[2020] EWHC 2973 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. BL-2019-000427**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
B E T W E E N :

Date: 11 November 2020

Before :

James Pickering QC
(sitting as a Deputy High Court Judge)

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Between :

BALWANT SINGH GILL **Claimant**

and

(1) JASHPAL SINGH THIND
(2) BALJIT GILL THIND
(3) JASHPAL SINGH THIND, BALJIT GILL THIND,
JEEVAN SINGH THIND & AVNEESH SINGH THIND
(Sued as trustees of the Thind SSAS Pension Fund)
(4) JEEVES ESTATES LIMITED
(5) SIMICARE LIMITED
(6) WATTS HEALTHCARE LIMITED
(7) JEEVES INVESTMENTS LIMITED **Defendants**

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Geraint Jones QC (instructed by **Rainer Hughes Solicitors)** for the **Claimant**
John Randall QC and Robert Mundy (instructed by **George Green LLP**) for the **Defendants**

Hearing date: 21 April 2020

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00am on 11 November 2020.

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James Pickering QC (sitting as a Deputy High Court Judge):

PART I: INTRODUCTION

1. In February 2019 the claimant, Balwant Singh Gill ("**Mr Gill**") issued a claim against a number of parties including his daughter, Baljit Gill Thind ("**Mrs Thind**") and son-in-law, Jashpal Singh Thind ("**Mr Thind**").

2. That claim included a number of derivative and double derivative claims. To the extent that the claims are derivative claims, under section 261(1) of the Companies Act 2006 permission is required to continue those claims. To the extent that the claims are double derivative claims, the above statutory provision is not engaged but not dissimilar principles apply at common law. In any event, the application now before me is Mr Gill's application for permission to continue the above derivative and double derivative claims.

3. There are 7 such derivative or double derivative claims. If I grant permission to all or any of those claims, those permitted claims will be allowed to proceed in the usual way. If I refuse permission in relation to any of them, those refused claims will not be allowed to proceed and will end here and now. In relation to all 7 such claims, Mr and Mrs Thind invite me to refuse permission and do so for a variety of reasons.

PART II: BACKGROUND

Mr Gill and his family

4. Mr Gill was born on 9 April 1939. At the time of this judgment, therefore, he is 81 years old. He (together with his wife, Baljinder Kaur) have 4 adult children. One of those, as set out above, is Mrs Thind who (together with Mr Thind) has 3 children. Mr Gill's other children have between them a further 4 children and accordingly in total Mr Gill has a total of 7 grandchildren.

Jeeves Investment

5. For many years, Mr and Mrs Thind ran a successful pharmacy business. On 12 January 2004 (and while still running the pharmacy business), they arranged for the incorporation of Jeeves Investments Limited ("**Jeeves Investments**"). According to them, the purpose was to buy properties as investments for their children. Mr Thind became its sole director.

6. A few months later, in July 2004, Jeeves Investments made its first investment, buying a flat in Whitechapel in London. The purchase price was some £220,000, some of which came from the Thinds and another company owned by them[1], with the balance being raised by way of a mortgage secured over the flat. According to Mr and Mrs Thind, it was shortly after this that they received tax advice that the shareholding in the company ought to be in the name of one or more of their children's grandparents. They therefore approached Mr and Mrs Gill who, according to the Thinds, agreed to hold the shareholding in Jeeves Investments for their (the Thinds') children.

7. In any event, in December 2004 the annual return for that company was filed stating that the issued share in that company was registered in the name of "*Mr and Mr B S Gill (Trustees)*" – in other words, in the name of Mr Gill and his wife. According to Mr and Mrs Thind, this reflected the fact that Mr and Mrs Gill had agreed to hold the

[1] Aveycare Limited ("**Aveycare**")

shareholding on trust for their children. According to Mr Gill, on the other hand, the filing of the above annual return was made without his knowledge and consent and, moreover, did not reflect the true position given that he and his wife did not hold the above shareholding in Jeeves Investments for Mr and Mrs Thind's children but instead held it for themselves absolutely.

The Laurels

8. In late 2005, Mr and Mrs Thind came across an opportunity arose to buy a nursing home in Hastings called the Laurels. The plan was that the freehold property itself would be bought by Jeeves Estates Limited ("**Jeeves Estates**"), a company which had been incorporated by the Thinds a few years earlier but which had been dormant ever since. The business of the nursing home, however, was to be run by a newly incorporated company called Laurels Nursing Home (Hastings) Limited ("**Laurels**") which would accordingly have to pay rent to Jeeves Estates.

9. Importantly, however, Mr Gill wished to become involved in the project. According to the Thinds, Mr Gill wanted to be a silent partner who would hold his interest not for himself but instead for all of his grandchildren (in other words, not just the Thinds' children but also the children of Mrs Thinds' siblings too). In any event, there is no dispute that in June 2006 Jeeves Estates bought the freehold property and that Laurels bought the business for a total sum of about £1.3 million. Nor is there any dispute that of that sum, £133,000 was advanced by Mr Gill[2], £267,000 was advanced by Mr and Mrs Thind, with the balance being raised by way of a mortgage secured over the property and guaranteed by the Thinds.

10. As for Laurels, its share capital was originally allotted 75% to Mr and Mrs Thind and 25% to Mr Gill. In December 2009, however, the above shareholdings were transferred to Jeeves Estates such that Laurels became a wholly owned subsidiary of Jeeves Estates. As for Jeeves Estates, as stated above, that company had in fact been set up by the Thinds a few years earlier with themselves as its only shareholders. In December 2008, however, an annual return was filed stating that its shares were held

[2] There is, however, a dispute as to whether the above advance from Mr Gill was by way of an investment (as Mr Gill says) or a loan (as the Thinds say).

as to 200 by Mr Thind and 100 by Mr Gill. According to the Thinds, Mr Gill was nothing more than a silent partner in the business and held these shares on trust for all of his grandchildren; according to Mr Gill, on the other hand, the business was being run as a quasi-partnership and that he held his shareholding for himself absolutely.

St Margaret's

11. In late 2010, Mr and Mrs Thind came across a further opportunity – this time to buy the freehold and business of a nursing home in Hythe called St Margaret's ("**St Margaret's**"). On 1 June 2011, St Margaret's was bought by Simicare Limited[3] ("**Simicare**"), a company which Mr and Mrs Thind had set up a few years earlier and of which Mr Thind was the sole shareholder and director. The purchase price was some £1.6 million, some of which came from the Thinds and another company owned by them[4], with the balance being raised by way of a mortgage secured over the assets of Laurels, Jeeves Estates and Simicare and guaranteed by Laurels, Jeeves Estates and the Thinds.

12. According to Mr and Mrs Thind, shortly before the above purchase, they had had a further discussion with Mr Gill in which they had said that they wanted to buy St Margaret's for the benefit of their children, and once again asked Mr Gill, for tax reasons, to hold the shareholding in Simicare on behalf of their children to which, according to them, he agreed. In any event, in May 2012 Mr Thind transferred the shareholding in Simicare to Mr Gill. Again, therefore, the Thinds say that the above shareholding is held by Mr Gill on trust for their children; and again this is disputed by Mr Gill who says that he holds the same for himself absolutely.

Sherwood House

13. In mid-2012, a yet further opportunity came to the attention of Mr and Mrs Thind – this time to buy the freehold of a nursing home in Rochester called Sherwood House. In September 2012, they arranged for Sherwood House to be bought by a small self-administered scheme pension (the "**Thind SSAS**") which they had set up. Following

[3] Originally incorporated as Thind Investments Limited.
[4] Once again, Aveycare

purchase, the Thind SSAS then let Sherwood House to Watts Healthcare Limited ("**Watts**") which had been incorporated by the Thinds in October 2012 with Mr Thind as the sole shareholder and director.

14. There appears to be no dispute that once again Mr Gill was involved in the project and indeed advanced the sum of £280,000 although there is a dispute as to whether the same was advanced as a loan (as the Thinds say) or as an investment (as Mr Gill says). In any event, in about January 2014, Mr Thind arranged for his shareholding in Watts to be transferred to Jeeves Estates. As explained above, while there is no dispute that Mr Gill holds shares in Jeeves Estates, there is a dispute as to whether he holds them for all of his grandchildren (as the Thinds say) or for himself absolutely (as Mr Gill says).

The 2015 declarations of trust

15. According to Mr and Mrs Thind, following advice from their bank, in about August or September 2015 they asked Mr Gill to sign two declarations of trust – one in relation to his shares in Jeeves Investment, and one in relation to his shares in Simicare.

16. As for Jeeves Investment, as explained above, back in December 2004 an annual return had been filed stating that the issued share in that company was registered in the name of "*Mr and Mr B S Gill (Trustees)*". By the declaration of trust prepared by the Thinds in 2015, Mr and Mrs Gill purportedly confirmed that they did indeed hold those shares for the Thinds' children[5]. According to the Thinds, Mr and Mrs Gill both signed that document which they (the Thinds) backdated to 7 January 2005 being the approximate date when the Gills had originally agreed to hold the shares on the above basis. The above account is hotly denied by Mr Gill who denies that either he or his wife signed the above document and alleges that their signatures must be forgeries.

17. As for Simicare, as also explained above, back in May 2012 Mr Thind had transferred the shareholding in that company to Mr Gill. By the declaration of trust prepared by the Thinds in 2015, Mr Gill again purportedly confirmed that he held that

[5] In fact, the declaration of trust refers to only two of the Thinds' three children

shareholding for the Thinds' children[6]. Again, according to the Thinds, Mr Gill signed the document which they then dated 1 August 2015. Again, however, this is denied by Mr Gill who again alleges that his purported signature is a forgery.

The breakdown in the relationship between the parties and the 2018 share transfers

18. According to the Mr and Mrs Thind, at about the same time as they asked Mr and Mrs Gill to sign the above declarations of trust (in other words, in about August or September 2015), they also asked them to sign two stock transfer forms – again, one in relation to Jeeves Investments and one in relation to Simicare – but both with the transferee's name left blank (and therefore effectively in escrow). According to the Thinds, they wanted these as further protection, particularly in relation to Mrs Thind's brother (and Mr Gill's son), Kuldeep Gill ("**Kuldeep**") who had been made bankrupt. According to them, Mr and Mrs Gill also signed these documents at that time – something which, once again, Mr Gill denies.

19. Sadly, by 2018 the relationship between the parties had started to break down. In summary, the Thinds say that while declarations of trust had now been signed in respect of both Jeeves Investments and Simicare (in favour of their children), no such declaration of trust had been signed in relation to Jeeves Estates (in favour of all of Mr Gill's grandchildren) and they now wanted to regularise the position there too. Mr Gill, however, took a different position and effectively asserted that his interest in all projects remained his to do with as he pleased. Matters came to a head when Mr Gill questioned a number of transactions and dealings which had been carried out by the Thinds over the years and effectively accused them of fraud.

20. In any event, in about August or September 2018, the Thinds completed the above mentioned stock transfer forms (which they say that the Gills had signed back in 2015) under which the shareholding in Jeeves Investments was transferred to Mr Thind and the shareholding in Simicare was transferred to Mrs Thind. As explained

[6] In fact, according to the Thinds, Mr Gill first signed a declaration of trust in favour of all three of their children and then shortly after signed a revised declaration of trust in favour of just two of them.

above, the Thinds say that they were entitled to do this as the Gills had signed those stock transfer forms back in 2015 – something which, as stated above, Mr Gill denies.

21. It was shortly after this that the parties instructed their respective solicitors following which fractious correspondence started to pass between them. It is no doubt right to observe that the high emotions in this case have not been assisted by the fact that the Thinds believed (and continue to believe) that the driving force behind Mr Gill's position is (and has always been) Kuldeep.

The proceedings

22. Following the above exchange of correspondence, on 22 February 2019 Mr Gill issued the present claim which, as stated above, included a number of derivative and double derivative claims. At the same time, he also issued an application for a freezing order. Noticeably, however, he did not issue an application for permission to continue the derivative and double derivative claims as required by CPR 19.9A(2).

23. In any event, on 5 March 2019, the freezing order application was heard by me on short notice. On that occasion, Mr and Mrs Thind submitted to some of the relief sought – namely, an order not to dispose of or deal with their shares in certain of the companies and/or deal with the underlying properties. The remainder of the application, however, was contested and, after hearing argument, I refused to grant any further relief pending the return date of the application. For reasons I do not need to go into here, I also ordered Mr Gill to pay the costs of that hearing.

24. At about the same time[7], Mr Gill made (albeit belatedly) two applications for permission to continue the various derivative and double derivative claims – one in respect of Jeeves Estates, the other in respect of Simicare and Watts. As the Thinds' legal team have pointed out on various occasions, however, no application was (or ever has been) brought in respect of Laurels.

[7] One application was made on 4 March 2019, the other on 8 March 2019

25. On 10 April 2019, the return date of the freezing order application came before me. The Thinds once again submitted to the limited relief previously ordered but this time Mr Gill abandoned the balance of the freezing order application and agreed to pay Mr and Mrs Thinds' costs.

26. In May 2019, Mr and Mrs Thind filed their Defence to the underlying claim.

27. On 13 June 2019, Master Shuman stayed the proceedings by consent pending the outcome of Mr Gill's two applications for permission to continue. Shortly after, Mr Gill served draft Amended Particulars of Claim and on 22 August 2019 Deputy Master Bartlett, by consent, gave permission in respect of the same. The Deputy Master further directed that, in the event that in due course permission to continue was granted, the Thinds had permission to file and served an Amended Defence in response.

28. On 16 December 2019, the applications for permission to continue came before Birss J to consider on paper in the usual way. Having considered the papers available to him (which appear not to have included certain bundles which had been submitted by the Thinds), Birss J declined to dismiss the applications for permission and instead ordered that those applications should be dealt with at a hearing. It is that hearing, of course, which is the matter before me now.

PART III: THE LAW

29. Where a company has a claim – for example, against one of its directors for breach of duty – the starting point is that it is only the company itself which is entitled to bring that claim. In general, a shareholder cannot bring such a claim. The shareholder may be a part-owner of the company, but it is the company alone which owns, and has the right to pursue, the claim.

30. A derivative claim is an exception to the above general rule. As stated by the Court of Appeal in ***Prudential Assurance Co Ltd v Newman Industries Limited (No.2)*** [1982] 1 Ch 204 at 210D-E:

> "A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the 'Rule in ***Foss v Harbottle***' (1843) 2 Hare 461 when applied to corporations but it has a wider scope and is fundamental to any rational system of jurisprudence."

31. Procedurally, the position is governed by CPR 19.9 and 19.9A. Under CPR 19.9(1) the rule applies to:

> "…a derivative claim (where a company…is alleged to be entitled to claim a remedy, and a claim is made by a member of it for it to be given that remedy), whether under Chapter 1 of Part 11 of the Companies Act or otherwise".

32. CPR 19.9(4) goes on to stay that after the issue of such a claim form:

> "…the claimant must not take any further step in the proceedings[8] without the permission of the court…"

33. In short, therefore, all derivative claims require the grant of permission to continue. Where the derivative claim is an "ordinary" derivative claim – in other words, a claim for breach of duty[9] against a director of the company which is brought by a member of that company[10], the grant of permission is governed by Chapter 1 of Part 11 of the CA 2006. Where the derivative claim is not such an ordinary derivative claim – such as a double derivative claim where the claim is brought not by a member of the company but by a member of the company's parent company - common law principles apply instead.

34. Given that the present claim involves a collection of both derivative and double derivative claims, each will be considered in turn.

[8] Save for certain excepted matters set out in that sub-paragraph
[9] Or negligence, default or breach of trust
[10] CA 2006, section 260(1), (3)

Ordinary derivative claims

35. Chapter 1 of Part 11 of the CA 2006 sets out a two-stage process. The first stage is effectively a filter where the court will consider the matter on paper and form a view as to whether the evidence discloses a prima facie case: CA 2006, section 261(2). If it does not, the court will dismiss the application for permission there and then: CA 2006, section 261(2)(a). If the court considers that it does disclose a prima facie case, it will give directions for a further hearing: CA 2006, section 261(3), (4). In the present case, as stated above, Birss J considered the matter on the papers and directed that it should be dealt with at the present hearing.

36. The second stage is the hearing itself. At that hearing, permission "must" be refused if the court is satisfied that "a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim": CA 2006, section 236(2)(a). In determining whether the above criterion is met:

(1) The court must be satisfied that the claimant has "more than a prima facie case": ***Iesini v Westrip Holdings*** [2009] EWHC 2526 per Lewison J at [79]. As was said by David Richards J in ***Abouraya v Sigmund*** [2014] EWHC 277 at [53], this is a higher test than a seriously arguable case and means a case which, if unanswered, would entitle the claimant to judgment. On the other hand, as Newey J said in ***Kleanthous v Paphitis*** [2011] EWHC 2287 at [42]:

> "…it seems to me that the court can potentially grant permission for a derivative claim to be continued without being satisfied that there is a strong case".

(2) The court must not embark on a mini-trial: ***Fanmailuk.com Ltd v Cooper*** [2008] EWHC 2198; ***Iesini*** [at 79]; ***Abouraya*** [at 53].

37. The overall position was neatly summed up by Chief Insolvency and Companies Court Judge Briggs (sitting as a Deputy High Court Judge) in ***Saatchi v Gajjar (Triptych Logistics Limited)*** [2019] EWHC 3472 at [29] as follows:

"…although there is no threshold test, and the court should not conduct a mini trial, a claimant will need to satisfy the court that there is something more than a prima facie case, but not necessarily a strong case. In order to reach a conclusion as to whether permission should be given, the merits of the claim will be relevant. In this respect the nature of the inquiry is fact sensitive."

38. Assuming the above threshold is met, the court then has a discretion as to whether or not to grant permission. In exercising that discretion, however, the court must take into account the various matters set out in section 263(3) including:

"(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;…

(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."

39. Once again, therefore, consideration needs to be given to what a person "acting in accordance with section 172" might do. As to this, useful guidance (for the purposes of both section 263(2)(a) and section 263(3)(b)) was given by Lewison J in ***Iesini*** as follows:

"85. As many judges have pointed out (e.g. Warren J in ***Airey v Cordell*** [2007] BCC 785 , 800 and Mr William Trower QC in ***Franbar Holdings Ltd v Patel*** [2009] 1 BCLC 1, 11) there are many cases in which some directors, acting in accordance with section 172 , would think it worthwhile to continue a claim at least for the time being, while others, also acting in accordance with section 172 , would reach the opposite conclusion. There are, of course, a number of factors that a director, acting in accordance with s.172, would consider in reaching his decision. They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the

company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on. The weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case.

86. In my judgment therefore… section 263(2)(a) will apply only where the court is satisfied that *no* director acting in accordance with section 172 would seek to continue the claim. If some directors would, and others would not, seek to continue the claim the case is one for the application of section 263(3)(b) . Many of the same considerations would apply to that paragraph too."

40. Of the other factors which the court, in these circumstances, is required to take into account, of particular significance is that set out in sub-paragraph (f), namely, "*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*" – effectively, therefore, the availability or otherwise of an alternative remedy.

41. As to this, in ***Mumbray v Lapper*** [2005] EWHC 1152, HHJ Reid QC said:

> "In my judgment, the true position is that, while the availability of an alternative remedy is a factor, and may well be an extremely important factor, it is not an absolute bar and the fact that it is possible to point to some other alternative method of achieving the desired result does not mean that it is inevitably inappropriate for permission for a representative action to be continued…"

42. Importantly, however, in the context of an application for permission to continue a derivative claim by a member who also has available to him or her the alternative remedy of presenting an unfair prejudice petition, as Lewison J pointed out in ***Iesini*** at paragraph 124:

> "From the point of view of the company itself a petition under section 994 is far preferable, principally because it will only be a nominal party and will not incur legal costs; whereas in the ordinary way if a derivative action is brought for its benefit it

will be liable to indemnify the claimant against its costs, even if the claim is unsuccessful…"

Double derivative claims

43. As explained above, the above provisions of the CA 2006 do not apply to double derivative claims; instead common law principles apply. As David Richards J said in ***Abouraya*** at [12]-[14]:

> "12. It is common ground that the claims made in these proceedings are not "derivative claims" for the purposes of the statutory framework for derivative claims contained in Part 11 of the Companies Act 2006 …
>
> 13. It is also common ground that the English court nonetheless has jurisdiction to entertain a derivative claim in the circumstances of the present case. As the cause of action is vested not in the company of which the claimant is a member but in a subsidiary of that company, any claim to obtain relief for the benefit of the subsidiary is what is generally called a double (or multiple) derivative claim. In ***Universal Project Management Services Ltd v Fort Gilkicker Ltd*** [2013] EWHC 348 (Ch), [2013] Ch 551, Briggs J held that double derivative claims were maintainable under English law, applying the reasoning of Lord Millett NPJ in the decision of the Court of Final Appeal of Hong Kong in ***Waddington Ltd v Chan Chun Hoo Thomas*** [2009] 2 BCLC 82. Briggs J further held that the provisions of Part 11 of the Companies Act 2006 did not apply to double derivative actions and had not implicitly or otherwise abolished the common law jurisdiction of the courts to entertain such actions. In the absence of any statutory provisions, Briggs J held that the common law rules for derivative actions continued to apply to double derivative actions.
>
> 14. As this is a matter which goes to the jurisdiction of the court, I am not bound by the common approach of the parties but must be satisfied that the court does indeed possess the necessary jurisdiction. In view of the doubts expressed by some commentators on whether the decision in ***Universal Project Management Services Ltd v Fort Gilkicker Ltd*** is correct (see, for example, ***Gore-Browne on Companies***, 45th ed., paras 18.2 and 39), I should

> say that I have considered the judgment of Briggs J and fully endorse both his conclusions and his reasoning."

44. For present purposes, these common law principles can be stated shortly. A derivative claim can only be brought if there is a prima facie case that:

(1) the company is entitled to the relief claimed: ***Bhullar v Bhullar*** [2015] EWHC 1943 at [20];

(2) there was either a fraud, or breach of fiduciary duty or negligence from which the wrongdoing benefited: ***Bhullar*** at [32]-[33]; ***Abouraya*** at [16];

(3) the claimant has suffered a loss (ordinarily a reflective loss): ***Abouraya*** at [25]-[26];

(4) the wrongdoers are in control of the company in a broad sense: *Charman and du Toit, **Shareholder Actions***, 2nd edition, at paragraph 6.8; and

(5) an independent board could reach the conclusion that it was appropriate to bring the proceedings: ***Bhullar*** at [38].

45. Even where the above requirements are all met, the court has a discretion as to whether or not to grant permission to continue. In exercising that discretion, the court will attach substantial weight to what it considers the attitude of an independent board of directors of the company would be to the bringing of the claim and, in doing so, will take into account the same factors it would when considering an "ordinary" derivative claim under the CA 2006: *Charman and du Toit* at paragraph 6.12.

PART IV: THE PRESENT APPLICATION

46. As stated above, the present claim comprises 7 derivative or double derivative claims. Each needs to be considered in turn.

Claim 1: Payments by Laurels to Mrs Thind's personal pension scheme

47. The first claim is set out in paragraphs 16 and 17 of the Amended Particulars of Claim.

48. Paragraph 16 states:

> "During its financial year ended 28 February 2017 [Laurels], at the instigation of and by the authority of [Mr and Mrs Thind], paid a sum of £97,550 described as "Directors pension, defined contribution scheme" to or for the benefit of [Mr and Mrs Thind]."

49. Paragraph 17 then goes on to plead that the above payments constituted a breach of various fiduciary duties owed "to both [Jeeves Estates] and [Mr Gill]".

50. As to the breaches of duties allegedly owed to Mr Gill, these are clearly personal claims – in other words, they are claims which belong to Mr Gill personally. Mr Gill does not, of course, require permission to continue such claims.

51. As to the breaches of duties alleged owed to Jeeves Estates, this is clearly a mistake – the money in question belonged to Laurels and so presumably the intended plea is that the above payments constituted breaches of duties owed to Laurels. For present purposes, I am prepared to proceed on the basis that the application, in so far as it relates to paragraphs 16 and 17 of the Amended Particulars of Claim, is for permission to continue a derivative claim on behalf of Laurels.

52. In their Defence, the Thinds do not dispute that the relevant payments were made by Laurels to the benefit of Mrs Thind's personal pension scheme[11]. Indeed, in paragraph 16 of their Defence they refer to Laurels' articles of association which empower a director of Laurels to give to any person who is serving or has served the company a pension, bonus or gratuity. In short, therefore, they say that these were entirely proper payments which Laurels was perfectly entitled to make.

[11] There is a relatively small dispute about the amount of the payments but for present purposes nothing turns on this.

53. Moreover, so the Thinds say, the statements of case and the evidence do not disclose a prima facie case in relation to the particular breaches of fiduciary duty relied on by Mr Gill. In broad terms, Mr Gill relies (although he does not put it precisely in these terms) on section 175 (duty to avoid conflicts of interest) and section 177 (duty to declare interest in proposed transaction) of the CA 2006.

54. As for the duty to avoid conflicts of interest under section 175, as counsel for the Thinds correctly points out, this is not that sort of case. Section 175(3) states (with underlining added): "*This duty does not apply to a conflict of interest in relation to a transaction or arrangement <u>with the company</u>*". In the present case, the alleged breach is in relation to payments to Mrs Thind's personal pension scheme by the company in question, namely, Laurels. Clearly, therefore, section 175 does not apply.

55. As for the duty to declare an interest in a proposed transaction under section 177, again counsel for the Thinds points out that this is not that sort of case. Section 177 requires a director, in certain circumstances, to declare a relevant interest "to the other directors". In relation to Laurels, however, Mrs Thind is the only director. Section 177, it seems to me, can therefore have no application.

56. The Amended Particulars of Claim do not plead a breach of either section 171 section (duty to act within powers) or section 172 (duty to promote the success of the company), yet I have nevertheless considered whether the statements of case and evidence disclose a case on either of these bases. As for section 171, as stated above, in their Defence the Thinds have referred to the articles of association which clearly empower Laurels to make payments to a personal pension scheme. It therefore seems clear that no complaint can be made here. As for section 172, I have considered whether it can be said that the making of the particular payments in those particular sums at the particular time they were made can be said to amount to a breach of the above duty to promote the success of the company. As stated above, however, that is not pleaded and, without something more – without some basis for asserting that the payments were in some way inappropriate – it does not seem to me that I can properly say that a case has been made out here either.

57. In short, therefore, I am of the view that the derivative claims pleaded in paragraphs 16 and 17 of the Amended Particulars of Claim do not disclose even a prima facie case and that therefore a person acting in accordance with section 172 of the CA 2006 would not seek to continue those claims. This being the case, and (this being a double derivative claim[12]) applying the above common law principles, I must refuse permission to continue.

Claim 2: Jeeves Estates director's loan

58. The second claim is set out in paragraphs 18 and 19 of the Amended Particulars of Claim. Those paragraphs complained about a loan of £110,003 by Jeeves Estates[13] to Mrs Thind.

59. As was pointed out in the Defence, however, the above plea appeared to have come from a mistaken reading of the accounts – the loans in question were not loans by Jeeves Estates to Mrs Thind, they were loans by Mrs Thind to Jeeves Estates.

60. In their skeleton argument, counsel for the Thinds reiterated the above point by reference to the documents following which counsel for Mr Gill sensibly withdrew reliance on the above claim. I therefore need not consider it any further.

Claim 3: Loan by Jeeves Estates to Avey

61. The third claim is set out in paragraphs 20 and 21 of the Amended Particulars of Claim and relates to a loan of £295,000 by Jeeves Estates to another company owned and controlled by the Thinds called Avey Investments Limited ("**Avey**"). Paragraph 21 goes on to plead that the above loan was made in breach of various duties owed by Mr Thind (as the sole director of Jeeves Estates) to both Jeeves Estates and also Mr Gill personally.

[12] Mr Gill does not claim to be a member of Laurels but only of its parent company, Jeeves Estates
[13] In fact, paragraph 18 referred to a loan by Laurels. This too, however, is a mistake and was intended to refer to Jeeves Estates

62. In their Defence, the Thinds do not dispute that Jeeves Estates loaned the above sum of £295,000. The Defence goes on to state, however, that £200,003 of that loan has been repaid and that in relation to the outstanding balance of £92,000, interest continues to accrue at 3% per annum above the Bank of England base rate[14] – in other words, say the Thinds, the loan was made on commercial terms and, as such, cannot be criticised as a breach of duty.

63. As for the alleged breaches of duty owed to Mr Gill personally, these again are personal (and not derivative) claims and so do not concern me for present purposes. As for the alleged breaches of duty owed to Jeeves Estates, on the other hand, these are of course derivative claims and I therefore need to consider once again the statutory criteria and in particular whether or not the materials disclose something more than a prima facie case such that a person acting in accordance with section 172 would seek to continue the claim.

64. In broad terms, the duties relied on by Mr Gill in relation to the loan are those contained in sections 171, 172, 175 and 177 of the CA 2006.

65. As for section 171 (duty to act within powers), as was pointed out in the Defence, under 3(a) and 3(q) of its memorandum of association, Jeeves Estates was entitled to lend money. There seems, therefore, to be nothing in this point. As for section 172, the statements of case and evidence do little more than refer to the bare fact that the loan was made – and make no comment of substance on the commercial terms which appear to have been agreed. Without something more – without some basis for asserting that the loan and/or their terms were in some way inappropriate – it does not seem to me that I can find that a case has been made out here either.

66. As for section 175 (duty to avoid conflicts of interest), as explained above, this has no application where the transaction in question was with the relevant company (as it was here). As for section 177 (duty to declare interest), to the extent that Mr Thind was the sole director, again the section is simply not engaged; and to the extent that there were in fact other directors (of which there is a suggestion), it would appear

[14] As evidenced by minutes of a meeting dated 1 February 2018

from the minutes of the meeting dated 1 February 2018 that the matter was fully discussed with all concerned such that the exception contained in section 177(6)(b) – which bites where the other directors were or ought to have been aware of the transaction – would apply in any event.

67. Again, therefore, I conclude that the derivative claims pleaded in paragraphs 20 and 21 of the Amended Particulars of Claim do not disclose even a prima facie case and that therefore a person acting in accordance with section 172 of the CA 2006 would not seek to continue those claims. This being the case, and this being an ordinary derivative claim, I find that I must refuse permission to continue under section 263(2).

Claim 4: Failure to buy Sherwood in the name of Jeeves Estates or Watts

68. The fourth claim to be considered is set out in paragraphs 25 and 27 of the Amended Particulars of Claim (paragraph 26 having been deleted on amendment). As explained above, when the opportunity to buy Sherwood House came to their attention, the Thinds arranged for the freehold of the property to be bought by the Thind SSAS which then let the same to the newly incorporated Watts. In summary, however, Mr Gill alleges that the purchase of the freehold property by the Thind SSAS was contrary to (with underlining added):

> "…the common intention of [Mr Gill] and [Mr and Mrs Thind] that same would be owned by and registered in favour of [Jeeves Estates] (or possibly [Watts])…"

69. The difficulty which Mr Gill has with this plea is that it is hopelessly vague. No particulars are given as to how that common intention is said to have arisen. Nor is it clear what fiduciary duties are said to have been breached (the following paragraph merely states, in the most general of terms, that the above conduct was "in breach of fiduciary duty as set out in paragraphs 15(a) to (f) above"). In particular, it is not clear whether it is being alleged that there was a common intention constructive trust and, if so, what precisely the common intention was said to be and how it is said to have come about, or whether in reality it is being alleged that there was a diversion of a corporate opportunity and, if so, precisely what opportunity and how it is said that that

opportunity in fact belonged to Jeeves Estates or Watts, as the case may be. Nor does the evidence in support of the application throw any material light on the matter.

70. Again, therefore, I am unable to conclude that the derivative claims pleaded in paragraphs 25 and 27 of the Amended Particulars of Claim disclose even a prima facie case. Again, therefore, permission to continue under both section 263(2) (in relation to Jeeves Estates) and at common law (in relation to its subsidiary, Watts) must be refused.

Claim 5: Payment of rent by Watts to the Thind SSAS

71. The fifth claim is set out in paragraphs 28 and 29 (and by amendment paragraph 21A(c)) of the Amended Particulars of Claim. In paragraph 28 it is said that over the period from 1 November 2014 to 29 February 2016, despite having sales of only £23,024, the Thinds caused Watts to pay rent to the Thind SSAS of £120,000. Further, by the newly inserted paragraph 21A(c), payments from Watts to the Thind SSAS of £135,000 are pleaded. In any event, by making the above payments, so Mr Gill pleads, the Thinds acted in breach of fiduciary duty.

72. In their Defence, the Thinds accept that moneys were paid from Watts to Thind SSAS and that the total sum paid was £135,000. They further confirm that the reason for the payments was indeed rent under a 20-year lease at an initial rent of £40,000 per annum.

73. Again, however, it seems to me that the above claim has no real prospect of success. Watts was contractually obliged to pay the above sums under the terms of the lease. In theory, it would have been open for Mr Gill to plead that the terms of the lease (and in particular the rent of £40,000 per annum) were in some way uncommercial and that by agreeing to such terms the Thinds were in some way in breach of one or more of their duties to Watts; but they have not pleaded that and nor is there any evidence to support such a plea in any event.

74. Again, therefore, it seems to me that the claim does not even get off the ground and that, applying common law principles (Mr Gill claiming to be a member not of Watts

but only of its parent, Jeeves Estates), once again permission to continue should be refused.

Claim 6: Payment of rent by Laurels to Jeeves Estates

75. The sixth claim to be considered is set out in paragraphs 30 to 33 (and by amendment paragraphs 21A (a), (b) and (d)) of the Amended Particulars of Claim. As explained above, after the Thinds came across the opportunity to buy the nursing home in Hastings, the freehold property was bought by Jeeves Estates but the business of the nursing home was acquired by the newly formed Laurels which would then have to pay rent to Jeeves Estates. The complaint as set out in the above paragraphs, in a nutshell, is that over a period of time Laurels did indeed make various rent payments to Jeeves Estates and, by procuring the same, the Thinds acted in breach of their various duties to Laurels.

76. In their Defence, the Thinds admit the above payments and say, quite simply, that the above payments were in respect of rent.

77. Once again, however, it seems to me that the above claim has no real prospect of success. Laurels was obliged to pay rent in respect of its occupation of the property. If Mr Gill wished to plead that the amount of the rent was in some way uncommercial and that by agreeing to those rental terms, the Thinds were in breach of duty, he could have done so. He did not, however, and nor has he disclosed any evidence which would have supported such a plea in any event.

78. Once again, therefore, the plea does not disclose even a prima facie case and accordingly (and applying common law principles given that Mr Gill is not a member of Laurels but only of its parent, Jeeves Estates), I once again refuse permission for it to continue.

Claim 7: Distributions to Simicare

79. The seventh and final claim is pleaded in paragraphs 22 to 24 of the Amended Particulars of Claim. I have taken this out of turn as it is the claim which has troubled me the most.

80. Between September 2013 and August 2016, the Thinds caused Simicare to make payments totalling £239,000 to a Nationwide account which had been set up in Mr Gill's name. Following receipt of each payment, monies were then withdrawn from that account to pay for the school and education fees of the Thinds' children. According to Mr Gill, although the account was in his name, he knew nothing about the payments either into or out of that account. Moreover, so he says, no dividends were ever declared by Simicare and therefore the above distributions must have been unlawful. In this way, so Mr Gill pleads, Mrs Thind must have acted in breach of her various duties to Simicare (and to himself personally).

81. In their Defence, the Thinds accept that the various payments were made (both into and out of the Nationwide account) but go on to state that, contrary to Mr Gill's assertion, dividends were in fact declared by Simicare equivalent to each such payment (and that Simicare had sufficient accumulated profits to enable it to properly do so). They also assert that Mr Gill was fully aware of both the payments into and out of the account – indeed the payments in respect of the Thinds' children's various school and educational fees were, so they say, the whole reason why the Nationwide account was set up in the first place.

82. Some of the alleged breaches of duty I can deal with in short form. To the extent that duties are said to be owed Mr Gill personally, once again they form the basis of personal (not derivative claims) for which no permission is required. To the extent that it is alleged that there were breaches of sections 175 and 177, these too seem to me to fail for the reasons already discussed.

83. More problematic, however, are the alleged breaches of the duty to promote the success of the company under section 172 (and, to a lesser extent, the duty to act within powers under section 171). As stated above, the Thinds have pleaded that dividends were declared and, moreover, have produced minutes evidencing such declarations. Mr Gill, however, does not accept the authenticity of those minutes and,

in a witness statement, has asserted that he believes them "to be manufactured recently"[15].

84. This therefore raises a question of fact: were the dividends properly declared? If they were, then it seems to me that once again there would be no proper basis for the alleged claim. But if they were not properly declared, it seems to me that there would be at least a prima facie case that, by causing Simicare to make the payments, Mrs Thind as director (and possibly Mr Thind as a shadow director) acted in breach of her (their) duties to Simicare under section 172 (and possibly section 171) of the CA 2006.

85. Counsel for the Thinds invites me to find that I should reject Mr Gill's denial of the authenticity of the minutes. He rightly reminds me of CPR 16.4(1)(c) and PD 16, paragraph 8.2 which require any allegation of fraud (such as alleging a document to be a forgery) to be specifically pleaded. He also rightly points out that Mr Gill's allegation of (effectively) forgery appears only in a witness statement and is not pleaded – whether specifically or otherwise – anywhere in the statements of case. I take into account, however, that Mr Gill's Amended Particulars of Claim expressly pleaded that no dividends had been declared[16], and that the first time that it was pleaded that dividends *had* been declared was in the Thinds' Defence[17] (which did not in any event make express reference to the minutes). It seems to me, therefore, that the appropriate place to raise (and specifically plead) any denial of dividends having been validly declared would be in a Reply. As explained above, however, on 22 August 2019 Deputy Master Bartlett granted Mr Gill permission to rely on his Amended Particulars of Claim and further directed that the Thinds had until 21 days after the determination of these applications to file and served any Amended Defence in response. In these circumstances, any Reply on behalf of Mr Gill cannot be said to be yet due.

86. Unlike the previous derivative claims I have considered, therefore, I am of the view that in relation to the matters pleaded in paragraphs 22 to 24 of the Amended

[15] See paragraph 39 of Mr Gill's second witness statement dated 26 March 2019
[16] Paragraph 22
[17] Paragraph 22.3

Particulars of Claim, Mr Gill does have something more than a prima facie case. More specifically, and without of course conducting a mini-trial, I do not think it can be said that a person acting in accordance with section 172 would not seek to continue such a claim – particularly given the guidance given by Lewison J in ***Iesini*** to the effect that section 263(2)(a) of the CA 2006 will apply only where the court is satisfied that *no* director acting in accordance with section 172 would seek to continue the claim.

87. It follows, therefore, that this claim – unlike the others – makes it to the next stage and I have to exercise my discretion, taking into account the various matters set out in section 263(3), as to whether or not to grant permission to continue[18].

88. Of these various matters, it seems to me that the most relevant is that set out in section 263(3)(f), namely, 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*" – in other words, the availability (or not) of an alternative remedy. As set out above, the fact that the member may have an alternative remedy is not an absolute bar: ***Mumbray***. On the other hand, where there is an alternative remedy, this is likely to be preferable from the company's point of view given that it would not be required to incur legal costs or indeed expose itself to adverse costs in the event that the claim is unsuccessful: ***Iesini.***

89. Indeed, the derivative claim raised by the above paragraphs – in other words, a dispute over whether a quasi-partnership existed between the parties, what (if anything) was agreed between the parties as to how monies would be distributed, and whether or not distributions were made to the benefit of one quasi-partner to the disadvantage of another – have all the hallmarks of the sort of claim commonly resolved by way of an unfair prejudice petition pursuant to section 994 of the CA 2006. Indeed, it is clear from the correspondence prior to the bringing of the present derivative claim, that Mr Gill and his legal team were clearly contemplating bringing such an unfair prejudice petition.

[18] Given the disputed transfer of Mr Gill's shareholding in Simicare to Mrs Thind in 2018, there is some argument as to whether the claim is an ordinary or double derivative claim. Given, however, that (as explained in paragraph 45 above) broadly the same principles apply, for present purposes nothing turns on this.

90. As is clear from the above guidance, the mere fact that Mr Gill does appear to have an alternative remedy is not an absolute bar to him being granted permission to continue the present derivative claim. Having said that, in the present case, so it seems to me, it would indeed be far preferable from Simicare's perspective that the dispute should be resolved by way of an unfair prejudice petition. Rhetorically, why should Simicare fund (and expose itself to adverse costs in relation to) litigation which is effectively a dispute between quasi-partners?

91. Taking all things into account, therefore, including in particular the merits of the claim (more than a prima facie case, but not necessarily strong), the size of the claim (relatively modest), and the fact that Mr Gill would appear to have an (eminently suitable) alternative remedy, it seems to me that as a matter of discretion (whether under section 263(3) or otherwise) I should refuse permission in relation to this claim too.

Procedural failures

92. Counsel for the Thinds also quite properly pointed out that there were a number of serious procedural irregularities with Mr Gill's application. First, while applications for permission had been made in respect of the derivative clams sought to be brought on behalf of Jeeves Estates, Simicare and Watts, no application for permission had been made in respect of the two derivative claims sought to be brought on behalf of Laurels. Second, while Jeeves Estates, Simicare and Watts had all been joined as defendants to the claim as required by CPR 19.9(3), Mr Gill had failed to join Laurels as such a defendant. For either or both of these reasons, so counsel for the Thinds invited me to find, the applications to continue should be refused in any event.

93. Having considered the matter, if I had otherwise been minded to grant permission to continue, I would have done so regardless of the above procedural failures. While it is true that Laurels were neither respondents to the application nor defendants to the underlying proceedings, the reality is that the claims which Mr Gill sought to advance on behalf of Laurels were pleaded in the Amended Particulars of Claim such that, in broad terms at least, the Thinds knew the application they had to meet. In the event,

however, I have refused to grant permission in relation to the above claims and therefore the above issue does not arise.

Bad faith

94. Counsel for the Thinds also submitted that the various derivative claims were being advanced in bad faith – whether by Mr Gill himself, or by Kuldeep on his behalf – such that, whatever else I might decide, permission to continue ought to be refused in any event whether pursuant to section 263(3)(a) or otherwise.

95. I disagree. While Mr Gill's case has not always been presented as clearly or as consistently as it might have been, I do not find any bad faith. Accordingly, while for the reasons given I refuse to grant permission to continue in each case, I do not do so on the basis of any lack of good faith, whether on the part of Mr Gill, Kuldeep or otherwise.

Challenge to beneficial ownership

96. All of the proposed derivative claims were predicated on the assertion that Mr Gill was the beneficial owner of at least some of the shares in the various companies. Indeed, it was on this basis that Mr Gill was at least able to issue the claim and then seek permission to continue on behalf of the various companies.

97. A not dissimilar situation arose in ***Abouraya.*** Although in that case permission to continue was refused for other reasons, David Richards J said at [70]:

> "A further consideration is that an issue which must be determined is the beneficial ownership of the share held by the claimant. In ordinary circumstances, if I were satisfied that the derivative claim should otherwise be permitted to continue, I would adjourn the present application and direct the trial of a preliminary issue as to the beneficial ownership of the share. The decision whether to grant permission for the proceedings to continue would be made following determination of that preliminary issue."

98. In the present case, if I had otherwise been minded to grant permission to continue, I would have directed the trial of a preliminary issue as to the ownership of the shares in question and would have adjourned my final determination as to permission to continue pending the outcome of the same. In the event, however, I have of course refused permission and accordingly the issue does not arise.

PART V: CONCLUSION

99. In conclusion, therefore, I refuse permission to continue in respect of all of the pleaded derivative claims. The proceedings may continue, of course, in relation to Mr Gill's personal claims which remain unaffected by this judgment. I also make it clear that nothing in this judgment should prevent Mr Gill from issuing an unfair prejudice petition in relation to the various matters complained of, should he so wish.

100. Finally, I conclude by expressing my gratitude to all counsel and their respective legal teams for the clear and helpful submissions made both in the skeleton arguments and orally at the hearing.

JPQC

November 2020