required the Claimant to deliver up documentation relating to the developments. On the First Defendant's case, the Claimant was unwilling or unable to provide this and therefore the deal did not progress.

19. Pausing for a moment in the narrative, it is apparent that there is a very significant difference between the Claimant and the First Defendant as to what occurred in April and May 2020. The Claimant contends that his relationship with the First Defendant broke down essentially because of the First Defendant's unilateral decision to terminate their dealings in favour of carrying on the same business with members of his family. The First Defendant contends that the breakdown was due to the Claimant's inability to deliver upon the role of project management in the project. Again, it is not possible or necessary to make any factual findings. It suffices to note that, if the derivative claim proceeds, it is likely to involve highly contentious factual issues.
20. On 16 June 2020, the First Defendant appointed the Third Defendant, a licensed insolvency practitioner, as a fixed charge receiver over the Properties, pursuant to his securities. The Third Defendant explains in his witness statement that he is a director of a company called Philmore and Co Ltd. He has 30 years' experience in insolvency and has been a licensed insolvency practitioner for 20 years. He has extensive knowledge of insolvency in the building and construction industries. He confirmed, as stated by First Defendant, that, prior to this instruction, they did not know each other.
21. The Third Defendant sets out his analysis of the position at that time of his appointment within his witness statement. I summarise that as follows:
 - (a) The Fourth Defendant owed just short of £4.75 million to the First Defendant, a figure increasing by £25,000 per month on account of interest.
 - (b) Subcontractors on-site were owed approximately £190,000 as the latest fortnightly payment.
 - (c) Such fortnightly payments were likely to continue at a similar level for at least four months (eight fortnights).
 - (d) The Fourth Defendant had no security to offer to a third party funder.
 - (e) The Fourth Defendant was continuing to incur costs such as site security, insurance, receivership costs and interest.

- (f) The Fourth Defendant's only source of money, the First Defendant, had withdrawn any further funding.
 - (g) There had been a breakdown in the relationship between the Claimant and the First Defendant.
22. The Third Defendant says that he decided against pursuing a marketing campaign for the following reasons:
- (a) On any version of events there were insufficient realisable assets to discharge a liability to the First Defendant;
 - (b) Any potential purchaser would have a significant outlay to complete the properties given that they were in the middle of development;
 - (c) Pursuing a marketing campaign may have led to increased debts to subcontractors who might in turn have chosen to walk off site with consequent risk of deterioration of the site and delay;
 - (d) The Second Defendant was a willing buyer who could proceed quickly at what the Third Defendant considered to be a reasonable price.
23. The First Defendant offered to buy two of the Properties, Tabley Court and Weaverham, from the Fourth Defendant and subsequently purchased them through the Second Defendant, a company controlled by him, on 26 June 2020 (that is to say 10 days after the appointment of the Third Defendant). The Fourth Defendant also entered into a development agreement with the Second Defendant in respect of the property at Hob Hey Lane.

The Litigation

24. On 6 August 2020, the First Defendant made an administration application in respect of the Fourth Defendant in the proceedings entitled BL-2020-MAN-000094. That application was heard by me on 29 September 2020. Whilst I was satisfied that the Fourth Defendant was then insolvent and that the purpose of administration was reasonably likely to be achieved, as recorded in a preamble to the order, I declined to exercise my discretion to make an administration order given the Claimant's stated intention to issue a derivative claim. I therefore adjourned the application which, as identified above, remains stood over pending the outcome of the application for permission to bring a derivative claim.

25. In the meantime, on 24 September 2020, the Claimant had made a pre-action disclosure application against the First, Second and Third Defendants. That too remains stood over pending the outcome of the application for permission.
26. On 13 October 2020, the Claimant issued the instant claim and on the same day applied for permission to continue the derivative claim on behalf of the Fourth Defendant. That application came before me on 23 October 2020. On that occasion, I considered whether the Claimant was able to pass the first hurdle of the test for bringing a derivative claim and concluded that he was. I therefore gave directions to join the Third and Fourth Defendants to the application, with consequential directions for the service of evidence and the hearing on 30 November 2020.
27. In a further application issued on 2 November 2020, the Claimant sought inspection of the accounting records of the Fourth Defendant. Yet again, that application has been stood over for reasons identified above.
28. To date, the Defendants have not filed Defences (or produced draft Defences). However, each of the First, Second and Third Defendants have made clear, through evidence adduced in opposition to this application and in their skeleton arguments for the purpose of this hearing, that they deny the various claims against them on a variety of grounds.
29. It should be noted that the Claimant states at paragraph 13 of his statement of 13 October 2020, that he is “*prepared to continue to fund these proceedings on behalf of myself and the Company...*” The Third Defendant notes at paragraph 58 of his skeleton argument that “*there is no evidence before the court as to [the Claimant’s] ability to fund the claimant which would give comfort to the reasonable director.*”

The Claimant’s pleaded case against the Defendants

30. The Claimant’s pleaded case against the First Defendant is that the relationship between him and the First Defendant is not simply that of shareholders and co-directors in the Fourth Defendant, but is properly to be characterised as a joint venture agreement (“the Joint Venture Agreement”) pursuant to which they agreed to conduct their business through the corporate vehicle of the Fourth Defendant. The Claimant asserts that he reposed “*a high degree of trust and confidence*” in the First Defendant and in particular pleads: “*Mr Hughes trusted that Mr Burley, in his capacity as funder of the development projects to be undertaken by the Company, would act consistently with the spirit and/or objectives of the Joint Venture Agreement and would not act contrary to the interests of the Company and/or Mr Hughes, who agreed to apply his skill and labour in expectation of an equal share of the profit on each development following completion and sale of the property concerned, which profit would not materialise unless Mr Burley provided*

sufficient funding to conclude the development in accordance with the Joint Venture Agreement.”

31. In consequence of such a relationship, the Claimant pleads that the First Defendant owed fiduciary duties to him, as set out at paragraph 12 of the Particulars of Claim:
- (a) a duty of good faith;
 - (b) a duty to be loyal to the Fourth Defendant and/or the spirit and/or objectives of the Joint Venture agreement;
 - (c) a duty not to prefer his own interests over those of the Fourth Defendant and/or the Claimant;
 - (d) a duty not to act, whether as a funder, charge holder or otherwise, such as to favour himself to the disadvantage of the Fourth Defendant and/or Claimant;
 - (e) a duty not to act whether as a funder, charge holder or otherwise so as to frustrate or defeat the common purpose of the Joint Venture Agreement;
 - (f) a duty to fulfil his obligation under the Joint Venture Agreement to provide the Fourth Defendant with adequate capital to develop the properties it chose to acquire.

The Claimant alleges similar (although not identical) implied terms in the Joint Venture Agreement.

32. As regards the Fourth Defendant, the Claimant pleads that the First Defendant owed it the following duties:
- (a) a fiduciary duty of single-minded loyalty;
 - (b) a duty pursuant to section 172 of the 2006 Act, to act in the way he considered, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole;
 - (c) a duty pursuant to Section 174 of the 2006 Act, to exercise reasonable care, skill and diligence;
 - (d) a duty pursuant to section 175 of the 2006 Act, to avoid a situation in which he had or could have a direct or indirect interest that conflicted or might possibly conflict with the interests of the Fourth Defendant;
 - (e) a duty pursuant to section 177 of the 2006 Act to declare to other directors of the Fourth Defendant the nature and extent of any direct or indirect interest in a proposed transaction or arrangement with the Fourth Defendant.

33. At paragraph 45 of the Particulars of Claim, the Claimant pleads that the First Defendant is in breach of the Joint Venture Agreement. There are 15 sub-paragraphs of alleged particulars of breach, which can be summarised in 5 groups:
- (a) ceasing to fund the Fourth Defendant's development of the properties;
 - (b) seeking to acquire and/or develop the properties for his own benefit and that of the Second Defendant, rather than the Claimant and the Fourth Defendant;
 - (c) calling in his loans to the Fourth Defendant before completion of the developments;
 - (d) appointing the Third Defendant as a receiver when the security was not in jeopardy and/or would not have been in jeopardy but for his own actions in failing to fund the continuing development;
 - (e) applying for an administration order in respect of the Fourth Defendant in his own interests but to the disadvantage of the Claimant and the Fourth Defendant.
34. The Claimant goes on to plead that the Fourth Defendant is entitled to claim relief in respect of the alleged breaches of the Joint Venture Agreement by the First Defendant pursuant to the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act"), since he and the First Defendant had intended to confer the benefits of the agreement on the Fourth Defendant.
35. In respect of the duties owed to the Fourth Defendant, the Claimant contends that the First Defendant was in breach in 14 respects particularised at paragraph 48 of the Particulars of Claim. They can be grouped as follows:
- (a) acquiring and/or developing the properties for the benefit himself and/or the Second Defendant, rather than for the benefit of the Fourth Defendant;
 - (b) calling in the loans, appointing a receiver and/or seeking an administration order in respect of the Fourth Defendant when the loans were not in default and/or the security was not in jeopardy (or would not have been in jeopardy but for the First Defendant's breaches of duty);
 - (c) having decided to cease funding the Fourth Defendant, failing to investigate alternative means of funding to continue development of the properties;
 - (d) using the commercially sensitive information of the Fourth Defendant for the benefit of himself and/or the Second Defendant in negotiating the purchase of the properties and/or the development agreement in respect of Hob Hey Lane;

- (e) failure to disclose to the Fourth Defendant his conflict of interest which arose through negotiating on behalf of the Second Defendant;
 - (f) opposing the disclosure of information to the Fourth Defendant relating to his conduct in respect of the properties;
 - (g) incurring liabilities on behalf of the Fourth Defendant without authorisation from the Board of Directors;
 - (h) causing a payment of refunded VAT to be diverted from the Fourth Defendant to himself.
36. In respect of the claim against the Third Defendant, the Claimant pleads that he owed to the First and Fourth Defendants fiduciary and/or equitable duties of care and good faith, and a duty to take reasonable care to obtain the best price available when selling properties pursuant to the charge.
37. The Claimant contends that the Third Defendant breached those duties in that:
- (a) He sold Tabley Court and Weaverham to the Second Defendant, a company controlled and owned by the First Defendant;
 - (b) He did not adequately or at all market the properties for sale;
 - (c) He did not adequately or at all investigate whether sale at a better price than that offered by the Second Defendant was available;
 - (d) He did not investigate whether the Claimant had a conflict as between his duties to the Fourth Defendant and his interest in the Second Defendant;
 - (e) He did not adequately investigate alternative purchasers and/or developers of the properties.
38. As against the First Defendant, it is alleged that he directed or interfered in the Third Defendant's actions which amounted to a breach of his duties to the Fourth Defendant and that therefore the First Defendant is liable to the company for those actions.
39. Finally, the Claimant alleges that the Second Defendant had actual knowledge of the First Defendant's and Third Defendant's breaches of duties and/or received the property of the Fourth Defendant unconscionably, such that it holds Tabley Court and/or Weaverham and/or the development agreement in respect of Hob Hey Lane on trust for the Fourth Defendant.

The Law – the permission application

40. Chapter 1 of Part 11 of the 2006 Act deals with the circumstances in which a derivative claim may be brought. Section 260(3) provides:

“A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.”

41. The word “*default*” here would appear to have the same meaning as it was held to have by Griffiths LJ in Customs and Excise Commissioners v Hedon Alpha Ltd [1981] QB 818 at 827H (when considering the same word in the same phrase in section 448 of the Companies Act 1948, which refers to “*any proceeding for negligence, default, breach of duty or breach of trust against an officer of a company...*”), namely “*a failure to conduct himself properly as a director of the company in discharge of his obligations pursuant to the provisions of the Act of 1948.*”

42. Where, as here, a member of a company brings a derivative claim, Section 261 of the 2006 Act deals with the procedure to be followed:

“(2) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission... the court -

(a) must dismiss the application, and

(b) may make any consequential order it considers appropriate.

(3) If the application is not dismissed under subsection (2), the court -

(a) may give directions as to the evidence to be provided by the company, and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(4) On hearing the application, the court may –

(a) give permission... to continue the claim on such terms as it thinks fit,

(b) refuse permission... and dismiss the claim, or

(c) adjourn the proceedings on the application and give such directions as it thinks fit.”

43. Thus, the court must consider an application for permission to bring derivative proceedings at a threshold stage, by determining whether the applicant makes out a prima facie case, and thereafter at a hearing. The threshold stage is usually dealt with on paper. In this case, that has not occurred as noted above, since the intention to bring derivative proceedings arose in the context of the application for an administration order and it was

convenient to consider the threshold stage at the adjourned hearing of the administration application on 23 October 2020. However, I should make clear that, whilst the Claimant was able to persuade me that he had a prima facie case sufficient to justify convening a hearing under Section 261(4), the fact that that decision was reached following a hearing at which the Claimant and the First Defendant were represented, rather than on paper, gives no greater authority to my decision that the Claimant had made out a prima facie case than would have been the case had I decided the issue on paper. It was simply a matter of convenience to deal with it in that way. This of course is of particular importance to the Third Defendant who was neither present nor represented at the hearing on 23 October 2020.

44. Section 263 of the 2006 Act provides:

- (2) *Permission (or leave) must be refused if the court is satisfied—*
- (a) *that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim.*
- ...
- (3) *In considering whether to give permission (or leave) the court must take into account, in particular —*
- (a) *whether the member is acting in good faith in seeking to continue the claim;*
- (b) *the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;*
- (c) *where the cause of action results from an act or omissions that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be, (i) authorised by the company before it occurs or (ii) ratified by the company after it occurs.*
- (d) *Where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;*
- (e) *whether the company has decided not to pursue the claim; ...*
- (f) *whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.*
- (4) *In considering whether to give permission (or leave) the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.”*

45. Section 172 of the 2006 Act provides:

- (1) *A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other things) to –*
- (a) *the likely consequences of any decision in the long term ,*
- (b) *the interests of the company’s employees,*

- (c) *the need to foster the company's business relationships with suppliers, customers and others,*
- (d) *the impact of the company's operations on the community and the environment,*
- (e) *the desirability of the company maintaining a reputation for high standards of business conduct, and*
- (f) *the need to act fairly as between members of the company."*

46. The First, Second and Third Defendants contend in respect of the claims against each of them that permission must be refused pursuant to Section 263(2), but that even if they do not make out that mandatory ground of refusal, the court should not exercise its discretion in the Claimant's favour.
47. In undertaking the second stage of the procedure for considering applications for permission to bring a derivative claim, the Court should not conduct a mini trial but must form a view on the strength of the claim. As Lewison J put it in Iesini v Westrip Holdings [2011] BCLC 498 at [79]:

"I do not consider that at the second stage this is simply a matter of establishing a prima facie case (at least in the case of an application under section 260) as was the case under the old law, because that forms the first stage of the procedure. At the second stage something more must be needed. In Fanmailuk.com v Cooper [2008] EWHC 2198 (Ch) Mr Robert Englehart QC said that on an application under section 261 it would be 'quite wrong ... to embark on anything like a mini-trial of the action'. No doubt that is correct; but on the other hand not only is something more than a prima facie case required, but the court will have to form a view on the strength of the claim in order properly to consider the requirements of s.263(2)(a) and 263(3)(b)."

48. The authorities also support the following principles:
- (a) Derivative claims are generally allowed to proceed in circumstances where otherwise a company's genuine claim might be stifled by the majority controllers of the company (see authorities cited in Hollington on Shareholders Rights, 9th edition, paragraph 6-07).
 - (b) Derivative claims may be considered appropriate where a wrong is done to a company and a claim by the shareholders would be liable to fall foul of the so-called reflective loss of principle and the principle in Foss v Harbottle (see, for example, SDI Retail Services Ltd v King [2017] EWHC 737);
 - (c) A Claimant is not disqualified from bringing a derivative claim simply because he may gain a collateral benefit from it - it is sufficient that the claim would benefit the company (see Iesini, op. cit. at paragraph 121);

- (d) A person acting in accordance with Section 172 would have in mind many factors in deciding whether to pursue a claim, including:
- i. The size of the claim;
 - ii. The strength of the claim;
 - iii. The cost of the proceedings;
 - iv. The company's ability to fund the proceedings;
 - v. The ability of the potential defendants to satisfy a judgment;
 - vi. The impact on the company if it lost the claim and had to pay not only its costs but the defendants' costs as well;
 - vii. Any disruption to the company's activities while the claim is pursued;
 - viii. Whether the prosecution of the claim would damage the company in other ways, such as by losing the services of a valuable employee or alienating a key supplier or customer.
- (see Iesini, op. cit. at paragraph 85)
- (e) Where the person seeking permission to pursue the derivative claim proposes to fund the action and does not seek any indemnity in respect of and adverse costs order, that is a relevant factor since it means that the litigation will not diminish the funds of the company available for distribution to members (Cullen Investments Ltd v Brown (2016) 1 BCLC 491, at paragraph 55);
- (f) The weighing of the considerations that a person acting in accordance with section 172 would have in mind is essentially a commercial decision which the court is generally ill-equipped to take (see Iesini, op. cit. at paragraph 85);
- (g) In undertaking the exercise required by section 263(3), the court is forming a provisional view of the merits of the case, including the likely quantum, doing the best it can on the basis of the evidence on paper, without the benefit of that evidence having been tested in cross-examination and without the parties having had the benefit of the disclosure of documents (see paragraph 36 of the judgment of Mark Anderson QC in Cullen Investments Ltd v Brown [2015] EWHC 473).

49. I would add to this list that the reference in section 172(1)(e) to maintaining a reputation for high standards of conduct in business must have the consequence that the hypothetical director would bear in mind that pursuing an unmeritorious claim, as well as potentially having adverse financial consequences for the company, might also adversely affect its reputation. This is likely to be of some significance where the person seeking to bring the derivative claim agrees to indemnify the company in respect of the costs of the claim, since the hypothetical director would not be concerned with potential economic

loss to the company caused by the litigation but must still have regard to the reputational consequences of such conduct. However, the usual detriments of pursuing unmeritorious litigation are financial rather than reputational and, where no question of an indemnity arises, the reputational risk might easily be outweighed by other commercial considerations in particular, the potential benefit of the litigation to the company.

50. The authorities cited include cases showing the decision of other judges in the application of the principles set out in Section 263(3). Whilst those examples are of interest, each case turns upon its own particular facts and circumstances.

The Law – the causes of action

51. Within this application, the court is of course not concerned with the merits of the Claimant's own claim against the First Defendant, since that is not a derivative claim governed by section 263. It is however concerned with:

- (a) The derivative claim brought against the First Defendant on the grounds that the Fourth Defendant can rely on the Contract (Rights of Third Parties) Act 1999;
- (b) The derivative claim brought against the First Defendant based upon the alleged breach of duties owed by him to the Fourth Defendant;
- (c) The derivative claim brought against the Third Defendant based upon the alleged breach of duties owed by him to the Fourth Defendant.

52. In each of these areas, the Defendants have identified legal problems with the Claimant's analysis. Whether or not those issues are definitive and/or can properly be determined at this stage, a person acting in accordance with section 172 of the 2006 Act would undoubtedly bear such matters in mind. It is therefore appropriate to summarise the relevant law, before dealing with the parties' submissions on the issues.

A. Claims brought in reliance on the alleged breaches of duty owed by the First Defendant to the Claimant

53. The Fourth Defendant's right to bring such claims as a derivative claim depends upon it having the right to enforce the terms of a contract to which it was not a party. In this regard, the Claimant relies on Section 1(1) of the Contracts (Rights of Third Parties) Act 1999, which provides:

“Subject to the provisions of this Act, a person who is not a party to a contract (a ‘third party’) may in his own right enforce a term of the contract if—

...

- a. subject to subsection (2), the term purports to confer a benefit on him.”*

54. For the purpose of analysing the duties allegedly owed to the Claimant, the Defendants divide them into the following groups:

- (a) an irrevocable obligation to fund the developments to completion;
- (b) fiduciary duties;
- (c) a duty of good faith.

55. The existence of the first of these gives rise to no particular legal issues (though considerable factual ones).

56. On the second group of duties, my attention is drawn to how Millett LJ defined a fiduciary in Bristol and West Building Society v Mothew [1998] Ch 1 at 18:

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.”

57. The relationship between Claimant and the First Defendant is that of shareholders. The Courts have been reluctant to find the existence of fiduciary duties in such circumstances. For example, in McKillen v Misland (Cyprus) Investments Limited [2012] EWHC 521 (Ch), David Richards J stated:

“94. In my judgment, a case that the shareholders owed each other fiduciary duties is not sustainable. Fiduciary duties arise where one person A holds property or exercises rights or powers for another, or for the benefit of another B. It is for that reason that A must deal with the property or exercise the rights or powers in the best interests of B and for the purposes which are properly within the scope of the power. It is for that reason that A owes a duty of loyalty to B and must not allow his duty to B to conflict with his own personal interests.

...

97. Accordingly, trustees, directors, solicitors and agents will all owe fiduciary duties. So, also, will partners, even though each partner is jointly holding property or exercising powers for his own benefit as well as for the benefit of his partners. It is because he acts for his partners as well as for himself that a partner owes fiduciary duties to his other partners. By contrast, the shareholders in the company own their own shares for their own benefit and not for the benefit of others. Likewise, all the rights and powers conferred on them by the Shareholders' Agreement and the Articles of Association belong to them personally.”

58. Again, in Al Nehayan v Kent [2018] EWHC 333 (Comm), Leggatt LJ stated:

“157. In considering this submission, I bear in mind that it is exceptional for fiduciary duties to arise other than in certain settled categories of relationship. The paradigm case of a fiduciary relationship is of course that between a trustee and the beneficiary of a trust. Other settled categories of fiduciary include partners, company directors, solicitors and agents. Those categories do not include

shareholders, either in relation to the company in which they own shares or to each other.”

59. But, as the decision in Ross River Ltd v Waveley Commercial Ltd [2013] EWCA Civ 910 shows, fiduciary duties can be owed between commercial co-venturers. In Glenn v Watson [2018] EWHC 2016 (Ch), Nugee J summarised the position thus at paragraph 131:

“(1) There are a number of settled categories of fiduciary relationship. The paradigm example is that of trustee and beneficiary; other well-settled examples are solicitor and client, agent and principal, director and company (subject to the impact of the Companies Act 2006), and the relationship between partners: Snell’s Equity (33rd edn, 2015) at §7-004.

*(2) Outside these settled categories, fiduciary duties may be held to arise if the particular facts warrant it. Identifying the circumstances that justify the imposition of fiduciary duties has been said to be difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship: *ibid* at §7-005.*

*(3) Fiduciary duties will not be too readily imported into purely commercial relationships. That does not mean that fiduciary duties do not arise in commercial settings – indeed they very frequently do, as the example of agency illustrates – but that outside the settled categories, this is not common, it being normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party: *ibid*.*

(4) A joint venture is not one of the settled categories of relationship giving rise to fiduciary duties between the joint venturers. Although at first sight the analogy with a partnership might suggest that it would be, it is clearly established that the phrase “joint venture” is not a term of art either in a business or in a legal context, and each relationship which is described as a joint venture has to be examined on its own facts and terms to see whether it does carry any obligations of a fiduciary nature: Ross River Ltd v Waveley Commercial Ltd [2013] EWCA Civ 910 (“Ross River”) at [34] per Lloyd LJ.

(5) The default position is that no such fiduciary duties arise. In the absence of agency or partnership, it would require particular and special features for such fiduciary duties to arise between commercial co-venturers: Crossco No 4 Unlimited v Jolan Ltd [2011] EWCA Civ 1619 at [88] per Etherton LJ. Examples of cases where, exceptionally, fiduciary duties have been held to arise are the decision in Ross River itself; that of Etherton J in Murad v Al-Saraj [2004] EWHC 1235 (Ch) (“Murad”) (appealed, but not on this point: [2005] EWCA Civ 959 at [4]); and that of Peter Smith J in J D Wetherspoon plc v Van de Berg & Co Ltd [2009] EWHC 639 (Ch) (“Wetherspoon”). In Wetherspoon one director of the defendant company was found to have owed a fiduciary duty but the other two not, and it was said by Lloyd LJ in Ross River at [37] to be a good illustration of the proposition that the existence of a fiduciary duty in such a case is very fact-sensitive. With these can be contrasted two recent cases in which fiduciary duties have been held not to arise between co-venturers: Baturina v Chistyakov [2017] EWHC 1049 (Comm) (Sue Carr J), and Cullen Investments Ltd v Brown [2017] EWHC 1586 (Ch) (Barling J) (“Cullen”), a case coincidentally involving Mr Watson.

(6) What then are the particular factual circumstances that will lead to the Court finding that fiduciary duties are owed? This can best be elucidated by a number of citations: (a) In his well-known classic judgment in Bristol & West Building Society v Mothew [1998] Ch 1 (“Mothew”) at 18A, Millett LJ said: “A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.” (b) In Arklow Investments Ltd v Maclean [2000] 1 WLR 594 at 598G, Henry J, giving the judgment of the Privy Council, said: “the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal.” (c) In F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) [2011] EWHC 1731 (Ch) at [225], Sales J said: “Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another.” (d) In another case involving Ross River Ltd, Ross River Ltd v Cambridge City Football Club [2007] EWHC 2115 (Ch) (cited by Lloyd LJ in Ross River at [56]-[58]), Briggs J referred at [198] to: “well known badges or hallmarks of a fiduciary relationship, such as ... [if] the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit.” (e) In Ross River at [51]-[52] Lloyd LJ cited with approval a passage from Bean, Fiduciary Obligations and Joint Ventures (1995) (itself referring to Finn, Fiduciary Obligations (1977)), which is too long to set out in full but the essence of which is as follows: “[Fiduciary] office holders are entrusted with power to act for the benefit of another, but are not under the immediate control and supervision of the beneficiary... Finn’s rationale is that the fiduciary who has freedom to determine how the interests of the beneficiary are to be served requires the supervision of equity. Indeed, it is the fiduciary’s autonomy in decision-making that requires equity’s supervision and this is required whether or not the autonomy is created under a contract between the parties or is inherent in the office.”

(7) Without in any way attempting to define the circumstances in which fiduciary duties arise (something the courts have avoided doing), it seems to me that what all these citations have in common is the idea that A will be held to owe fiduciary duties to B if B is reliant or dependent on A to exercise rights or powers, or otherwise act, for the benefit of B in circumstances where B can reasonably expect A to put B’s interests first. That may be because (as in the case of solicitor and client, or principal and agent) B has himself put his affairs in the hands of A; or it may be because (as in the case of trustee and beneficiary, or receivers, administrators and the like) A has agreed, and/or been appointed, to act for B’s benefit. In each case however the nature of the relationship is such that B can expect A in colloquial language to be on his side. That is why the distinguishing obligation of a fiduciary is the obligation of loyalty, the principal being entitled to “the single-minded loyalty of his fiduciary”(Mothew at 18A): someone who has agreed to act in the interests of another has to put the interests of that other first. That means he must not make use of his position to benefit himself, or anyone else, without B’s informed consent.

(8) This analysis also explains why fiduciary duties will not readily be found in commercial settings. In commercial dealings the relationships are (usually) primarily contractual; and it is of the essence of commercial contracts that each party is (usually) entitled, subject to the express and implied constraints of the contract, to seek to prefer his own interests, and is not obliged to put the interests of the other party first.

(9) *So far as joint ventures are concerned, fiduciary duties may in particular be found to arise where one party has control of assets which are to be exploited for the joint benefit of both. Thus for example in John v James [1991] FSR 397 at 433 Nicholls J said of a publishing agreement: “The copyrights were to be assigned to the publisher, and to become its property, but with the intention that they would be exploited by the publisher, which would have complete control over the method of exploitation, not for its benefit alone but for the joint benefit. Thus, commercially, the arrangement was in the nature of a joint venture, and the writers would need to place trust and confidence in the publisher over the manner in which it discharged its exploitation function.” And in Ross River Lloyd LJ (who said at [62] that John v James was the most useful and compelling analogy) described it at [55] as: “a clear and instructive example of a transaction in the nature of a joint venture where the relevant assets belong legally and beneficially to one party, whose task it is to exploit them, but they are to be exploited for the common benefit of both parties, and where fiduciary duties arose from the situation despite the fact that the operator had its own personal interest in the exploitation to which it was entitled to have regard.”*

(10) *Even if a party is held to have owed a fiduciary duty to another party, the nature of the fiduciary obligations owed is itself a fact-sensitive enquiry, to be determined by considering the particular relationship between the parties: Ross River at [64]. Thus for example in John v James the defendants were not disposed to dispute that the publisher owed a fiduciary obligation to account for royalties received, but it was disputed, and had to be decided, whether it owed a fiduciary obligation in respect of exploitation of the copyrights; in Ross River Morgan J had found that the defendants owed fiduciary duties in certain respects but not others, and the Court of Appeal found that the duties were more extensive.”*

60. As to the third issue, the alleged duty of good faith, Leggatt LJ stated in paragraph 172 of Al Nehayan v Kent cited above, that such duties may often be apposite to those involved in joint ventures. He cites with approval paragraph 11.17 of Hewitt on Joint Ventures (6th edition), where the authors state:

“If findings of fiduciary duties in the fullest sense between joint venture parties will continue to be rare, principles relating to “good faith” seem to fit a relationship between parties to a joint-venture where mutual trust and commitment are crucial to the success of the venture – and often explicit in the terms of establishing the relationship at the outset.”

61. The extent of any duty of good faith, where it exists, has to be kept within reasonable bounds. In Al Nehayan v Kent, Leggatt LJ at paragraph 175 stated that, where such an obligation does exist, it has been summarised as “...an obligation to act honestly and with fidelity to the bargain and an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed, with the caveat that the obligation of fair dealing is not a demanding one and does no more than require a party

to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people... In [Paciocco v Australia and New Zealand Banking Group Ltd [2015] FCAFC 50] (at para 290) Allsop CJ also made the important point that:

"The standard of fair dealing or reasonableness that is to be expected in any given case must recognise the nature of the contract or relationship, the different interests of the parties and the lack of necessity for parties to subordinate their own interests to those of the counterparty. That a normative standard is introduced by good faith is clear. It will, however, not call for the same acts from all contracting parties in all cases. The legal norm should not be confused with the factual question of its satisfaction. The contractual and factual context (including the nature of the contract or contextual relationship) is vital to understand what, in any case, is required to be done or not done to satisfy the normative standard."

B. Claims brought in reliance on the alleged breaches of duty owed by the First Defendant to the Fourth Defendant

62. Like the previous group of claims, the Claimant relies in part on the existence of a fiduciary duty, namely a duty of loyalty. Otherwise he relies on various duties arising from his role as director pursuant to the 2006 Act, essentially to promote the success of the Company in good faith and not to divert business from the Company. The duties pleaded are largely statutory in nature and their existence is uncontroversial. The alleged duty of single-minded loyalty might be the subject of some controversy, though for the purpose of this application, the Claimant contends that it is at least arguable that the First Defendant owed a duty to the company along these lines.

C. Claims brought in reliance on the alleged breaches of duty owed by the Third Defendant to the Fourth Defendant

63. The duties of a receiver in the position of the Third Defendant are not contentious. They can be drawn from the judgments of the Court of Appeal in Silven Properties Limited v Royal Bank of Scotland plc [2004] 1 WLR 997 and Ahmad v Bank of Scotland [2016] EWCA 602 and are helpfully set out at paragraph 21 of Mr Bowmer's skeleton argument, as follows:

- (1) A mortgagee is not a trustee of the power of sale for the mortgagor; the power is given for his own benefit;
- (2) A mortgagee therefore has an unfettered right to sell when he likes in order to obtain repayment of the debt and need not take account of the mortgagor's interests in deciding whether or when to sell;
- (3) The court will not interfere with exercise of the power of sale or the timing of a sale because this might be disadvantageous to the mortgagor, nor because a short delay

might produce a higher price, nor because the mortgagor might be soon in position to redeem;

- (4) A mortgagee owes a duty in equity to exercise the power of sale in good faith;
- (5) If and when the mortgagee does decide to sell, he must take reasonable care to obtain a proper price at the date of sale;
- (6) A mortgagee is not required to incur expense in improving the security in order to sell it at a higher price;
- (7) A receiver is deemed to be the agent of the mortgagor who is solely responsible for the receiver's acts and defaults unless the mortgagee gives directions to the receiver or interferes with his conduct;
- (8) A receiver owes a similar duty in equity to exercise his powers in good faith, and if he sells to take reasonable care to obtain a proper price;
- (9) But, again, he is not obliged to incur expense in improving the security to sell it at a higher price;
- (10) These duties may be excluded by clear wording in the mortgage deed.

64. The Third Defendant makes the following further points at paragraph 23 of Mr Bowmer's skeleton argument:

- (1) The receiver's duty to take care to obtain the best price reasonably obtainable at the date of sale is a limited one - there is no duty to await or effect any increase in value or improvements and it is permissible to proceed with an immediate sale.
- (2) A receiver is given a wide margin of professional discretion and flexibility. There are no prescriptive procedures or processes that must be followed, and a receiver will not be adjudged to be in default "*unless he is plainly on the wrong side of the line*" (per Eder J in Saltri III Ltd v MD Mezzanine [2012] EWHC (Comm) 3025 at paragraphs 128 and 137).
- (3) The question whether appropriate value is obtained by a receiver is a commercial one to be viewed in round and practical terms (so that, for example, if a side-benefit is obtained for the mortgagor which is in addition to the price, that is part of the commercial context against which the question must be answered) (Saltri III at paragraph 138; and per Lord Scott in Newport Farm Limited v Damesh Holdings Ltd [2004] NZLR 721 (PC) at paragraph 24).
- (4) For a Claimant to succeed with an allegation that there has been a breach of the duty of good faith on the part of a receiver "*requires more than negligence or even gross*

negligence: it requires some dishonesty, or improper motive or element of bad faith to be established” (Ahmad at paragraph 39(vi)).

(5) Where a receiver sells to a company in which the mortgagee has an interest, this does not give rise to any requirement that the receiver justify what he has done or bears the burden of proving that he has not breached his duties on account of any conflict of interest (per HHJ Paul Matthews in Devon Commercial Property Ltd v Barnett [2019] EWHC 70 (Ch) at paragraphs 27 and 194).

65. The final point relating to the burden of proof merits closer attention. In Tse Kwong Lam v Wong Chit Sen [1983] 1 WLR 1349, the Privy Council considered the position where a mortgagee exercised a right of sale under charge and then sold the property to his wife at auction. The borrower claimed against the mortgagee for the difference between the price paid for the property and the best price reasonably obtainable for it at the date of the sale, contending that the mortgagee had failed to show that he had taken reasonable precautions to obtain the best obtainable price. The Privy Council, in allowing the borrower’s appeal against a decision dismissing his claim, stated at p. 1355A:

“In the view of this Board on authority and on principle there is no hard and fast rule that a mortgagee may not sell to a company in which he is interested. The mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time.”

Further in the judgment, the Board stated at page 1359H:

“A mortgagee who wishes to secure the mortgaged property for a company in which he is interested ought to show that he protected the interests of the borrower by taking expert advice as to the method of sale, as to the steps which ought reasonably to be taken to make the sale a success and as to the amount of the reserve. There was no difficulty in obtaining such advice orally and in writing and no good reason why a mortgagee, concerned to act fairly towards his borrower, should fail or neglect to obtain or act upon such advice in all respects as if the mortgagee were desirous of realising the best price reasonably obtainable at the date of the sale for property belonging to the mortgagee himself.”

66. This rule is described by the authors of Lightman and Moss on the law of Administrators and Receivers of Companies (6th Edn) at paragraph 13-47 as “a fair-dealing rule”. At paragraph 13-048 they state that the same rule applies in the case of a receiver selling as agent of the mortgagor to a company in which the mortgagee has an interest. However, in Devon Commercial Property Ltd v Barnett, HHJ Paul Matthews doubted this expression of the principle, since the receiver and mortgagee are two persons and it is the mortgagee not the receiver who benefits from the putative sale at undervalue (see paragraph 28 of the judgment).

The Claimant's Submissions

67. The Claimant's starting position is to examine the relationship of the First Defendant and himself. Notwithstanding paragraph 21 of his third witness statement, in which the First Defendant firmly denies that he and the Claimant entered into a joint venture agreement, the Claimant notes that the First Defendant has himself described their relationship in a way that is liable to lead to a finding that there was such an agreement (see paragraphs 6, 7 and 9 of his first witness statement) and indeed described discussions about his willingness "*to fund a joint venture development business*" at paragraph 16.2 of his second witness statement. Further, the project was described as a "*joint venture*" in the attendance note prepared by Dootsons' solicitors following the meeting on 3 October 2018. The Claimant contends that this was a venture in which they were each investing, the First Defendant through the introduction of capital and the Claimant through the provision of his services. Subject to the exact nature of the payment of £50,000 per annum mentioned above, neither was to be paid during the development works, but only on their conclusion. Each had to be able to trust the other to see the developments through, otherwise they each risked loss if the projects were aborted. In those circumstances, the court might well find that they had entered into a joint venture agreement pursuant to which they owed duties, including fiduciary duties, to each other.
68. Turning to the First Defendant's motives for the termination of the relationship and the appointment of a receiver, the Claimant contends that the evidence does not support the First Defendant's position:
- (a) Whilst he states that the Fourth Defendant was operating over budget, the Fourth Defendant's balance sheet as at April 2020 showed indebtedness to the First Defendant of just in excess of £4.4 million (see page 66 of exhibit NJB1), the total anticipated investment, that is to say the sum of the acquisition costs and the estimated development costs set out at paragraph 11 above, was £6.6 million and cannot therefore be said that the projects were over budget.
 - (b) The contention that the project was also over budget is inconsistent also with the email from Ms Harrison referred to at paragraph 14 above.
69. The First Defendant's conduct in failing to continue to fund the developments is therefore not justified on the grounds now asserted by him, namely a lack of confidence in the Claimant's ability to perform his side of the venture. Rather, it appears that the First Defendant saw an opportunity to make a profit for the benefit of himself, to the detriment of the Claimant and the Fourth Defendant, by ceasing funding of the venture and calling in his loans. The decision subsequently to sell two of the Properties to the

Second Defendant, a company controlled by the First Defendant, and to enter into a development agreement with the Second Defendant in respect of the third is indicative of this motivation.

70. The Claimant further criticises the First Defendant for failing to consider alternative sources of funding the developments to completion even if he were not willing to fund the projects himself. The Claimant asserts at paragraph 12 of his witness statement of 13 October 2020 that he has funding of £500,000 available immediately and, at paragraph 6 of his statement of 20 November 2020, he expresses confidence about raising the necessary funds to complete the developments through a broker.
71. Further, since this dispute has arisen, the First Defendant has acted contrary to the interests of the Fourth Defendant, but in his own interests by:
 - (a) Purporting to vote against a resolution to make an application to court for disclosure against the First Second and Third Defendants, notwithstanding the fact that it was plainly in the interests of the Fourth Defendant for such disclosure to occur.
 - (b) Causing the Fourth Defendant to incur liabilities without the authorisation of the board.
 - (c) Causing the Fourth Defendant to pay to him a VAT refund that it received from HMRC.
72. Taking the evidence together, the Claimant says that this is a classic case of a fraud on him where there is a deadlock in the company and the wrongdoer is stifling a claim that the Company would want to bring in its own name.
73. In respect of the claim against the Third Defendant, the Claimant contends that the evidence gives rise to considerable concern about how he approached the issue of selling the Properties:
 - (a) He did not obtain any valuations;
 - (b) The Properties were not marketed;
 - (c) The Third Defendant's analysis of the reasons for the sale, as set out in his witness statement dated 11 November 2020, indicates a concern about the indebtedness of the company. However, as a receiver appointed pursuant to the Law of Property Act, this was not a relevant consideration. The Claimant suggests that this may have led him to enter into error in his assessment of matters relevant to his equitable duty of care.

- (d) He did not explore alternative options for the continued funding of the developments and/or realisation of the Fourth Defendant's assets with the Claimant, despite his being a director of the Fourth Defendant who, unlike the First Defendant, did not have a conflict of interest as the controlling mind of the proposed buyer (in the case of Tabley Court and Weaverham) and the proposed developer (in the case of Hob Hey Lane);
 - (e) He did not investigate whether the First Defendant's obvious conflict of interest had been disclosed to the Fourth Defendant.
74. The Claimant contends that, in light of the analysis in *Lightman and Moss* referred to above, the burden lies on the Third Defendant to show that his duties to the Fourth Defendant were discharged, yet he has not provided any proper basis to explain the decisions that he took.
75. The Claimant suggested at paragraph 42 of his skeleton argument that, because the claim against the Third Defendant is somewhat secondary to that against the First and Second Defendants, the court might consider it appropriate to defer determination of the case against him, pending determination of the claims against the First and Second Defendants. The wording of that paragraph appears to indicate a suggestion that the determination of the issue of permission to bring the derivative claim pursuant to Section 261 of the Companies Act be deferred, although in oral submissions, counsel for the Claimant limited his case to the suggestion that, assuming permission is given, the court's exercise of case management powers might sensibly defer the claim against the Third Defendant until after determination of the claim against the First and Second Defendants. I agree with the position taken by the Third Defendant that, the question of the granting permission having been brought to a head in this hearing, it should be resolved at this stage. The question of the proper case management of derivative claims (if they are allowed to proceed) is one properly dealt with following the filing of defences in the usual way.
76. Insofar as the Defendants allege that the Claimant has an alternative remedy, namely his own personal claim against the First Defendant pursuant to the alleged Joint Venture Agreement, the Claimant contends that this is not an adequate remedy. The primary purpose of the derivative claim is to recover the Fourth Defendant's assets, namely the Properties that have been transferred to the Second Defendant. It is far from clear that a claim by the Claimant himself against the Defendants would achieve the same end, having regard in particular to the principle in *Foss v Harbottle* and the rule against reflective loss.

A. Claims brought in reliance on the alleged breaches of duty owed by the First Defendant to the Claimant

77. The Claimant contends that the facts as set out support the existence of a duty on the part of the First Defendant to fund the development projects through to completion. Such a duty is at least arguable for the purpose of the permission application.
78. As to the existence of fiduciary duties, the Claimant acknowledges that this is a developing area of law, but, on the basis of the facts set out above and having regard to the judgment of Nugee J as he then was in Glenn v Watson [2018] EWHC 2016, there is an arguable case that the relationship between the Claimant and the First Defendant was one from which fiduciary duties might be found to be owed, given the dependence of the Claimant on the First Defendant continuing to invest in the projects if he was to be properly remunerated for his services. The Claimant draws parallels with the Pallant v Morgan equity that arises where parties enter into an endeavour where they agree to buy properties for development. This is factually a different situation, but one where it is arguable that equity will intervene to prevent one party taking advantage of the other.
79. As to the alleged duty of good faith, such a duty the Claimant contends, can readily be inferred from the relationship between himself and the First Defendant as joint venturers.
80. The Claimant goes on to contend that the Joint Venture Agreement was intended to confer a benefit on the Fourth Defendant, namely the continued funding of its properties. Accordingly, the duties owed by the First Defendant pursuant to that agreement are enforceable by the Fourth Defendant under the 1999 Act. The First Defendant's conduct amounts to a breach of those duties, hence the action should be permitted to proceed.

B. Claims brought in reliance on the alleged breaches of duty owed by the First Defendant to the Fourth Defendant

81. As regards these alleged breaches of duty, the Claimant relies upon the same facts as he relies on the claim arising from the First Defendants alleged breaches of duty. Although the duties are framed slightly differently and involve allegations of diverting business opportunities from the Fourth Defendant to the Second Defendant, in reality this is another part of the same course of conduct by which the Claimant contends that the First Defendant has turned the business of the joint venture to his own advantage.

C. Claims brought in reliance on the alleged breaches of duty owed by the Third Defendant to the Fourth Defendant

82. The duties relied on by the Claimant in respect of the claim against the Third Defendant are uncontroversial, though as I have noted there is some doubt as to where the burden of

proof lies in an allegation of sale at an undervalue where the sale is made by a receiver to an associate of a chargee.

83. As to the alleged breaches of duty by the Third Defendant, the Claimant makes the following points:
- (a) The Court may readily draw the inference that the First Defendant interfered in the sale of the properties at Tabley Court and Weaverham and the entering into of the development contract in respect of Hob Hey Lane, given that the two properties were sold to his company within just 10 days of the appointment of the Third Defendant, without having been marketed, and the third was the subject of a development contract with his company. In those circumstances, the principle in Tse Kwong Lam applies and the burden lies on the Receiver (Third Defendant) and mortgagee (First Defendant) to show that the best price obtained on sale was the best price reasonably obtainable and/or that the terms of the development contract were the best reasonably obtainable.
 - (b) The Court has no satisfactory evidence to justify the price obtained. He did not obtain any valuation of the properties.
 - (c) The Third Defendant failed to engage with the Claimant prior to selling the two properties and entering into the development agreement in respect of the third.
 - (d) There is no evidence that the Third Defendant reflected upon the First Defendant's potential conflict of interest as being both a director of the Fourth Defendant and the owner of the Second Defendant.
84. Whilst of course the Third Defendant was not a director of the Fourth Defendant, the Claimant contends that the claim against him is sufficiently closely connected to that against the First Defendant as to bring it within the ambit of Section 260, since it "*arises from*" the conduct of the First Defendant in seeking to divert the Company's assets for his own benefit.
85. In so far as the Third Defendant seeks to place reliance upon clause 9 in the charges to exclude liability (which appears to be the position taken in his witness statement), the Claimant says that the clause is arguably not apt to cover the potential liability of the Third Defendant. However this point was not pursued in oral submissions. As the Claimant said, it is arguable that the clause is not wont to cover the situation here. For the purpose of a permission application, the court should treat with considerable caution the argument that the claim might be defeated by an exclusion clause such as this.

The First and Second Defendants' submissions

86. The Defendants rely on the First Defendant's account of his relationship with the Claimant and the circumstances of it breaking down. For the purpose of this application, the Defendants have to concede that there are triable issues as to what occurred, but they lay considerable emphasis on two overriding matters:

- (a) A person exercising their duty under Section 172 of the 2006 Act would be alert to the fact that the litigation was likely to be heavily contested;
- (b) The duties for which the Claimant contends inevitably involve asserting that the First Defendant was obliged to subordinate his own interests to those of the venture more generally. Having regard to the authorities cited above, a court is unlikely to impose duties that have this effect and therefore the prospects of success in the claim are poor.

A. Claims brought in reliance on the alleged breaches of duty owed by the First Defendant to the Claimant

87. The Defendants raise three general points of objection based upon the derivative claim of the Fourth Defendant arising from duties allegedly owed to the Claimant which it is contended may be enforced under the 1999 Act:

- (a) The claims are contractual in nature, yet a derivative claim under the 2006 Act cannot be brought in respect of a contractual claim.
- (b) The alleged breaches of contract are not claimed against the First Defendant in his capacity as director therefore the 2006 Act cannot be relied upon.
- (c) The claims are based upon fiduciary not contractual duties therefore the 1999 Act does not apply.

88. On the first of these issues, the Defendants submit that the claims brought in reliance on the 1999 Act are, by definition, claims in contract. However, they submit that claims for breach of contract are not covered by Section 260(3) of the 2006 Act, since they are not claims "*arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust.*" Accordingly, the Defendants submit that a claim that arises by virtue of the 1999 Act cannot be the subject of a derivative claim under the Companies Act.

89. On the second issue, the Defendants draw attention to the fact that a claim under Section 260 of the 2006 Act can only be brought in respect of acts or omissions "*involving negligence, default, breach of duty or breach of trust by a director of the company*" (my

emphasis). From that starting point, the Defendants, as I follow the rather brief argument set out at paragraph 10 of their skeleton arguments and expanded on a little orally, contend that the court can only allow a derivative claim to proceed if it is brought against the director in his role of director of the company. This conclusion is said to flow from the decision in Customs and Excise Commissioners v Hedon Alpha Ltd cited above.

90. In any event, insofar as those claims rely upon fiduciary duties allegedly owed by the First Defendant to the Claimant, such duties are not “*terms of the contract*” such that the 1999 Act could allow them to be brought by the Fourth Defendant. In this regard, the Defendants rely upon a passage from the judgment of Lord Browne-Wilkinson in White v Jones [1995] 2 AC 207 at 271E, where he explains:

“The paradigms of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B ... By so assuming to act in B’s affairs, A comes under fiduciary duties to B ... The special relationship (i.e. a fiduciary relationship) giving rise to the assumption of responsibility ... does not depend on any mutual dealing between A and B, let alone on any relationship akin to contract. Although such factors may be present, equity imposes the obligation because A has assumed to act in B’s affairs. Thus, a trustee is under a duty of care to his beneficiary whether or not he has had any dealings with him...”

91. The Defendants contend that, properly analysed, the duties relied upon by the Claimant in his claim against the First Defendant are fiduciary rather than contractual in nature. Accordingly, the 1999 Act has no application.
92. Turning to the duties themselves, as I have indicated, the Defendants divide the alleged breaches of duty into the following groups:
- (a) an irrevocable obligation to fund the developments to completion;
 - (b) fiduciary duties;
 - (c) a duty of good faith;
93. The Defendants argue in respect of the first and third of these that the Claimant has no prospect of making out a breach of duty when the evidence is properly analysed. As to the second, the Defendants say they are simply not sustainable as a matter of law.
94. On the issue of the irrevocable contractual obligation to fund, the Defendants, draw attention to the following:

(a) The Particulars of Claim do not plead that the term of the funding was irrevocable;

(b) Clause 6.2 of the charges entered into in respect of the Properties states:

“at any time after this security has become enforceable or if at any time the property appears to the lender to be in danger of being taken in execution by any creditor of the mortgagor or to be otherwise in jeopardy, the lender may and without notice to the mortgagor:

6.2.1 appoint any person to be a receiver of the property or any part of it, and

6.2.2 remove any such receiver, whether or not appointing another in his place,

and may at the time of appointment or at any time subsequently fix the remuneration of any receiver so appointed.”

This, the Defendants say, is inconsistent with the First Defendant being under an irrevocable obligation to fund the development.

(c) The file note from Dootson’s referred to at paragraph 9 above asserts that neither director was obliged to provide either capital or services. This is inconsistent with the alleged obligation on the First Defendant to fund the development of the Properties through to completion.

95. As to the argument that the First Defendant owed fiduciary duties to the Claimant, the Defendants draw attention to cases such as McKillen v Misland (Cyprus) Investments Limited and Al Nehayan v Kent cited above. There is nothing in the circumstances of this case to bring it within that unusual category where the court might find co-shareholders owe fiduciary duties to each other.

96. On the third category of claim, the duty of good faith, the Defendants concede the possibility that the First Defendant will be held to have owed such a duty to the Claimant. However, they contend that the ambit of such a duty is inevitably constrained by the circumstances. There were obviously potential conflicts of interest between the Claimant on the one hand and the First Defendant on the other. It would be exceptional to in effect imply into the joint venture agreement an obligation that the First Defendant had to subordinate his interests to those of the Claimant. As Sir William Blackburne put it in Myers v Kestrel Acquisitions [2015] EWHC 916 (Ch) at paragraph 63:

“where a commercial party... has a discretion which impinges directly on its own commercial and economic interests, exceptional circumstances are needed to imply

a term requiring that party to subject those interests to those with whom it is dealing, not least when the incident in which the term is to be implied is one where, as here, the terms are to be found in a detailed and professionally prepared commercial document.”

97. Given the breakdown in the relationship of the Claimant and the First Defendant there is no prospect of a court concluding that the First Defendant’s conduct in ceasing to fund the venture and/or seeking repayment of his loan would, in the words of Leggatt LJ in Al Nehayan v Kent, “*be regarded as commercially unacceptable by reasonable and honest people.*” Such a finding would amount to imposing an obligation on the First Defendant to subordinate his own interests to those of the Claimant.

B. Claims brought in reliance on the alleged breaches of duty owed by the First Defendant to the Fourth Defendant

98. As with the alleged breaches of duty owed by the First Defendant to the Claimant, the First Defendant contends that the case based upon the alleged breach of duties owed by him to the Fourth Defendant is unsustainable. Whilst the statutory duties pleaded in paragraph 47 of the Particulars of Claim are not in dispute (at least for the purpose of this application) and the Defendants do not take issue with the general proposition that the First Defendant owed to the Fourth Defendant a duty of loyalty, in order to succeed, the Claimant would have to prove that:

- (a) The First Defendant was not entitled to demand repayment of loans, or at least acted in bad faith in doing so; and
- (b) The First Defendant was not entitled to appoint a receiver, or at least acted in bad faith in doing so; and
- (c) The receiver was not entitled to transfer the properties to the Second Defendant, or at least acted in bad faith in doing so.

99. However, as with the breach of duties alleged against the First Defendant, the Defendants contend that the relationship between the Claimant and the First Defendant (and of each of them with the Fourth Defendant), was such that it is not possible to either infer a duty of continuing funding or to categorise a failure to continue to fund as a breach of any statutory or other duty owed by the First Defendant to the Claimant. In this regard, the Defendants rely upon the same arguments as those set out above in respect of the duties allegedly owed to the Claimant. If one assumes that there was no irrevocable obligation to continue to fund the development, once the First Defendant had made the decision to

cease funding, he was entitled to conclude that the properties were in jeopardy, that he could call in his loan and that he could exercise the power to appoint a receiver.

100. But even if the Claimant proved the existence of such an irrevocable obligation and the requisite bad faith in the decision making, the Claimant would have to go on to prove that the transfer of the properties to the Second Defendant had caused loss to the Company. The Defendants say that such an argument is doomed to failure. In a skeleton argument dated 27 September 2020, prepared for the purpose of the hearing on 29 September 2020, counsel for the First Defendant analysed the potential valuation of the properties, comparing the sums actually received upon sale of Tabley Court and Weaverham with the Claimant's evidence as to the true value of those properties. Through that skeleton argument, he demonstrated that, even if those properties were sold at an undervalue, the true valuation relied upon by the Claimant would have left the position in which the Fourth Defendant's indebtedness to the First Defendant exceeded the value of the properties. The skeleton argument was prepared in support of the argument that the First Defendant was a creditor, or at least a contingent creditor, of the Fourth Defendant regardless of which valuations were relied upon. That was an argument that I accepted in considering the Administration application.

101. The Defendants now rely upon the same argument to show that, even if the transfer of the properties was at an undervalue and/or otherwise in bad faith, the Fourth Defendant is unable to show that it has suffered any loss as a result, at least absent any finding that the First Defendant was under an irrevocable duty to continue funding of the projects.

C. Claims brought in reliance on the alleged breaches of duty owed by the Third Defendant to the Fourth Defendant

102. In large part, the First and Second Defendants defer to the Third Defendant on the issue of the duties owed by him to the Fourth Defendant. However, the Second Defendant in particular has an interest in this aspect of the claim, since it is the transfer of two of the properties to it and the entering into of a development agreement with this in respect of the third property that underlies the claim against the Second Defendant.

103. Like the Third Defendant, the Second Defendant argues that there is no general prohibition on a receiver transferring properties to a company in which the mortgage or has an interest, subject to obtaining the best price reasonably obtainable. In any event, any loss to the Fourth Defendant as a result of such a transfer is limited to the extent to which the transfer was an undervalue which in any event is less than the Fourth Defendant's liability to the First Defendant and accordingly the proposed claim is of no value to the Fourth Defendant.

The Third Defendant's submissions

104. The Third Defendant's starting position in the material set out within his witness statement and summarised above is, in essence, that on his appointment, he was faced with a position where the Fourth Defendant was not able to continue to fund the development work that was taking place but that to suspend such work put the value of the Properties at risk. In those circumstances, it was appropriate for the Third Defendant to act quickly. In the Second Defendant, he had a willing buyer for Tabley Court and Weaverham whose offer did not appear unreasonable. By selling those two properties and entering into a development agreement with the Second Defendant in respect of Hob Hey Lane, he realised the two properties speedily and without further loss and secured the future of the third.
105. The Third Defendant understandably places particular emphasis on his independence from the First and Second Defendants and the broad margin of discretion and professional judgment allowed to receivers. On the evidence before the court, there is no prospect of a finding that the Third Defendant was clearly on the wrong side of that line.

Discussion

106. I shall consider first the Defendants' arguments that the various causes of action relied upon are, for a variety of reasons, unarguable. After that, I shall consider whether the derivative claim is one that a director acting in accordance with section 172 of the 2006 Act would not seek to continue, in which case the court has no jurisdiction as to whether to grant permission. If the Claimant clears this hurdle, it will be necessary to proceed to consider whether permission would in fact be granted having regard to all the circumstances of the case and, most particularly, the matters set out in section 263(3) of the 2006 Act.

A. Claims brought in reliance on the alleged breaches of duty owed by the First Defendant to the Claimant

107. The Defendant's argument that it is not open for a derivative action to be brought on the basis of duties owed by the First Defendant to the Claimant involves three propositions: first, that a derivative claim cannot be brought in respect of an alleged breach of contract, because section 260(3) of the 2006 Act does not allow this; second, that the claim here is based on the acts of the First Defendant as joint venturer rather than director and therefore cannot be the subject of a derivative claim; and, third, that the claims made by the Claimant are in any event not alleged breaches of contract but breaches of fiduciary duties and therefore any breach of such duties are not actionable by the suit of a third party under the 1999 Act.

108. Dealing with the first proposition, contrary to the Defendants' submission, a breach of contract is a breach of duty, the duty being one that arises under the contract. It is notable that Section 11 (1) of the Limitation Act 1980 speaks of the "*special time limit for actions in respect of personal injuries*" as applying "*to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under statute or independently of any contract or any such provision)...*" Whilst it might be thought that the express reference to a breach of duty including a duty existing by virtue of a contract is suggestive that, absent those words, the phrase would not be apt to include such a claim, it is in fact clear that these words are merely indicative of the breadth of the phrase "*breach of duty*". In Giles v Rhind [2008] EWCA 118, Arden LJ, as she then was, considered the phrase "*breach of duty*" in section 32 of the Limitation Act 1980 (which contains no such qualifying words) and said, at paragraph 40: "*as the judge said, the expression "breach of duty" most obviously connotes a breach of duty owed by the defendants to the claimant in the sense of a contractual, fiduciary or tortious duty.*" (She went on to hold that the expression has a wider meaning, including a claim under section 423 of the Insolvency Act 1986, that is to say a claim arising from a transaction defrauding creditors.) In those circumstances, I have no hesitation in finding that the phrase "*breach of duty*" in the 2006 Act includes a breach of duty pursuant to a contract.
109. On the second issue, the argument was relatively undeveloped. For the purpose of this application, I am not persuaded that the point is well made. In Wallersteiner v Moir (No. 2) [1975] QB 373 at p. 390A, cited in Iesini, Lord Denning MR explained the justification for the right to bring a derivative action as follows:

"it is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which loan it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in Foss v Harbottle (1843) 2 Hare 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself as the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs – by directors who hold a majority of the shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the company against themselves. The general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the

company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue.”

110. In Iesini, Lewison J, having cited this passage from Lord Denning’s judgment, went on:

“74. Lord Denning was clearly contemplating a case in which the companies cause of action was a cause of action against the “insiders” themselves who would be liable for damages. Indeed that seems to be the usual situation in which derivative actions were allowed to continue. That is why this exception to the rule in Foss v Harbottle (above) was often called a “fraud on the minority”.

75. A derivative claim, as these are defined by section 260(3) is not, however, confined to a claim against the insiders. As the concluding part of that subsection says, the cause of action may be against the director or another person (or both) nevertheless the cause of action must arise from (emphasis in the original) an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director (again, emphasis in the original) of the company. A derivative Claim may “only” be brought under Part 11 Ch 1 in respect of 1 cause of action having this characteristic...”

111. There is nothing within the passages from either of these cases to limit the derivative claim to circumstances where the duty which the director is alleged to have breached arises other than from his role as director. Whilst derivative claims against directors will often involve allegations of breach of duties said to arise from that role, it is perfectly possible to conceive of circumstances in which a company has a potential claim against a director arising from acts or omissions which are not incidental to the person’s role as director. Indeed, if the Claimant’s case here is made out both in fact and in law, it is strongly arguable that the duties in respect of which the derivative claim is pursued do not arise from the First Defendant’s role as director, but rather from his role as co-venturer with the Claimant. If the claim is otherwise maintainable by the company, is the Claimant to be prevented from pursuing a derivative claim against the First Defendant? To allow this would run counter to the justification for derivative actions enunciated by Lord Denning in Wallersteiner v Moir (No. 2). I am not satisfied that the right to bring a derivative claim is limited in the manner contended for by the Defendants.

112. As to the third issue, it is true that fiduciary duties often arise independently of contract. That however is not to say that similar duties cannot exist as an obligation in a contract. It is arguable that some or all of the duties alleged in paragraph 12 of the Particulars of Claim, if in fact contractual in nature, are not correctly described as “fiduciary duties”. It is notable that, within their skeleton argument, the First and Second Defendants

distinguish between an obligation to fund to completion (see paragraphs 16 to 19) and other duties of a fiduciary nature (paragraphs 20 to 23).

113. In any event, I do not see that this argument is fatal to the current application. It would be a matter for the court in due course (if the Claimant is permitted to proceed) to consider the nature of any duties owed by the First Defendant and the extent to which the Fourth Defendant might be a beneficiary of those duties pursuant to the 1999 Act, but I do not see that this argument could defeat the claim at the permission stage, notwithstanding the duty to give consideration to the merits of the claim.
114. I turn then to the alleged duties relied upon by the Claimant, namely:
- (a) an obligation to fund the developments to completion;
 - (b) fiduciary duties;
 - (c) a duty of good faith;
115. On the first of these issues, the Defendants characterise the duty contended for as an “irrevocable” duty to fund the developments to completion. However, as they themselves rightly point out, this is not precisely how it is pleaded in the Particulars of Claim. Rather the duty is said, at paragraph 8.2, to be one to “*provide the company with the capital to finance the acquisition of the properties identified by them for development and the development costs up to and in concluding completion of the agreed development.*” The Claimant then pleads:
- (a) At paragraph 12(f), a fiduciary duty on the part of the First Defendant “to fulfil his obligation under the Joint Venture Agreement to provide the Company with adequate capital to develop out the properties he chose to acquire.”
 - (b) At paragraph 13(a), a duty to act in good faith towards the Claimant and/or the company in his dealings relating to the Joint Venture Agreement;
 - (c) At paragraph 13(b), a duty not to exercise any of his powers as fundholder, charge holder or otherwise “*contrary to the spirit and/or objectives of the Joint Venture Agreement and/or in such a manner as to favour himself to the disadvantage*” of the Fourth Defendant and/or Claimant.
116. It is a striking feature of the Joint Venture Agreement that, on either party’s case, the Claimant’s profit from the developments was entirely (based on the First Defendant’s case that he had no entitlement to remuneration other than a payment on account of profits) or substantially (on the Claimant’s case that he had a right to remuneration of £50,000 per annum) dependent upon the development of the Property being seen through

to completion. In that sense, the Claimant was very dependent upon the First Defendant's willingness to provide funding. In light of this, it is not fanciful to argue that the First Defendant's right to bring the relationship to an end was qualified at the very least by a duty to act in good faith, if not by a limitation on his right to withdraw further funding. I have considerable doubt that a court would conclude that the relationship was such that the First Defendant was obliged to put the Claimant's interests ahead of his and it follows that I doubt that he will be held to have owed fiduciary duties. But some lesser level of duty, in particular a duty to act in good faith, is, as I say, not far-fetched.

117. Further, given that the Claimant's benefit from this project (in whole or in large part) depended upon the success of the Fourth Defendant, it is in my judgment possible to see how the court would conclude that the Joint Venture Agreement purported to confer a benefit on it and that therefore it may in its own right enforce terms of the contract pursuant to the 1999 Act.

B. Claims brought in reliance on the alleged breaches of duty owed by the First Defendant to the Fourth Defendant

118. Again, the first consideration in respect of these claims is whether the Claimant shows an arguable case that the First Defendant breached the duties allegedly owed to the Fourth Defendant.
119. As to whether the Fourth Defendant is unable to show that it has suffered any loss as a result of the sale of Tabley Court and/or Weaverham, the Defendants argue, correctly in my view, that the evidence available to the court indicates that, on the Claimant's best case, if the transfer of the properties were set aside and they were returned to the ownership of the Fourth Defendant and/or if the Fourth Defendant recovered damages to reflect any loss caused by sale at an undervalue, it would remain the case that its indebtedness to the First Defendant exceeded its assets. That is a significant factor to bear in mind in considering the exercise of the power to grant permission.
120. However, if that remedy were coupled with a claim for damages for the failure of the First Defendant to fund the development through to completion, it is not inevitable that the indebtedness would exceed the assets. It is inherent to profiting from property development that the developer achieves a sale for more than the current cost of the property together with the development costs. If the two properties were to be returned to the Fourth Defendant then, with appropriate funding, whether by way of the damages claim against the First Defendant or otherwise, it is possible that the Fourth Defendant would achieve a position where the value of the Properties exceeded the indebtedness to

the First Defendant, though the figures set out by the Defendants indicate that such an argument would not be easy to maintain.

121. The way the First and Second Defendants put the argument is that, unless the Claimant shows a strong claim that the First Defendant was in breach of duty to the Company to provide funding (or assist in the procurement of alternative funding, which funding would have been obtained and is now no longer available) the court should refuse permission under Section 263 because the Company has suffered no loss. Whilst there is force in this argument, I do not accept that the Claimant has to show a 'strong' claim that the First Defendant was in breach of such a duty – it would be sufficient for the Claimant to show an arguable claim in order to bring the case within the category in which the court can exercise the discretion contained in Section 263, in which case the strength of that case would be one of the factors to be taken into account in the exercise of the discretion.
122. For reasons that I have identified in respect of the claim based upon the alleged breach of duties owed by the First Defendant to the Claimant, it is possible that the First Defendant will be found in breach of the duty of good faith in failing to complete the funding of the developments. If such an argument were to succeed, then, as the First and Second Defendants concede in their skeleton argument, the Claimant may be able to show that the Fourth Defendant's assets exceed the indebtedness to the First Defendant.

C. Claims brought in reliance on the alleged breaches of duty owed by the Third Defendant to the Fourth Defendant

123. I have set out above the arguments advanced by the Claimant in respect of the alleged breach of duty on the part of the Third Defendant. The circumstances of the sale of Tabley Court and Weaverham may give rise to a suspicion as to whether the Third Defendant discharged his duties as receiver. Such a case is not doomed to failure, in particular given the relatively sparse explanation given by the Third Defendant thus far for his actions, although the hypothetical director considering such a case under Section 172 would have firmly in mind the evidence that the Third Defendant has no previous connection with the First Defendant.
124. An assessment of the prospects of the case against the Third Defendant involves considering whether the court would draw an adverse inference against him, absent a full explanation for his decision-making. The judgment of HHJ Paul Matthews in Devon Commercial Property raises an interesting question as to whether the authors of Lightwood and Moss correctly state the burden of proof in the context of a claim against a receiver for alleged sale at an undervalue to an associate of a chargee. Whereas, as a

matter of principle, Judge Matthews' comments about the distinction to be drawn between the role of the receiver and that of the mortgagor at paragraph 28 of the judgment is surely correct, the practical difficulty in this scenario lies in the fact that a close relationship between receiver and mortgagee may allow impropriety to go undiscovered. That risk might be thought to justify the application of a "fair dealing rule", which after all is only rule of evidence, in such circumstances.

125. For the purpose of this application, that argument is academic. I am not engaged in a fact-finding exercise. I am however entitled to look at the quality of evidence adduced thus far in determining whether to grant permission for the derivative action to proceed. Where the receiver in the position of the Third Defendant is able to give a full and persuasive explanation as to the circumstances of the sale, that is likely to weigh heavily against allowing permission to bring a derivative action on the ground claim is unlikely to succeed, whereas if there is little detail forthcoming, the court is likely to be more readily persuaded that the claim is arguable and should go forward to trial.

Would a person acting in accordance with section 172 (duty to promote the success of the company) not seek to continue the claim?

126. Whereas the other statutory considerations set out below go to the discretion as to whether to grant permission, this first matter of course goes to jurisdiction. If a person acting in accordance with section 172 would not seek to continue the claim, the court has no power to grant permission for the claim to proceed.
127. If this were a hopeless claim, then even in circumstances in which the person seeking to bring the derivative claim agrees to fund the action and to indemnify the company, it would be difficult to see that any hypothetical director acting in accordance with her or his duty under Section 172 would consider that the claim ought to be pursued, since the hypothetical director would reason that any potential loss of reputation through pursuing the claim would inevitably outweigh the potential benefit of pursuing the claim, since there would be none.
128. However, having rejected the Defendants' argument that the claim against the First and/or Second Defendants has no prospects of success because it cannot be brought within the ambit of section 260 of the 2006 Act and/or Section 1 of the 1999 Act, and having concluded that the causes of action alleged are not unarguable, the court is left with assessing the prospects of success of the claim which, on one view of the facts, could succeed on at least some of the causes of action pleaded. If successful, the potential benefit to the company would or at least could outweigh any possible reputational damage, given the Claimant's position on costs. In those circumstances, the hypothetical

director might choose to pursue the derivative claim and the court is therefore not bound to refuse the application under Section 263(2) of the 2006 Act.

129. Equally, notwithstanding all of the difficulties in pursuing a claim against a receiver (who for good reasons is given a wide margin of discretion in the discharge of his or her duties), the claim against the Third Defendant is not to my mind so hopeless that a director, exercising their duties under Section 172, would reject out of hand a proposal to proceed with a claim against the receiver that might benefit the company in circumstances in which that litigation was being underwritten by a third party.

Is the Claimant acting in good faith in seeking to continue the claim?

130. The Defendants contend that the Claimant's account of his dealings with the First Defendant is a misrepresentation of the true position. To that extent, they allege that he is not acting in good faith. Further, the Third Defendant contends that this claim arises from the failed discussions between the Claimant and the First Defendant in respect of a buy out following their falling out. The Third Defendant submits that "*it is an obvious inference that any fair-minded observer would draw that these claims are brought not for the benefit of the Company itself but to improve Mr Hughes' position in his negotiation with Mr Burley. This is an obvious inference because (1) any recovery by the Company would merely serve to make it less insolvent than it already is; (2) it would increase the Company's assets only to the benefit of Mr Burley as its main creditor. It is not suggested that Mr Hughes does not make the application honestly (although it is noted that there are keen disputes of fact between him and Mr Burley) but it is suggested that the true purpose of the claims is not in reality to benefit the Company but to improve Mr Hughes' negotiating position in his dispute with Mr Burley*" (paragraph 65 of the Third Defendant's skeleton argument).
131. However, whilst the Defendants allege that the Claimant has remedies available to him (as of course is reflected in his bringing the claim in his own name as well as pursuant to Section 260), it is not suggested that through bringing a derivative claim as well as a personal claim, the Claimant seeks some unfair advantage that demonstrates bad faith on his part.
132. In any event, whilst the Third Defendant is undoubtedly right to say that the derivative claim is brought for the ultimate benefit of its members (specifically the Claimant), the route through which the claimant seeks that benefit is the assertion that the Fourth Defendant should have been given and should now be given the opportunity to complete the development of the properties. This raises the very issue of reflective loss that causes the Claimant to argue that a derivative claim is justified in the first place. It is arguable

that the only basis upon which this claim can succeed is one where the Claimant shows that, but for breaches of duty by the Defendants, the Fourth Defendant would have successfully developed the Properties and would have assets that exceeded its liabilities to the First Defendant. Such a claim could probably only be brought by the Fourth Defendant.

What importance would a person acting in accordance with Section 172 attach to continuing the claim?

133. A person acting in accordance with Section 172 would have regard in particular to the following matters:
- (a) The claim involves significant factual and legal disputes. In particular
 - i. It is difficult to see how the claim against the First Defendant can succeed without showing some duty on his part in respect of the continued funding of the projects. Such a continuing duty to fund the development, with the concomitant implication that the First Defendant might have to prefer the interests of the Claimant to his own, is likely to be difficult to substantiate.
 - ii. It is likely to prove difficult to show that the Third Defendant's actions were "*plainly on the wrong side of the line.*"
 - (b) Litigation of this kind is likely to be lengthy and expensive.
 - (c) On the face of it, the litigation will be conducted at no financial risk to the Company because it is to be funded by the Claimant. However, as the Third Defendant rightly points out, there is no evidence before the court as to the Claimant's ability to fund the claim. A hypothetical director observing this would be concerned that an unsuccessful claim against the Defendants would further reduce the available assets to pay the Company's creditors (specifically the First Defendant). The director would expect to see evidence to support the Claimant's ability to fund what is likely to be expensive litigation, yet none is forthcoming.
 - (d) The litigation will impose no burden on the operation of the Company or its employees because the company is largely dormant (having disposed of two of the Properties and entered into a development agreement with the Second Defendant in respect of the third), and no resources of the company would be consumed in the litigation.
 - (e) If the litigation were to be unsuccessful, this might in theory adversely affect the company's reputation. However, in reality, if the litigation is unsuccessful, it

appears inevitable that the company will be wound up without further trading, in which case no reputational damage would be caused.

- (f) If the litigation were to be successful, it might take the Company from a position of being insolvent to one of being solvent. However, even if the claim were in part successful, as the Defendants have shown, the victory may be Pyrrhic since it may not alter the fact that the Company's assets are less than its indebtedness to the First Defendant.
- (g) The litigation arises in circumstances where there is a bitter dispute between the two equal shareholders in the company. It is arguably unfair to either of them, but the company is prevented from taking action against the other by reason of the fact that there is no mechanism to deal with the stalemate that arises when they disagree.
- (h) On the other hand, litigation conducted in a derivative claim by one of those warring shareholders against the other is unlikely to be scrutinised in the same way that such litigation would be were it carried out by an independent scrutiny through the route of liquidation.

Where the cause of action results from an act or omissions that is yet to occur, could the act or omission be, and in the circumstances would it be likely to be, (i) authorised by the company before it occurs or (ii) ratified by the company after it occurs?

134. The cause of action arises from acts that have already occurred. Accordingly this consideration is not relevant.

Where the cause of action arises from an act or omission that has already occurred, could the act or omission be, and in the circumstances would it be likely to be, ratified by the company?

135. As indicated, the cause of action arises from the breakdown in relations between the Claimant and the First Defendant who are equal shareholders. Given that there is no mechanism to break the stalemate that results from them having opposing views as to how the Fourth Defendant should act, there is no prospect of the company ratifying the alleged acts or omissions.

Has the company decided not to pursue the claim?

136. The company has made no decision on whether to pursue the claim. Again, this is a consequence of the dispute between the Claimant and the First Defendant.

Does the act or omission in respect of which the claim is brought give rise to a cause of action that the Claimant could pursue in his own right rather than on behalf of the company?

137. The Claimant has himself brought a claim arising out of the same facts as those in respect of which the derivative claim is brought. Whilst that claim too is denied, the establishment of a cause of action on the Claimant's part is probably more straightforward than the derivative claim, in that it does not involve the court having to deal with the intricacies of the 1999 Act (as to whether a third party can bring a claim on the Joint Venture Agreement) or the 2006 Act (as to what types of claim can be brought by way of derivative action). However, the Claimant has maintained throughout this litigation that, having regard to the rule in Foss v Harbottle and the principle against reflective loss, it is by no means clear that the Claimant's loss (if any) as a result of any breach of duty on the part of the Defendants would equal the losses that the Fourth Defendant could claim.

Is there any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter?

138. Since the Claimant and the First Defendant are the sole shareholders in the company, there is no disinterested member of the Company whose views could be canvassed.

Conclusion

139. This claim is speculative in nature, dependent upon the favourable resolution of factual issues, as well as the court being invited to make findings that lie at the outer edges of the current thinking on the nature of the duties of joint venturers. Causes of action alleged are not unarguable for the reasons identified above, but it is likely that this litigation would be drawn out and expensive. In the context of a company which is insolvent and unable to meet its full liability to its major creditor, the First Defendant, a person having regard to their duty under section 172 of the 2006 Act would undoubtedly pause long and hard before deciding to proceed with the litigation.
140. Furthermore, were the Company to be in a position which was likely to continue to trade regardless of the outcome of the litigation, the hypothetical director would have significant concerns about the reputational damage that defeat in litigation might bring. In the event however, I am satisfied that, unless this litigation were successful, the Company is unlikely to resume trading and therefore any reputational damage is no more than theoretical.
141. Were I to be persuaded that the Claimant has the means to fund the litigation to conclusion, including the means to meet any adverse costs order that may be made, as well as showing that he has an irrevocable liability to meet any costs order that might be

made against the Fourth Defendant, that would be a significant factor in favour of granting permission. In those circumstances, the hypothetical director might consider that, in the absence of any factors weighing against pursuing the litigation, it was appropriate to let the claim proceed by way of third party funding and indemnity, since the company had nothing to lose.

142. The Claimant has however adduced no evidence as to his means to fund the litigation. Further, he has not proffered any undertaking in respect of indemnifying the Fourth Defendant against any costs liability that might arise. On the second issue, the hypothetical director having regard to their duties under section 172 might have taken the view that it was appropriate to permit the litigation to continue on condition that such an undertaking was forthcoming (a requirement that I could impose as a condition of granting permission under section 261 of the 2006 Act). But the absence of evidence on the first issue would leave the hypothetical director in a position which they could have no confidence as to the value of any such undertaking.
143. In those circumstances, I am not persuaded that it is proper to give permission for this derivative claim to proceed. It would leave the Fourth Defendant at risk of further harm to its interests.
144. In the light of my previous findings, it appears that it is now appropriate to make an Administration Order in respect of the Fourth Defendant. However, I invite the parties to discuss the appropriate order consequent upon this judgment and will if necessary hear the parties further on the issue of consequential orders.