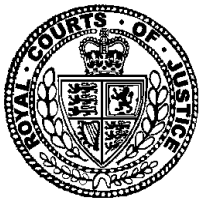

Neutral Citation Number: [2021] EWHC 22 (Ch)

Case No: HC-2015-001065

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

Business and Property Courts England and Wales
The Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 12/01/2021

Before:

Chief ICC Judge Briggs
(sitting as a Deputy High Court Judge, Chancery Division)

- -

Between :

RICHARD TERENCE PERCY	**Claimant**
- and -	
(1) MERRIMAN WHITE	
(2) RAYMOND JOHN MURPHY	**Defendants/ Additional Claimants**
(3) DAVID MAYALL	
Additional Defendant	

- -

- -

HENRY BANKES-JONES (instructed by **DAC BEACHCROFT LLP**) for the **Additional Claimants**

PATRICK LAWRENCE QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Additional Defendant**

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 14:00hrs on 12 January 2021

Hearing dates: 8,9,10 December 2020

- -

Approved 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.

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DEPUTY HIGH COURT JUDGE BRIGGS (Chief ICC Judge)

Deputy High Court Judge Briggs (Chief ICC Judge):

Introduction

1. The claimant, Mr Richard Percy engaged Merriman White as solicitors to act in relation to a commercial dispute involving a joint venture. Merriman White instructed Mr David Mayall, a barrister in private practice, to advise on the legal and tactical merits of the claim, draft particulars of claim and represent Mr Percy in court. The claim failed at a preliminary stage (the "Derivative Claim"). Mr Percy subsequently made a claim for negligence or breach of contract against Merriman White, and Mr Mayall (the "Negligence Claim").

2. After pleadings had closed in the Negligence Claim Mr Percy agreed to no longer pursue Mr Mayall on the basis that each side pay their own costs. Later Merriman White settled with Mr Percy.

3. By this action Merriman White seek a contribution from Mr Mayall pursuant to the Civil Liability (Contribution) Act 1978.

The structure of this judgment

4. In this judgment I shall first describe the background to the Derivative Claim (paragraph 12). I heard evidence from the lead solicitor at Merriman White, Mr O'Sullivan, and Mr Mayall on certain issues. I shall make findings of fact where required.

5. An issue arose during the course of this trial as to where the burden of proof lay when a party seeks permission to bring a derivative claim on behalf of a company. I intend to cover this issue next (paragraph 45) but shall do so with some brevity.

6. Thirdly, I shall add further context by making reference to the judgment given in the Derivative Claim (paragraph 47).

7. Fourthly, there was an application to appeal the judgment (paragraph 52).

8. Fifthly, I shall turn to the Negligence Claim (paragraph 54), make reference to the pleadings in that claim and the agreement not to continue against Mr Mayall, struck between Mr Percy and Mr Mayall (paragraph 66).

9. Sixthly, I shall analyse the Contribution claim (paragraph 68) and make findings as to what defences are permissible against a party who seeks a contribution against another.

10. Seventhly, I shall deal with specific issues raised by Mr Mayall who argues that he was not negligent, and did not cause loss to Mr Percy (paragraph 93). The second of these issues primarily concerns the no reflective loss principle.

11. Lastly, I shall deal with any quantification of contribution (paragraph 101) and make my conclusions (paragraph 108) in the form of a summary.

Background to Derivative Claim

12. On 9 January 2007 Mr Percy and Mr Trevor agreed to enter a joint venture agreement (the "Agreement"). They decided upon a corporate structure to facilitate the venture incorporating an operations company known as Seven Holdings Limited ("SHL"). SHL was incorporated on the same day. They used two corporate vehicles to hold an equal number of shares in and be members of SHL. Mr Percy wholly owned Langley Ward Limited ("LWL") and Mr Trevor wholly owned Maddisonjay Estates Limited ("MEL"). I shall refer to these three companies in the collective noun (the "Companies"). The Agreement specified that the Companies "have decided to acquire the Property in joint venture through the medium of A Limited on the basis that A Limited will act as their nominees for B Limited and C Limited as beneficiaries". The "Property" is defined as "such freehold or leasehold property or properties" as MEL and LWL shall direct to be acquired by SHL. At the time of the Agreement, they had or were about to acquire 10A Austin Avenue Bickley, Kent ("Austin Avenue") and intended to refurbish it and construct two new detached houses for sale. The Agreement apportioned ownership shares, outlined duties (such as procuring SHL to keep proper records accurately and recording Receipts and Expenses), relative investments, the division of profit or loss and an arbitration clause: "in the event of any difference or dispute arising between the parties hereto in relation to any matter or thing required to be done performed or observed hereunder such dispute or matter shall be referred to an arbitrator in accordance with the provisions of the Arbitration Act 1990…". The Agreement was determinable upon notice "with immediate effect upon the earlier of… any time after the Property or the last of the Property has been sold whichever the case may be."

13. Each director contributed £244,000 to the purchase of Austin Avenue and SHL raised finance from the Bank of Ireland. The Agreement provided that the contributions would be made by the Companies. If that is correct, the contributions are more likely than not to have been made by Mr Trevor via MEL and Mr Percy via LWL who received them as loans from the individuals. However, the contributions are said to have been added to the directors' loan accounts of SHL. Despite the corporate structure the only interested humans were Mr Percy and Mr Trevor.

14. Once Austin Avenue was purchased the refurbishment and development required funding. Further advances, including advances for the purchase of materials, increased the loan accounts.

15. A further property known as Sundridge Avenue was purchased. Mr Trevor made additional advances. It is not clear from the documents before the court whether the advances were made directly to SHL or via MEL. Some amounts were repaid and debited to his loan account when Austin Avenue and later Sundridge Avenue were sold. By the end of January 2009 the credit balance of his loan account was over £800k. By contrast, Mr Percy made no further advances, but received repayments of around £40k, and had a credit balance of around £220k.

16. While Austin Avenue and Sundridge Avenue were being developed, both Mr Percy and Mr Trevor were engaged in building a house for personal occupation, Mr Percy at 25 Bosbury Road, Catford, and Mr Trevor at 7 Mavelstone Close, Bromley. Mavelstone Close was conveyed into Mr Trevor's name in November 2007. The house was part of a larger plot which he purchased with a friend called Julian Beale in

May 2007. They had agreed to divide the plot allowing each to build a house. It was geographically close to Sundridge Avenue.

17. By 2010 Mr Percy became suspicious that Mr Trevor was using money standing in the bank account of SHL (set up in accordance with recital 2 of the Agreement) for his own purposes. More precisely Mr Percy was suspicious that Mr Trevor was ordering building materials, paying for those materials and labour from the bank account of SHL and using the purchased materials and labour for his own benefit at Mavelstone Close.

18. This suspicion led Mr Percy, in February 2010, to write to the directors and shareholders of SHL calling for an extraordinary general meeting for the purpose of removing Mr Trevor as director. The letter was passed to GSC solicitors LLP ("GSC") by Mr Trevor who he instructed to deal with the issue. They wrote to Mr Percy on 12 March 2010 stating that the notice was invalid and suggesting that he take independent legal advice. Contained in the letter was an accusation that Mr Percy had breached his duties owed to SHL and was "conducting the affairs of the Company in an unfair and prejudicial manner". GSC asserted that the relationship between Mr Percy and Mr Trevor was "no doubt a quasi partnership".

19. The extent of the distrust between Mr Percy and Mr Trevor at that time can be gleaned from a letter written by GSC to a firm of solicitors which acted for SHL in connection with a property acquisition: "we understand that you have on occasions been instructed by the other director to [SHL] Mr Richard Percy to act for [SHL] on property transactions and that on occasions you have refused to speak with our client or report to him on transactions that you are or have been undertaking in [SHL's] name. This is not acceptable. You are no doubt aware that [SHL] is essentially deadlocked…".

20. Mr Percy contacted Merriman White ("MW") who had acted for him in respect of a driving offence. Mr St John Murphy, a partner at MW wrote to him on 18 March 2018 first addressing the problem and secondly providing a solution: "I am sorry to learn of the dispute which has arisen between yourself and your partner. From the information you have provided I consider that you have a good case to petition the court for an order that your partner sell his shares in the company to you…I also confirm that if we can identify there is a real risk of dissipation of assets you will be entitled to obtain a freezing order…it is essential to ensure the outlay [in costs] is justified by the anticipated return." Mr Percy subsequently attended a meeting at the offices of MW where Mr Jeremiah O'Sullivan, who had liaised with Cranfield accountants to obtain information in respect of SHL, took conduct of the case and drafted a statement for his approval. As a partner of MW, it was for Mr Murphy to send the firm's letter of engagement. The letter was addressed to Mr Percy (not SHL) and Mr Percy was asked to sign the terms and conditions (not SHL). One of the activities specified in the engagement letter was "to commence proceedings on your behalf, if so advised by counsel."

21. In his evidence Mr O'Sullivan explains that he had two years post qualification experience at the time of the first meeting with Mr Percy. His view was that Mr Percy had a claim for unfair prejudice as: (i) he had been excluded from the management

which was unfair; (ii) SHL was deadlocked; and (iii) the conduct of Mr Trevor, by reason of his alleged breach of fiduciary duties, was prejudicial.

22. Mr Trevor accepted that he was using some of the building materials ordered and paid for by SHL for use at Mavelstone Close, but said that there had been an agreement with Mr Percy that this could be done. By mid-June 2010 Mr Trevor wanted to settle the issue and made an offer of £265,000. In an attendance note, prepared by Mr O'Sullivan and dated 21 June 2010, Mr Percy is said to have informed Mr O'Sullivan of this offer. He told Mr O'Sullivan that he had asked Mr Trevor to put the offer in writing. The attendance note records: "It is well below his target of between £500,000 and £800,000. It is not revealed why Mr Percy had this target or whether the target had been challenged by MW".

23. At a meeting on 25 June 2010 attended by Mr Murphy and Mr O'Sullivan, Mr Percy informed MW that Mr Trevor had installed an expensive kitchen in his own home and a less expensive one in the house to be sold by SHL, despite documentation that "suggested" it would be the other way around. Mr Percy thought this was evidence of misconduct. GSC in the meantime had contacted MW to ask if the offer of £265,000 had been accepted and that GSC had prepared a contract. By this time SHL was late in filing its accounts at Companies House and had failed to file its tax return. SHL was incurring financial penalties. Mr Murphy thought it best to write to Companies House "explaining the situation". Mr Percy reported that Mr Trevor had paid "various suppliers' debts and, in particular City Plumbing…he either paid them off or turned them into personal debts."

24. On 30 June 2010 MW provided instructions to Mr Mayall to advise in conference on how best to proceed "in order to protect Mr Percy's interest"; "whether the fact that Mr Percy holds his shares through a limited company has any effect on his potential remedies"; and (among other things) "to advise instructing solicitors generally in regard to strategy." It is apparent from the instructions, that Mr Mayall had delivered to him a considerable number of documents including correspondence with GSC, documents relating to the various properties, the draft statement of Mr Percy and documents concerning the Companies.

25. Mr O'Sullivan kept a detailed note of the conference with Mr Mayall on 7 July 2010. It is important to say that it does not represent a verbatim record, but it is thorough and contemporaneous. Mr Mayall does not take issue with its content, save for one point which I shall come to. Mr Percy informed the attendees that the only properties held by SHL at that time were two houses developed on Austin Avenue. They were being actively marketed by an estate agent. The proceeds of sale would return £945,000 to SHL less the costs of sale. The attendance note records Mr Mayall as advising that there would be "two separate actions". The first would seek an order that Mr Trevor would make a repayment of "funds misappropriated". He had in mind a derivative claim. The second would involve issuing a petition for unfair prejudice seeking relief that Mr Trevor purchase the shares of LWL. The rather convoluted and no doubt expensive strategy for protecting Mr Percy's interests was not challenged by Mr O'Sullivan, who says that he relied on Mr Mayall for expert advice. Mr Mayall also advised that Mr Trevor be invited to provide an undertaking not to dispose of the shares held by MEL.

26. Mr O'Sullivan explains that he thought Mr Mayall was at first undecided as to whether an action on a petition for unfair prejudice or a derivative claim was most appropriate. Mr Mayall settled for the derivative claim because "the authorities suggested this was the preferred option in the circumstances of this claim." The exception to the accuracy of the attendance note is that Mr Mayall says he "did not advise that the correct course was an unfair prejudice application." He agrees that he advised that there would need to be two actions: a derivative claim on behalf of SHL and a "possible" unfair prejudice action to force Mr Trevor to buy Mr Percy's shareholding. The attendance notes evinces reliance by Mr O'Sullivan (and Mr Percy) on Mr Mayall for advice.

27. In early September 2010 Mr Percy discovered that Mr Trevor had paid off the finance on his vehicle from SHL's funds and that the finance agreement on his own vehicle had not been paid. The vehicle had then been sold. This would later become a claim in the derivative action where it was alleged that Mr Trevor had failed to account for the proceeds.

28. On 15 September 2010 Mr Mayall advised in conference about evidence in support of the derivative claim. Mr O'Sullivan says: "Mr Mayall did not warn Mr Percy, or me, that there was any possibility that the court would reject the proposed course of action wholesale in the way that later transpired or indeed of the pros and cons of that course of action as opposed to seeking a winding-up" of SHL. In fact, the note of the conference includes a response to a question from Mr Percy who asked Mr Mayall "whether he could win". The recorded response is that there was evidence to "show Gareth diverted labour and materials to his private house, however some of this is already factored into the Directors' loan account and there isn't much room to play with." Later in the conference Mr Percy asked the question again. This time Mr Mayall responded that based upon the evidence he had seen "the Company will almost certainly win, so we have very good prospects of success in regard to liability". In cross examination Mr Mayall accepted that he did not change his view about the prospects prior to the hearing before Mr Donaldson QC in June 2011. I am not sure that is correct as he was less optimistic when advising in writing, which he did by way of a note for Mr O'Sullivan in December 2010 provided for the purpose of mediation. It may be that when giving his evidence orally he had in mind that his overall view did not alter. In any event Mr Mayall explained that the reference to "liability" is a reference to successfully demonstrating a good cause of action against Mr Trevor in his capacity as director of SHL. Mr Mayall says it is correct that he advised that proceedings should be issued, but that further evidence to support the allegation of fraud was required.

29. On 21 September 2010 GSC wrote to MW responding to a letter before action dated 2 September 2010. The letter is detailed and likely to make most recipients pause for thought. There was no pause in this case. The main complaint in the letter to MW was a lack of particularity. An offer was made for inspection of SHL's files and reference made to the Agreement. GSC explained that the accountants drew up the Agreement to "reflect what was being agreed" and that "you cannot dispute our description of the relationship underlying Seven as being one of a quasi partnership." Neither party referred to the dispute resolution clause that provided that disputes in respect of the joint venture should be referred to an arbitrator. Dealing with the factual dispute that had arisen GSC stated that "Mr Trevor has never sought to deny that materials and

labour were used at 7 Mavelstone Close but this was with your clients' knowledge and blessing. We understand that Mr Richard Percy did likewise in respect of his own property. The majority of invoices show the place of delivery. However, it appears that Richard Percy seeks to challenge this but by bare assertion only and without proof to the contrary." The letter reminded MW of Mr Trevor's DLA and said: "you yourselves have endorsed the unjustifiable approach of Richard Percy without in any way testing either his assertions or the quantum of the loss he says he has suffered as a result. You have simply adopted global sums that cannot be justified on any legal basis…". The warning was stark.

30. The following day MW wrote to Mr Percy advising that there "is sufficient evidence of unfair prejudice and misappropriation of funds" and "counsel pointed out, you are not at a substantial risk of an adverse costs award until Gareth Trevor instructs his solicitors to make a formal Part 36 offer. Until that has occurred, it is in your interests to pursue litigation as aggressively as possible…".

31. On 27 September 2010 Mr O'Sullivan and Mr Mayall spoke over the telephone. Mr O'Sullivan records that GSC had provided 2 boxes of documents and "a plausible response". Despite a "plausible response" Mr Mayall advised that strategically they had "been corresponding long enough and we have clearly conveyed the substance of the allegations against them, if not the precise details." On 22 October 2010 Mr Mayall and Mr O'Sullivan spoke again by telephone. Mr Mayall explained that they had to obtain permission from the court to continue with the derivative claim. There is no record of Mr Mayall advising that permission to continue was not a rubber stamp, or the evidence required to meet the test that had to be met. Mr O'Sullivan says: "Mr Mayall never advised that there was any risk of Mr Percy failing to get permission to proceed." Mr Mayall's evidence in cross examination on this point is as follows:

> "As to that, I cannot now remember whether I specifically advised as to that risk. I accept that there is nothing in the documents expressly indicating that I did advise that there was that risk. However, there are documents indicating that it is at least likely that I did give advice as to that risk"

32. I find that this is an honest response to events that took place many years ago where there is an absence of a record that any such advice was provided. Later in his evidence Mr Mayall agreed that he believed that the first part of the application to bring a derivative claim was "a formality". He was pressed as to whether he warned of the risks when it became known that the permission hearing would be contested. Mr Mayall provided almost the exact same response as I have set out above. As the point is before me, I find it more likely than not that Mr Mayall did not provide such advice. I reach that conclusion for three reasons. First, and most obviously, there is no record of the advice. The absence of a note of the advice is contextually powerful evidence as Mr O'Sullivan generally produced thorough attendance notes. Secondly, a note produced by Mr O'Sullivan in October 2010 refers to advice being sought as to "permission to continue". The attendance note does not record an assessment as to the outcome or any warning. Lastly, Mr O'Sullivan's evidence in cross-examination was: "At no point was either I or Mr. Percy advised that there was any real risk of a strike out or not being given permission to continue". There is no evidence of any instruction being given to Mr Mayall to advise LWL.

33. A witness statement drafted for Mr Percy in support of the derivative claim, was considered and amended by Mr Mayall after he received instructions on 4 October 2010 to draft the particulars of claim and advise as to what further action should be taken at that time.

34. GSC wrote on 6 October 2010:

> "You have adopted the practice of making speculative and uncorroborated bare assertions in the name of your clients which you have failed to support with any legal authority or proper documentation. This is encapsulated in the wholly ridiculous assertion that Seven is entitled to a sum in excess of £3 million from Mr Trevor. That assertion demonstrates a total failure to analyse the legal position…such conduct is unacceptable and certainly not in the best interests of Seven. It is clearly prejudicial to the interests of our clients and the company's creditors…we also put you on notice that some of the trade creditors are pressing for payment and threatening action. This could include the presentation of a petition for the winding up of Seven."

35. On 19 October 2010 Mr O'Sullivan wrote to Mr Mayall attaching a chronology stating that his investigations demonstrate £450,000 had been spent on building materials that had been delivered to various properties connected to Mr Trevor. It is not clear how this conclusion was reached. On 22 October 2010 Mr O'Sullivan and Mr Mayall spoke over the telephone. Mr Mayall suggested that a freezing order could be applied for if there was evidence that one of the properties owned by SHL had been sold. Mr O'Sullivan told Mr Mayall that the delay in constructing the Austin Avenue houses caused no "prejudice" to SHL. The particulars of claim were finalised and signed on 1 November 2010, after an e-mail was sent to Mr Mayall asking him to "beef up the complaint in regard to the delay". The claim form was drafted in wide terms not descending to detail: "The Claimant alleges various breaches of the First Defendants duties to the Second Defendant…"

36. On 2 November 2010, Mr O'Sullivan e-mailed Mr Mayall asking him for the prospects of success of obtaining a freezing order because of a "rumour" that Mr Trevor was seeking to sell Mavelstone Close, the home of Mr Trevor. The claim in respect of Mavelstone Close can be summarised as Mr Trevor using assets of SHL for his personal benefit without permission of the company's decision-making organ or shareholder approval. It is also said that Mr Trevor caused SHL to insure his home. Mr Mayall provided advice assessing the prospects of between 50% - 75% but warned that "the main risk to you is the cross undertaking in damages."

37. The hearing for a freezing order took place on 12 November 2010 and came before Vos J (as he was then). Mr O'Sullivan produced an attendance note of the hearing running to 65 paragraphs. The note records Vos J as saying that he would feel more comfortable if Mr Trevor was put on notice of the hearing and given an opportunity to attend. He thought that it made more sense if the same Judge heard the freezing order as well as the permission to continue application: "the tests are somewhat similar…[for a] freezing injunction the Applicant has to show he has a good arguable

case, whereas in regard to the application to continue the Claimant has to show a prima facie case." It follows that if Mr O'Sullivan and/or Mr Mayall did not know before the hearing, they were aware after, that the claims made in the action would be subjected to this test or a similar test. Vos J is recorded as saying that it "would be difficult for him to form a view on each and every element of the claim" at the hearing of the freezing order. It was not a giant step to assume that "each and every element of the claim" would be subjected to analysis at the permission hearing.

38. In any event the freezing order was adjourned to a separate hearing listed on 17 November 2010 when it came before Henderson J (as he was then). An attendance note produced by Mr O'Sullivan records the submissions made by counsel acting for Mr Trevor. They included an explanation in respect of the sale of Mavelstone Close and exposing the weaknesses of the claims made against Mr Trevor. Counsel submitted that a derivative claim was not appropriate in the circumstances, and that a winding up order should be made. Indeed, Mr Trevor was about to take steps to wind up SHL when Mr Percy commenced the derivative claim. Mr Mayall cannot recall the submissions, but as he accepts as accurate the attendance notes of Mr O'Sullivan I find that the submissions alerted MW and Mr Mayall to the potential difficulties that lay ahead.

39. As it happened the parties agreed the issue regarding potential dissipation of assets and the matter was adjourned to enable mediation. Despite the two hearings, knowing that Mr Trevor would urge the court to adopt a different course at the permission hearing, there is little to suggest that there was a pause to take stock of the situation. The issue of whether SHL should be wound up did not recede. On 25 November 2010 Mr O'Sullivan wrote to Mr Mayall at his chambers: "Mr Trevor's solicitors have made a big issue of the fact that we have admitted that it was a quasi partnership. Can you advise what, if anything, turns on the point." In the same letter he asked Mr Mayall to "do a brief note in regard to each of our alleged breaches and heads of claim. For each I would appreciate if you could indicate our overall prospects of success and indicate the type of remedies available to the court".

40. An attendance note produced by Mr O'Sullivan records a telephone call with Mr Percy after he had received the position statement from Mr Trevor on 16 December 2010. Mr O'Sullivan's note states that he thought the position statement was taking an "extreme position" and that Mr Percy did not want Mr O'Sullivan to be "too aggressive" during the mediation. A settlement figure of £800,000 plus costs was considered acceptable. At this point in time Mr Mayall had not given advice on a settlement figure and had not been asked to do so.

41. The note of merits was produced by Mr Mayall in accordance with his instructions of 25 November 2010 and forwarded on 17 December. The note records Mr Mayall as assessing the prospects of success in respect of the Mavelstone Close allegation as "good" but "subject to arguments that this has already been accounted for in the directors loan accounts". However, "it is extremely likely that further amounts remain unaccounted for." He does not give his reasons for this last assessment. He advises that the prospects of recovering in respect of (i) the insurance and (ii) vehicles were good. His assessment of the prospects of recovering in relation to an overpayment made for Sundridge, based on a conspiracy to cheat SHL was expressed as "no real prospect of recovering the sum claimed." A claim that Mr Trevor received a bribe was

not quantified in terms of success, but Mr Mayall noted that there was "no real evidence that he received any sweetener". He also identified difficulties in respect of a claim for loss arising from a delay in purchasing Austin Avenue but that a delay in sale "I have always thought would be extremely difficult to prove." He advised that some of the lesser claims, such as a transfer of £10,000, had not been answered by Mr Trevor and as such he did not know if there was a credible explanation. Lastly, he advised that SHL was a "classic quasi partnership". The significance of that characterisation, he thought, was evidential in that it may make it "more likely that the parties would have agreed a modus operandi of allowing each other to use the company's resources subject to a chargeback type arrangement via the loan accounts."

42. The mediation took place on 21 December 2010. Mr Mayall did not attend but was asked to assist in preparation. Late in the afternoon of 21 December Mr Trevor made a "final" offer of £500,000 including costs. The offer was rejected. Mr O'Sullivan provides several reasons for the failure to settle including Mr Percy's distrust of Mr Trevor.

43. The day after mediation Mr O'Sullivan sent to counsel a "full mediation bundle and a copy note from the mediation". Mr Mayall advised in conference on 5 January 2011 in accordance with his instructions which included the provision of advice about the offer made at mediation. Mr Mayall advised that just and equitable winding up was rarely ordered, that it was a "nuclear" option, and the most likely outcome was that Mr Trevor would be ordered to buy out Mr Percy's shares. Mr Mayall says that Mr Percy was resolute to press forward with the claim." Mr O'Sullivan says that Mr Percy may not have been so bullish if he understood the nature of the argument which was likely to be made against him and the threshold test that he had to pass in order to proceed with the claim. Mr Mayall did advise that a settlement figure between £400,000 and £750,000 excluding costs would be worth considering. There followed further conversations, a draft part 36 offer was made at £950,000 (despite Mr Mayall not valuing the claim as high), advice on strategy given and directions drafted by Mr Mayall for the court to consider at the outcome of the permission application.

44. The matter came before Mrs Justice Proudman. She declined to deal with the permission application on paper and ordered a one-day hearing. Mr O'Sullivan says "based on Mr Mayall's clear advice I understood that obtaining permission to continue was a formality". Mr Mayall accepts he gave "clear and robust" advice. Mr Mayall finalised draft particulars of claim in April 2011. In early May, Mr O'Sullivan received a witness statement from GSC arguing that "the appointment of a liquidator was more likely to result in a resolution of the dispute." The hearing before Mr Donaldson QC sitting as a Deputy Judge of the High Court proceeded on 25 May 2011. The Deputy Judge asked for written submissions to follow the hearing on the question of just and equitable winding up. Mr Mayall produced a detailed skeleton argument.

Burden of proof -permission application for the Derivative Claim

45. It was submitted that the burden of proof lay with Mr Trevor at the permission hearing. No authority was cited for that proposition. That submission must fail. The procedural filter scheme contained in CPR 19.9 and ss 260-263 of the Companies Act 2006 places the burden on the claimant to obtain permission to proceed. The filter is a

direct reflection of an established principle of company law, namely that a cause of action against a director for wrongdoing in relation to a company is vested in the company and not its members. A derivative action is an exception to the rule that only the company may take the action. It is to address circumstances when the company cannot or will not bring an action against the alleged wrongdoer. The court may allow a member of the company to pursue that action for the benefit of the company and thus, indirectly, all its shareholders. This principle was well known by the time of the claim in this matter. Although not cited to the court it is useful, to support what I have said, to refer to a case that has been approved by the Supreme Court in *Marex Financial Ltd v Sevilleja (All Party Parliamentary Group on Fair Business Banking intervening)* [2020] 3 WLR 255. *Sevelleja* concerned the boundaries of the reflective loss principle and that in turn required consideration of *Prudential Assurance Company Limited v. Newman Industries Limited (No. 2)* [1982] 1 Ch 204. The passage I cite from *Prudential Assurance* is at page 210 D-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."

46. In my judgment it follows that the burden lay with Mr Percy to establish a "prima facie" case to bring the action. That involved demonstrating to the satisfaction of the court at least that the claims against Mr Trevor as director were sustainable and the sums at stake were worthwhile.

The Derivative Claim -Judgment

47. The judgment delivered on 30 June 2011 by Mr Donaldson QC in respect of the application to continue the derivative claim was cited by both counsel in this matter to support their positions. I shall refer to this as the "Permission Judgment". It carries neutral citation [2011] EWHC 1893 (Ch). I set out here some observations in respect of the judgment. It is an essential part of the background to this case. I start with the Judge setting the scene (paragraph 3):

> "For a variety of reasons the relationship between Mr Trevor and Mr Percy began to break down in the course of 2009 and has degenerated to a point where all trust and confidence between the two men has disappeared with important consequences given the deadlock structure of the company. It has also infected the communications between their respective accountants and lawyers One important consequence has been that both the company and the two men have been prosecuted and fined as the result of their inability to agree and file the statutory company accounts for the year ended February 2009, and remain vulnerable to further prosecution. In the meantime

> the deadline for filing the accounts for the following year has also passed, raising the prospect of prosecution for that year as well. The correspondence between the parties and their representatives and the content of the present litigation give no ground for hope that this position will change; quite the contrary"…The present action, commenced on 1 November 2010, augmented in draft Amended Particulars of Claim ("APC"), that makes a large number of allegations against Mr Trevor, which Mr Percy seeks - by the claimant - to advance as derivative claims on behalf of [SHL]. For this purpose, he requires and applies for the permission of the court under section 260 ff of the Companies Act, 2006 to continue the action (and also seeks an order under CPR 19.9E that the company should indemnify him against any liability for costs). Section 261 provides that an application for such permission shall only be allowed to proceed if it appears to the court that the application and the evidence filed in support of it disclose a prima facie case for granting the permission, at which point only the court may give directions for service of the application and claim form on [SHL]."

48. Mr Trevor had argued that a derivative claim was inappropriate and that SHL should be wound up. The Deputy Judge observed that SHL was deadlocked, was not a party to the permission application, and it had "run its course, subject only to sale of the two completed units at Austin Avenue". He observed (paragraph 15):

> "I can see no prospect of the parties agreeing statutory accounts, putting [SHL] once more into breach of the criminal law and exposing it and the two men to further prosecution and fines. It is in short a natural candidate to be wound up on a just-and-equitable petition by either shareholder."

49. Taking account of those circumstances and in accordance with the guidance offered in *Franbar Holdings Ltd v Patel* [2009] 1 BCLC 1 the Deputy Judge addressed the need for the court to be satisfied that no director complying with section 172 of the Companies Act 2006 would seek to continue the claim: "a potential winding-up of [SHL], though not a cause of action or perhaps even a remedy, can be a significant factor both as regards the importance that a hypothetical director would attach to the prosecution of a claim and the overall decision of the court whether to grant permission for the claim to be brought by the applicant as a derivative claim."

50. The argument advanced against a just and equitable winding up may be summarised as follows: the court cannot make such an order if Mr Trevor was without clean hands. The argument failed. It failed on the facts as there was no evidence that the break-down in mutual trust and confidence was due to the alleged misconduct of Mr Trevor. Further, the break-down of relations predated the allegations supporting the derivative claim. The decision is consistent with high authority: *Vuljnovich v Vuljnovich* (1989) 5 BCC 740.

51. In any event the allegations made against Mr Trevor were unlikely to preclude MEL from advancing a petition to wind up SHL on just and equitable grounds, where the management was deadlocked and the special purpose nature of SHL had reached its natural end. The court was undoubtedly approaching the permission application correctly by taking account of alternative remedies.

52. Nevertheless, the Deputy Judge did not dismiss the application to continue on the single ground that there was an alternative remedy. He divided the claims pleaded into two groups. In relation to the first group, he found that the matters pleaded did not reach the threshold test provided by section 263(3) of the Companies Act 2006. The Deputy Judge found that no director acting in accordance with his statutory duties under section 172 of the Companies Act 2006 would seek to prosecute the claim. Two examples suffice. First, in respect of a claim concerning a delay in exchanging contracts for the purchase of Austin Avenue, the Judge found a serious temporal problem and that the claim failed because it could not be made against Mr Trevor in his capacity as director. Secondly, the pleaded case exposed difficulties in the case against Mr Trevor by failing to particularise certain matters. As regards the second group, "though presented as a single claim…[it] is more accurately a very large number of individual claims, totalling £461,465.85, for alleged misappropriation of materials and labour, mainly the former…". The Deputy Judge explained that the core of the allegation was "unallocated amounts", and that Mr Percy was taking an "extreme" position. Many of the claims were for small sums which would fail the threshold test, but in respect of the larger payments totalling in excess £300,000 the Deputy Judge found that "the only question is whether they [the payments] were made for the purposes of [SHL]…no director would therefore cause [SHL] to bring a positive action in respect of these payments." The Deputy Judge was saying that it would not be in the best interests of SHL to permit a claim that merely amounted to an accounting exercise to be made. Mr Trevor had openly accepted that he had used SHL's resources: the only question was, to what extent. As SHL owed Mr Trevor a large sum, such accounting exercise would have to take account of the loan account. Mr Donaldson concluded (paragraph 60):

> "had I reached a different conclusion I would have decided that in any event these disputes would be better resolved in the context of a winding-up…"

53. Mr O'Sullivan says that the outcome was "a complete shock to me and to Mr Percy."

Permission to appeal application

54. Mr Mayall was instructed to seek permission to appeal. The application was dismissed by the Deputy Judge on the ground that it did not have a real prospect of success. After the handing down of the Judgment Mr Mayall advised Mr O'Sullivan that even if permission to appeal had been given the prospects of success were no greater than 25%. In his witness statement Mr Mayall states "I am resolute in my view that an application for a derivative action was the correct application to be made in the circumstances of this case" and that "I disagree with the Judge's determination."

The Negligence Claim

55. Mr Percy, in his particulars of claim averred that there was no shareholder agreement. The assertion was not admitted by Mr Mayall. In any shareholder dispute competent solicitors and counsel are likely to make such an inquiry at the outset. The particulars state that the source of the dispute between Mr Percy and Mr Trevor was that "each man was using company funds and materials on a project of his own", and that Mr Percy was of the view that Mr Trevor was not accounting for the materials and labour at Mavelstone Close.

56. Having referred to the retainer with MW, it was averred that it was:

> "an implied term of [MW]'s retainer by the Claimant the First Defendant would, in the performance of its retainer, exercise the skill and care reasonably to be expected of a competent litigation solicitor with expertise in commercial law including company law disputes."

57. The particulars in support of the implied term that a duty was owed to Mr Percy were as follows:

> "the Defendants acknowledged that the fact that [LWL] was nominally the shareholder in [SHL] was a technicality affecting only the name in which the claim was properly to be brought, and not the substance of the claim: which was a claim brought by [Mr Percy];
>
> The Defendants at all material times knew that [LWL] was a "one man" company which functioned entirely as a vehicle to promote the interests of the Claimant, and whose shares were wholly owned by the Claimant;
>
> The Defendants at all material times knew that if and to the extent that [LWL] suffered loss and damage, the Claimant (and no other person) would suffer loss and damage in the same manner and to the same extent;
>
> Generally [LWL] was the alter ego of the Claimant;
>
> In the premises the Defendants were retained by the Claimant and the Defendants owed duties of care in tort to the Claimant."

58. Specifically, in respect of Mr Mayall:

> "…[he] was from time to time instructed and/or briefed by [MW] to advise, draft and appear on behalf of [Mr Percy] (through [LWL]) in the dispute and proceedings.
>
> [he] owed the Claimant a duty of care in tort, to perform the tasks which he was instructed to carry out with skill and are to be expected of a senior junior barrister experienced in commercial law including company law disputes.

> [he] advised in conference on 7 July 2010…that the likely "basic" claim of the Claimant was £297,000…[he] failed to advise that [SHL] should be wound up on a just and equitable basis and/or that taking other proceedings was inadvisable and/or that there was no proper evidential basis of misconduct which the Claimant sought to make against [Mr Trevor]…"

59. At this stage the particulars of claim turn to the proceedings settled by Mr Mayall. It was averred that these proceedings were "seriously flawed" for the following reasons:

> "[They] ought never to have been commenced; instead [Mr Percy] ought to have been advised that [SHL] be wound up and his claims determined by the liquidator".

60. In respect of the mediation on 21 December 2010 it was claimed that Mr O'Sullivan failed to advise Mr Percy to accept a good offer. During the conference on 5 January 2011 it is averred that Mr Mayall was negligent by reason of his advice that it was "very rare" for the court to wind up a company on just and equitable grounds and that he failed in his duty of care to advise that:

> "the sum offered [of £500,000 at mediation] was within the bracket that he deemed to be sufficient sum in compensation for the losses incurred by [Mr Percy]".

61. The case against Mr Mayall was put in the alternative, namely that he ought to have reconsidered the strength of Mr Percy's case and ought to have identified and advised about the serious weaknesses in the case (failure to warn). The failure to obtain permission to proceed with the derivative claim was said to have been predictable. The costs of the proceedings which Mr Percy faced (he had been joined to the proceedings for the purpose of costs only) was £221,000 plus costs. The exposure to the adverse costs order against LWL reduced Mr Percy's ability to settle the claims made against Mr Trevor: he accepted a sum of £65,000 in full and final settlement. The particulars of negligence pleaded against Mr Mayall are similar to the particulars of negligence pleaded against MW:

i) Failing to appreciate and/or advise the Claimant that proceedings by way of a derivative action was misconceived;

ii) Advising that it was very rare for a company to be wound up on the just and equitable basis and/or failing to perceive or advise that this was the obvious solution to the position as regards [SHL];

iii) Failing to have any or any proper regard to the comments of Henderson J and/or Mr Kallipetis QC [the mediator] to the effect that [SHL] was a natural candidate for winding up on just and equitable basis;

iv) Failing to advise the Claimant robustly and clearly [about the matters above]…and/or the fact that the antipathy between [Mr Percy] and [Mr Trevor] meant that the Claimant was likely to wish to issue and prosecute proceedings against [Mr Trevor] which would be protracted, costly and stand little prospect of success;

v) Advising [Mr Percy] that there was sufficient evidence of unfair prejudice and misappropriation of funds and/or that there was strong evidence of wrongdoing on the part of [Mr Trevor], when such was not the case;

vi) Drafting proceedings when the same contained the obvious flaws and defects …;

vii) Failing to advise on 5 January 2011 that the offer of £500,000 was an attractive settlement offer and should be accepted given the defects in the proceedings, the risk that they would not be permitted to proceed, the litigation risks generally and the fact that £500,000 represented an excellent commercial settlement;

viii) Failing to review his advice and conclusions following the issuing of the proceedings and/or the failure of the mediation;

ix) Failing to give the advice [that it would be prudent in the circumstances to settle for £500,000]; and

x) Failing to correct and/or qualify the erroneous advice given by [MW].

62. MW admitted in its defence that it owed Mr Percy a direct duty of care. Mr Mayall did likewise. Those admissions are consistent with the initial contact with Mr Percy, the letter of engagement and the instructions to Mr Mayall for the conference 30 June 2010 where he was asked to how best to proceed so as to protect Mr Percy's interests. The defence of Mr Mayall admitted:

> "Throughout the period during which [Mr Mayall] was acting for [LWL], he knew that [Mr Percy] wholly owned and controlled [LWL]. Further he knew that, to the extent that [LWL] suffered loss, [Mr Percy] was liable to suffer loss reflective of [LWL's], in the form of diminution of the value of his rights as shareholder of [LWL], provided at any rate that the loss and damage suffered by [LWL] left it solvent."

63. By his defence Mr Mayall admits that one claim made was groundless and other claims were weak. The defence denies that the weak claims ought not to have been included as Mr Percy "was adamant that an aggressive strategy be adopted that involved the inclusion in the proceedings of claims, notwithstanding their weakness.".

64. Turning to the conference on 5 January 2011 Mr Mayall admitted that he was informed of the £500,000 offer and that he agreed with Mr Percy and Mr O'Sullivan that a reasonable settlement offer would be in the range of £400,000 to £750,000 plus costs. Mr Mayall was not able to guess whether the costs at that time meant that an offer had been made within a "reasonable" range. He did not ask Mr O'Sullivan what the costs were as at 5 January 2011. The advice given was to "press on with proceedings with a view to obtaining disclosure." Although the defence of Mr Mayall admitted that he did not advise that the derivative claim was misconceived or that the pleaded case included allegations which ought not to have been advanced, it denies

the particulars were misconceived and or that "any particular allegation contained in the proceedings that were not properly arguable substantially affected the merit of pursuing" the derivative claim. It was averred that the cost implications of the failed claim, for Mr Percy, were not real, as LWL was ordered to pay the costs. That does not take account of Mr Percy's own costs or that Mr Percy was known to have been funding the action. It was admitted that the effect of Mr Percy's potential exposure of costs was likely to act to reduce any later settlement with Mr Trevor.

65. As well as denying that the action was wrong, that the weakness of any particular allegation pleaded did not affect the outcome, that to fail to advise that the offer made at mediation should be accepted or warn Mr Percy that a derivative claim which included weak allegations may not succeed at the permission hearing, bringing the proceedings to an end, the defence states:

> "[I]t is denied that [Mr Percy] is entitled to recover any loss of [Mr Percy's] which is reflective of loss suffered by [LWL] in respect of [LWL's] rights or interests. If (which is denied) [Mr Mayall] were liable to [Mr Percy] in respect of the realisation of the value of [LWL's] rights and interests, he would likewise be liable to [LWL], and any loss suffered by [Mr Percy] in that regard would simply be reflective of [LWL's] loss, and irrecoverable as such."

66. Lastly a causation argument was raised in respect of a failure to advise that the mediation offer should be accepted.

67. On 18 May 2017 Mr Percy agreed to a dismissal of his claim against Mr Mayall. The particulars of claim required amending to take account of the dismissal. The amended particulars against MW only maintained certain allegations such as: "Mr Mayall's advice as to the form of the Proceedings and/or the allegations to be made therein was wrong"; that the advice given by [Mr Mayall] was: "glaringly wrong" that there were: "obvious flaws in the proceedings as drafted by Mr Mayall". This put MW in an unenviable position.

68. The Negligence Claim as between Mr Percy and MW later settled by way of a Tomlin order dated 7 January 2019.

The contribution claim

69. On 8 September 2017 MW issued an application seeking permission to file a notice of contribution against Mr Mayall for an indemnity or contribution in respect of the main proceedings. Permission was given by consent. I do not repeat the pleadings in respect of the contribution claim. To do so would be to make this judgment unnecessarily long. I mention a few features. First the contribution notice relies on the amended particulars of claim served in the Negligence Claim. Secondly, that the settlement made on 7 January 2019 was made bona fide. Thirdly that Mr Mayall is liable for the same damage in relation to which MW settled. The defence to the contribution claim avers that Mr Mayall did advise that winding up may be an option for the court at the permission hearing; the loss was not caused by Mr Mayall; and denies that Mr Mayall is liable for any damage.

70. In relation to the last point Mr Lawrence argues that Mr Mayall is not liable in respect of the "same damage" as that which underlay MW's liability to Mr Percy. Further, MW was not liable, even if the factual basis of the claim pleaded by Mr Percy could be made out. This argument rests on the no reflective loss proposition. It is said that as Mr Percy acted "through" LWL, it follows as a matter of law, that Mr Percy had no claim in respect of the pleaded loss in the Negligence Claim. The relevant loss was sustained by LWL. Mr Bankes-Jones submits that MW relied on the specialist advice of Mr Mayall. It follows that liability for the dismissal of the permission application must rest with Mr Mayall. Lastly he makes reference to the provisions in the Civil Liability (Contribution) Act 1978 (the "1978 Act") which Mr Lawrence described as not entirely straightforward. I turn to them now.

71. By section 1 of the 1978 Act:

> "(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.
>
> (3) A person shall be liable to make contribution by virtue of subsection (1) notwithstanding . . . that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.
>
> (4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.
>
> (5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that

> judgment in favour of the person from whom the contribution is sought."

72. The 1978 Act has been the focus of many judicial decisions with section 1 receiving close recent analysis in *WH Newson Holding Limited v IMI Plc & Delta Limited* [2016] EWCA Civ 773; [2017] Ch 27.

73. In *Newson*, the claimants brought a follow-on claim for damages against defendants ("IMI") who had been found by the Commission to have participated in a price fixing cartel for copper fittings. IMI raised a limitation defence, to which the claimants pleaded a reply relying on the postponement of the limitation period in a case of 'fraudulent concealment' under section 32(1)(b) of the Limitation Act 1980 ("LA 1980"). IMI also served a Part 20 claim seeking contribution from Delta Ltd ("Delta"), who were also addressees of the Commission's decision although not sued by the claimants. By its defence to the Part 20 claim, Delta denied that either it or IMI had caused any loss to the claimants, and also pleaded a limitation defence, asserting that the claimants could not satisfy the conditions of section 32 LA 1980.

74. The claimants then reached a settlement with IMI. The question arose whether in IMI's claim for contribution (now, towards the sum it had paid in settlement), Delta could maintain its limitation defence; i.e. whether under section 1(4) of the 1978 Act Delta was precluded from advancing that defence. Delta accepted that section 1(3) meant that it could not argue that a claim by the claimants against Delta would have been time-barred. Expiry of the limitation period would not have extinguished the claimants' right of action against Delta; it would only have barred their remedy. However, Delta submitted that it could argue that the claim by the claimants against IMI was time-barred so that IMI would never have been liable to the claimants.

75. In a judgment delivered by Sir Colin Rimer (with which Gross and Hamblen LJJ agreed), the Court of Appeal considered prior first instance judgments on section 1(4), including in particular the decision of Chadwick J in *Arab Monetary Fund v Hashim (No 8)* The Times, 17 June 1993, and the background to the provision in the Law Commission's 1977 Report on Contribution. Using the shorthand C, D1 and D2 to refer to the parties to the main proceedings and the contribution proceedings, Sir Colin Rimer addressed the construction of section1(4) as follows:

> "51. On its ordinary wording ('made … or agreed to make'), section 1(2) applies also to the case in which D1 has made a bona fide settlement or compromise of C's claim before he brings his contribution claim against D2. If, therefore, section 1 had stopped at section 1(3), in a case such as the present D1 would be faced in contribution proceedings against D2 with the burden of proving his own liability to C at the time of the payment or the agreement to make it. Section 1(4), however, deals expressly with the case of a bona fide settlement or compromise and is plainly directed at qualifying the provisions of sections 1(1) and 1(2) in relation to any contribution claim by D1 that follows the making of such a settlement.

52. Section 1(4) must also be read as a whole and its major part (down to the proviso) makes it clear that, subject to the proviso, a contribution claim by D1 against D2 made in the wake of D1's bona fide settlement or compromise of C's claim neither requires nor permits any investigation into whether or not D1 'is or ever was liable in respect of the damage …', that is whether or not he was actually liable. That is an express negation of the probative burden that, had they stood alone, section 1(1) and (2) would have imposed on D1. It is obvious that the policy underlying section 1(4) in that respect is that explained in the Law Commission report, which expressed the concern that, following a bona fide settlement between C and D1, D1 ought not in any contribution proceedings against D2 to have to prove its own liability to C. It wanted the law to be so reformed that, provided that D1's settlement with C was bona fide, D1 could recover contribution from D2, whether or not he, D1, was so liable. One driver behind that recommendation was that otherwise, as explained in paragraph 44 of the report, it would mean 'turning all the usual conventions of civil litigation upside down' – that is, it would have required D1 to prove C's case against himself. Another was that otherwise D1 might feel obliged to fight C's case to judgment in order to protect his contribution rights. Whereas the ordinary sense of section 1(1) is that, in contribution proceedings, D1 must prove his own liability to C, and section 1(2) clarifies the time at which he must do so, section 1(4) qualifies both requirements.

53. The qualification is not, however, absolute because it is subject to the proviso....

56. The premise of a contribution claim by D1 based on section 1(4) is that there has been a bona fide settlement or compromise of C's claim against D1. It will no doubt be open to D2 to argue in any contribution proceedings that the settlement or compromise was not a bona fide one, for example that it was a collusive, corrupt or dishonest one (see the Law Commission report, paragraph 56), and if such a case is made good the provisions of section 1(4) will not avail D1. In this case, however, there is no suggestion that D1's settlement with C was other than bona fide and so section 1(4) is in play.

57. If I may be forgiven for stating the trite, legal proceedings can range from the relatively simple to the very complicated. In some cases, C's claim may be based on straightforward facts and D1's Defence may do no more than deny them. In others, D1's Defence may question whether, even if proved, C's factual case would entitle C to relief; it may also deny the facts or material parts of them; it may raise a limitation or other collateral defence; and the outcome on the pleadings may be

that the burden of proof on matters raised by the Defence will rest on D1 or that a burden of disproof will shift to C.

58. Whether, however, the case is simple or complicated, in arriving at a bona fide settlement C and D1 will respectively have assessed the relative strength or weakness of their respective cases in the litigation and have brought into account the commercial considerations bearing upon it. If the settlement involves a payment by D1 to C, then a claim by D1 for contribution to it by D2 will be one to which section 1(4) applies. The central feature of section 1(4), expressly spelt out in its main part down to the proviso, is that in any such claim there will be no question, and therefore no inquiry, as to whether or not D1 was in fact liable to C. In so providing, section 1(4) gave clear effect to the Law Commission's recommendation.

59. The proviso of course shows that D1 must still prove at least something in order to succeed against D2. That is that 'he would have been liable [to C] assuming that the factual basis of the claim against him could be established.' In my judgment the sense of that is that all that D1 needs to show is that such factual basis would have disclosed a reasonable cause of action against D1 such as to make him liable in law to C in respect of the damage. If he can do that, he will be entitled to succeed against D2. There may of course remain issues as to quantum, as to which section 1(4) makes no assumptions.

60. Chadwick J's view expressed in *Hashim* was that there was more to the proviso than that since its stated assumption as to the establishment of factual matters did not extend to an assumption in favour of C of any factual matters forming the basis of a collateral defence raised by D1 in respect of which the burden of proof was on D1. His view was, therefore, that the proviso permitted an investigation by D2 of whether any such collateral defence might have succeeded; and, if it would have done, D1 would not have been liable to C.

61. In my respectful view, that construction of the proviso is one that section 1(4) does not permit. It has provided expressly that there is to be no inquiry as to whether D1 was or was not actually liable to C and the proviso cannot therefore fairly be read as impliedly qualifying that prohibition so as to let in an inquiry directed at showing that D1 was not actually liable. Such an interpretation is repugnant to the express intention of the primary provision of section 1(4). In my judgment, the only permissible interpretation of the proviso, read in the context of section 1(4) as a whole, is that the limit of the inquiry it permits is as I have summarised it in [59] above."

76. It is clear, in my judgment that subject to the proviso MW does not have to prove Mr Percy's case against itself. MW is entitled to a contribution from Mr Mayall whether MW was, in fact, liable. The court need not test the facts that Mr Percy asserted to support his claim against MW and led to the compromise. The task of the court is to determine if the claim made by Mr Percy disclosed a reasonable cause of action against MW such as to make MW liable in law.

77. In my judgment, when asking whether MW "would have been liable assuming that the factual basis of the claim against [it] could be established?", I answer in the affirmative. The Negligence Claim brought by Mr Percy disclosed a reasonable cause of action against MW based on a failure to exercise skill and care. That conclusion can be tested by asking what arguments are put before the court to demonstrate that there was no reasonable cause of action. The attack on the claim made by Mr Percy takes two forms. First, as a matter of law Mr Percy had no claim in respect of the pleaded loss. As a matter of law, the relevant loss was sustained by LWL. Secondly, Mr Mayall was not liable in respect of the "same damage" as that which underlay MW's supposed liability to Mr Percy. The two are connected.

78. In my judgment it is not open to Mr Mayall to argue the no reflective loss argument, attractive though the argument may be. I remind myself that in the *Newson* case, Delta's argument was that it was open to it to plead, by way of a defence to the contribution proceedings, that when IMI made an agreed payment to the claimant, the claim was barred by limitation. A legal argument that would, if successful, have been an answer to liability. The Court of Appeal emphatically protested against the admission of such an argument as it would permit an investigation into whether or not the defendant 'is or ever was liable in respect of the damage…that is whether or not he was actually liable". To admit an argument of reflective loss to undermine MW's liability and claim that the compromise was not in respect of the "same damage", is to adopt the discredited approach taken by Chadwick J in *Arab Monetary Fund v Hashim*.

79. The Court of Appeal characterised such an approach as "allowing the tail of section 1(4) to wag the dog". The approach was wrong because it focused too much on "the trees in the [section 1(4)] proviso without standing back and noting the nature of the wood in which they had been planted". There is no distinction in this matter, at least no discernible distinction has been brought to my attention. Section 1(4) of the 1978 Act does not permit an inquiry into whether MW was "actually liable". All the court need do is consider the Negligence Claim and decide on the assumed facts whether there was a reasonable cause of action.

80. Sir Colin Rimer was careful not to define the term "collateral defence" recognising that it may take more than one form. It could, for instance, take the form of a defence based on causation or the no reflective loss principle. There is no need to carry out a search within the pleadings for a "collateral defence". That leads to a rejection of the submission that the Court of Appeal was confining the analysis to the statutory defence of limitation on the basis that it provides a bar to recovery but does not negate liability.

81. As Mr Mayall is unable to avail himself of a "collateral defence" because no factual assumptions may be made in respect of them, I conclude for the reasons given, and

based on the permitted assumed facts, the breach of a duty of care pleaded in the Negligence Claim resulting in loss and damage gives rise to a reasonable cause of action between Mr Percy and MW. It follows, without more, that MW is entitled to a contribution from Mr Mayall: see *Newson* paragraphs 59-61.

82. If I am wrong about the availability of "collateral defences", and Mr Mayall is permitted to challenge whether MW was "actually liable" on the basis that the no reflective loss principle would have barred recovery, I find that the defence would not have prevailed. For the same reasons I find that the defence of no reflective loss would not have succeeded against Mr Percy. As this is a secondary reason for rejecting the defence to the contribution notice I shall endeavour to give my reasons succinctly. This requires a consideration of the Supreme Court judgment in *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255.

83. I observe that at the time of the compromise between MW and Mr Percy *Sevilleja* had not been determined. Nevertheless, the no reflective loss principle has a long tail. It is right to say that the principle stems from the rule in *Foss v Harbottle* (1843) 2 Hare 461. As Lord Reed explained in *Sevilleja* [10] it is "a rule which (put shortly) states that the only person who can seek relief for an injury done to a company, where the company has a cause of action, is the company itself." By reference to *Prudential* Lord Reed observed [31]:

"a share is a right of participation in the company on the terms of the articles of association. The articles normally confer on a shareholder a number of rights, including a right to vote on resolutions at general meetings, a right to participate in the distributions which the company makes out of its profits, and a right to share in its surplus assets in the event of its winding up."

84. This observation led to reasoning that as a shareholder has no legal or equitable interest in the company's assets, he may not bring a claim where the company has suffered a loss by the wrongdoing of another. The cause of action vests in the company. The no reflective loss principle safeguards the company's control over its own cause of action and prevents "the rule in *Foss v Harbottle* from being circumvented. In summary Lord Reed said [89]:

> "The rule in *Prudential* is limited to claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions they receive as shareholders, has been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way."

85. The reference to the "ordinary way" meant that the no reflective loss principle did not apply. One example of the "ordinary way" is given at paragraph 79 of Lord Reed's judgment: a claim made by a person who is a shareholder and a creditor is not barred as reflective loss.

86. Before leaving *Sevilleja* the reasoning of Lord Hodge [108] provides a valuable insight into the principle:

> "…the law's refusal to recognise the diminution in value of a shareholding or the reduction or loss of a distribution, which is the consequence of the company suffering loss as a result of wrongdoing against it, as being separate and distinct from the company's loss is a principled development of company law. It excludes the possibility of double recovery. It avoids a scramble between shareholders to establish their private claims against a wrongdoer in case the wrongdoer does not have sufficient accessible assets to meet those claims. It thereby upholds the default position of equality among shareholders in their participation in the company's enterprise: each shareholder's investment "follows the fortunes of the company". It maintains the rights of the majority of the shareholders, as the Court of Appeal stated in *Prudential* [1982] Ch 204, 224. And it preserves the interests of the company's creditors by maintaining the priority of their claims over those of the shareholders in the event of a winding up."

87. Mr Lawrence submits that this is a paradigm case in which Mr Percy was infringing the no reflective loss principle when he sought damages from his lawyers in respect of their alleged mishandling of a claim brought by, and solely by, LWL.

88. I am informed by counsel that Mr Percy was a creditor-shareholder of LWL. Pursuant to the Agreement LWL paid £250,000 into an account held by SHL. The payment was not a gift. It was a loan made for a specific purpose. The money paid by LWL was acquired by way of a loan from Mr Percy. No company accounts are produced.

89. If it is correct that Mr Percy was a creditor-shareholder, and it has not been argued otherwise, the no reflective loss principle does not apply. The case is to be run in the "ordinary way". The argument must fail.

90. There is another reason why it must fail. As shareholder of SHL, LWL could not make a claim for loss of value to its shares. The loss to SHL could be recovered and conducted only by the company. This is the very reason why Mr Mayall advised that a derivative claim was appropriate. The exposure of LWL to adverse costs in the derivative claim is not the same as Mr Percy's loss or damage arising out of the engagement of MW or Mr Mayall to "protect his interests". His financial interests, whether direct or indirect, were wrapped up in the fortunes of SHL.

91. To elaborate MW and Mr Mayall acted for Mr Percy, owed Mr Percy a duty of care to act with reasonable skill and care, acknowledged that his interests in the joint venture were bound up with LWL and that any damage to LWL would damage Mr Percy.

92. It follows that Mr Percy, on the assumed facts, had a reasonable cause of action against MW for at least the following reasons:

    i) the engagement letter was between MW and Mr Percy;

    ii) the letter of engagement expressly contemplated proceedings being issued on Mr Percy's "behalf";

iii) the terms and conditions of MW's engagement were signed by Mr Percy not LWL;

iv) the defence of MW to Mr Percy's claim admitted that the firm was retained to advise and act for Mr Percy (through LWL) in relation to the dispute that had arisen. This acknowledged that Mr Percy was the client of MW but that his interests were bound up in LWL;

v) similarly it was admitted by MW that they owed a duty of care in contract and tort to Mr Percy;

vi) MW admitted that the substance of the claim was between Mr Percy and Mr Trevor;

vii) all correspondence in connection with the claim, all invoices sent and all telephone calls and meetings were with Mr Percy;

viii) MW was concerned with protecting Mr Percy's interests;

ix) GSC asserted in early correspondence that the joint venture was "designed and set up by agreement as a quasi partnership in which [Mr Percy] and Mr Trevor were to have equal voting rights and equal entitlement…"

x) all parties (Mr Trevor, Mr Percy, MW and Mr Mayall) acted on the assumption that the relationship was in nature a quasi partnership;

xi) the corollary of such an analysis was two-fold. First, to recognise that Mr Percy and Mr Trevor were in substance partners and secondly, that although the structure used was corporate, behind it were individuals with rights, expectations and obligations inter se which were not necessarily submerged in the corporate structure: *Ebrahami v Westbourne Galleries Ltd* [1973] AC 360, 379b;

xii) MW and Mr Mayall knew that Mr Percy wore several hats. He acted in his own capacity; was part of an admitted and acknowledged quasi partnership; acted as a director of two of the three companies in the corporate joint venture structure; was a member of LWL and a creditor of LWL;

xiii) LWL was a beneficiary under the trust deed entered on 9 January 2007 but the ultimate beneficiary was Mr Percy;

xiv) MW knew that "to the extent that [LWL] suffered loss and damage, [Mr Percy] (and no other person) would suffer loss and damage in the same manner and to the same extent";

xv) In the knowledge of the above matters MW admitted that LWL was the alter ego of Mr Percy;

xvi) instructions to Mr Mayall dated 30 June 2010 were provided by Mr O'Sullivan. The first item (giving rise to a reasonable assumption that it was

the most important) was "how to proceed in order to protect Mr Percy's interest"; and

xvii) no instruction was given to Mr Mayall to advise LWL and no attendance note records advice being given to LWL.

93. It is not argued that no loss or damage resulted from the breach of duty of care. However, Mr Lawrence relies on the no reflective loss principle to argue that Mr Mayall is not responsible for the "same damage". The argument fails in law and on the facts. Other than the no reflective loss principle, no positive case was advanced to argue that the damage was not the same. Damage does not mean damages. The damage suffered by Mr Percy arose from the failure to protect his interests. MW and Mr Mayall were engaged to protect his interests.

Specific issues raised by Mr Mayall

94. I fully accept that by finding that it is not permissible to deploy collateral defences, Mr Mayall faces a claim for contribution without being able to air the argument that MW had a defence in the shape of the no reflective loss principle (as does he) or that he did not cause loss or damage to Mr Percy. I have dealt with the former argument. It may seem to him unfair to Mr Mayall as he contends that: (i) he was not negligent (he asks the court to go behind the Permission Judgment so as to determine the issue) and (ii) an agreement to drop hands between Mr Percy and Mr Mayall is evidence that there were causation difficulties for Mr Percy in his claim against Mr Mayall. Accordingly, it is said, MW must prove that Mr Mayall's negligence was causative of loss. These arguments are to look at the proceedings through the eyes of the party against whom a contribution notice is served.

95. As regards the first of these (negligence) Mr Mayall asks the court to find (to use the language of Mayall recorded in his witness statement) that "the Deputy High Court Judge was wrong". If he had taken the right course and permitted the derivative action to proceed, Mr Mayall could not be said to be negligent. I state straight away that no authority has been cited to me in support of the jurisdictional basis to find that "the Deputy High Court Judge was wrong". Mr Lawrence accepts, as he must, that it was Mr Mayall who advised that a derivative action was the best option for Mr Percy (to protect his interests), advised Mr O'Sullivan how to issue the claim, advised on prospects of success and pleaded the claim. I have found that he failed to warn [paragraphs 20, 24 and 25 above] Mr Percy. I decline the invitation to determine whether Mr Donaldson QC was wrong when dismissing the permission application, and making the assessment that the pleaded claims were too weak to continue, that no director would consider it desirable for MEL to prosecute any of the claims and there was "no possible benefit to the company in adopting such a course". To do so would be to undertake a second assessment of the merits of the derivative claim and review findings made of a competent court. In my judgment that would undermine rather than maintain the rule of law and put in danger the reputation of the administration of justice: *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321.

96. The order made following the Permission Judgment was not appealed and stands unless or until it is set aside.

97. The second issue (causation) although raised in the skeleton argument of Mr Lawrence was pressed with little vigour by the end of the trial. There was no doubt good reason for that. It was accepted by Mr Mayall that it was likely that the Derivative Claim could have been settled prior to the permission application. He accepts that he failed to give advice to revisit the offer made at a conference where he was expressly asked to advise. His failure to advise is more likely than not to be causative of loss. The objection taken is that Mr Percy was not present to give evidence that he would have heeded the advice if it had been given, or not proceeded with the derivative claim if he was properly warned of the risks. Yet this is not a case where the court is "driven to speculate what would have happened": *Goldsmith Williams solicitors v E. Surv Ltd* [2015] EWCA Civ 1147. The court has the benefit of the judgment of the Deputy Judge, the pleadings in the Negligence Claim, the admissions made, and has heard evidence from Mr O'Sullivan and Mr Mayall. Mr O'Sullivan had considerable dealings with Mr Percy and was examined about whether he would take the case to court if he had known of the weaknesses of the case.

98. Mr Mayall had admitted in his defence to the Negligence Claim that damage could be caused by his failure to advise that the offer of £500,000 was attractive given the defects in the proceedings, the risk of failure to obtain permission to proceed and general litigation risk. Mr Percy was not equipped with the right advice to make an informed decision as to whether to proceed or settle the claim after mediation. The failure to warn and properly evaluate the risks involved with the permission application, negated any argument that Mr Percy would have "pressed on" regardless and ignored his advisors on issues of law that would directly affect the commercial outcome.

99. I accept the evidence of Mr O'Sullivan that Mr Percy "was not going to simply go to trial to hear his fate from the lips of a judge". In other words, he would have taken account of the commercial risks if he had been properly advised and settled the claim by accepting the offer. He would not have "pressed on". The evidence of Mr Mayall was that he advised him to "press on". Mr O'Sullivan's evidence, tested in cross examination, was that Mr Percy was "a very commercial man" and "had no intention of going to trial if it could be compromised on the way".

100. The rejection of the invitation to re-assess the permission judgment creates further difficulties for Mr Mayall. The Deputy Judge was required to consider the pleaded case against Mr Trevor. He made findings. He found that the pleaded case was wanting in many respects. He said in relation to one claim: "the propriety of such a pleading appears to me seriously questionable, and it does not appear to disclose a cause of action. It also ignores and is hard to reconcile with the fact that the purchase of Mavelstone Close was agreed and completed months before contracts were exchanged on Sundridge Avenue". Mr Mayall was questioned about the basis of the claim to recover the difference between the purchase and sale price of Mavelstone Close. The Deputy Judge said: "Counsel for Mr Percy was however unable to explain to me how these could give rise to an obligation to account to the company for the whole of his gross profit." The combination of admissions made by Mr Mayall, the findings I have made having heard the evidence of Mr O'Sullivan and the findings of the Deputy Judge, lead me to conclude that on the balance of probabilities these failures caused loss. As the issue of causation was advanced with a light-touch I deal with it no further. Although I was not addressed on the test for causation, applying the

"but for" test I conclude there is no merit in the argument that Mr Mayall would have succeeded with a defence of causation on the facts of this case.

Assessment of contribution

101. That the "same damage" was caused by MW and Mr Mayall does not mean that the court should find that all loss and damage flowing from the breach of duty rests with Mr Mayall, as has been submitted by Mr Bankes-Jones. Section 2(1) of the 1978 Act provides:

> "Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question".

102. The responsibility, in my judgment, of the loss and damage suffered by Mr Percy falls more on the shoulders of MW than Mr Mayall. The solicitors acting for Mr Percy held themselves out in the letter of engagement as experts in commercial law. There is no authority to suggest, as Mr Bankes-Jones did, that because Mr O'Sullivan had less experience than Mr St John Murphy or Mr Mayall he, or the firm, would be less liable. He was expected to exercise reasonable skill and care of a competent solicitor acting in his field.

103. Prior to the instruction of Mr Mayall an offer had been made to settle the dispute, which in reality was between Mr Trevor and Mr Percy. The offer was not insubstantial. It required proper analysis to understand if it was a reasonable offer. At that stage few legal costs had been incurred: none to speak of. There is no correspondence evincing a dialogue between GSC and MW in relation to the offer whereby MW sought an analysis by way of a break down for the offer. MW accepted at a very early stage that Mr Percy was seeking over £500,000. It is not clear from the documents before the court that this figure was ever subjected to critical analysis by MW. The settlement offer was reduced by June to £265,000. The correspondence shows that instead of seeking to provide informed advice as to the merits of accepting the offer, MW accepted without testing, that the claim against Mr Trevor was worth considerably more. MW went about obtaining evidence to support a nebulous figure by writing directly to Mr Trevor and his partner and asking for documents, despite GSC being on the record. These observations are borne out by two documents. First the instructions to Mr Mayall dated 30 June 2010: "Mr Percy has little information to correctly calculate his losses. However, based upon the information he does have he estimates these exceed £800,000." Secondly, a letter from GSC dated 28 July 2010 where strong allegations were made against Mr Percy including his receipt of a cash sum from a purchaser of one the properties in the joint venture. At no stage did MW seek to trigger the dispute resolution clause in the Agreement and failed to answer at all a proper proposal made by GSC aimed at resolving the dispute without litigation. In my judgment Mr Mayall was not responsible for any of these failures which led to the offer made by Mr Trevor being withdrawn.

104. In my judgment Mr Mayall correctly identified that the cause of action vested in SHL and not Mr Percy. He was right to identify that a claim against a director for misappropriation may be made by a shareholder in the name of the company. That did not necessarily make a derivative claim the best option in this matter. There is no evidence of an analysis of options, including winding up and arbitration, being proffered. Mr Mayall's solution, that Mr Percy make two claims, presumably back-to-back, is less easy to justify. A more efficient solution may have been more appropriate.

105. In my judgment when advising that a shareholder bring an action by way of a derivative claim, advice should be given not only from the shareholder's point of view (in this case it was given from the point of view of Mr Percy) but from the perspective of the company: *Iesini v Westrip Holdings* [2009] EWHC 2526 (Ch), [2010] BCC 420. The reason for this is that the court needs to be convinced that it is right for the company to indemnify the costs of the action and in any event it asks, at the permission stage, whether no director acting in accordance with his statutory duties under section 172 of the Companies Act 2006 would seek to continue the claim. There is no evidence that Mr Mayall provided any advice to Mr Percy or MW in this respect. Indeed, Mr O'Sullivan said in evidence that this was not the case. There is no evidence that Mr Mayall gave due or any consideration to the best interests of SHL. His answer to the issue of whether he had given due consideration was not directly answered. I accept the evidence of Mr O'Sullivan that no consideration was given. That would have required taking full account of its position: it formed part of a quasi partnership; the management was in deadlock; it existed solely for the purpose of the joint venture; that the joint venture was at or near its end.

106. Mr Lawrence submits that the law of derivative claims was new or novel in 2010, the implication being that Mr Mayall may not have been fully aware of the applicable test to obtain permission, because he was breaking new ground. I do not accept that the law of derivative action was new or novel. I have mentioned the rule in *Foss v Harbottle* (supra). The Companies Act 2006 was a result of a law commission recommendation that the common law derivative action be replaced with a statutory procedure with a modern and accessible criterion for determining whether a shareholder can pursue an action. The principles for obtaining permission to continue would have been well known by the end of 2010 to someone who held themselves out as a specialist. There is nothing in this point as Mr Mayall quite properly referred to several authorities that concerned the permission procedure: In *Iesini v Westrip Holdings* [2009] EWHC 2526 (Ch), [2010] BCC 420 and *Franbar Holdings Ltd v Patel* (*supra*).

107. The responsibility for a failure to accept the offer made at mediation, in my judgment, rests with MW. Mr Mayall was not present, nor did he participate in the mediation. The offer was rejected without reference to him. However, Mr Mayall rightly concedes that he was aware of the offer when giving advice in conference on 5 January 2011. In this regard Mr Mayall must shoulder some of the responsibility for failing to advise that the offer made should be revisited when advising about a range of acceptable offers. I fully accept that there was no guarantee that the offer would still be available. As he had made an offer prior to proceedings and several offers during the mediation, there was a reasonable prospect that an offer would be available. The mediator could have been contacted to assist. I accept also that Mr

Mayall did not know the costs incurred by MW. He was unable to calculate whether the settlement offer was attractive. As he was instructed to advise whether to continue with the proceedings and generally, the offer made at mediation should not have been left out of account. I reject the submission that this situation is analogous to *Moy v Pettman Smith* [2015] UKHL 7 where the barrister had to give evidence at the court door. The costs of the proceedings to that date were easily ascertainable. If not immediately then a day or so later. Unlike *Moy v Pettman Smith*, there was sufficient time to reflect and provide valuable informed advice. MW should take responsibility for not revisiting the offer made at mediation, for the same reasons.

108. Mr O'Sullivan was alive to the threat made by Mr Trevor to apply for a just and equitable winding up of SHL. In my judgment MW and Mr Mayall are equally responsible for the continuation of the permission action without warning Mr Percy of the consequences of (i) dismissal and (ii) Mr Trevor asking the court to wind up SHL. In my judgment MW was not entitled to take the advice provided by Mr Mayall to "press on with the proceedings" at face value. It was incumbent on the legal team to warn that the proceedings would come to an end, taking away any reasonable leverage at the negotiating table, if the court were to refuse permission to continue. Mr Mayall said in evidence that he did inform Mr Percy that winding up SHL was an option. He did not say that he provided an assessment of that outcome to enable Mr Percy to gauge the offer as good or unacceptable. In my judgment reliance on later authority where the court declined to make a winding up order is misconceived. Each case is dealt with on their own facts: *Mumbray v Lapper* [2005] EWHC 1152, [2005] B.C.C. 990; *Barrett v Duckett* [1995] B.C.C. 362. The submission to wind up the company in *Hughes v Weiss* [2012] EWHC 2363 was rejected Judge for reasons that were not present in this matter. Similarly, *Saatchi v Gajjar* [2019] EWHC 3472 was factually a different case. The circumstance of this case required a clear warning that the court would look at the merits of the application from SHL's point of view: *Iesini v Westrip Holdings Ltd (supra).*

109. The decision to "press on" is said to have been given clearly. In my judgment MW was entitled to defer to Mr Mayall for an assessment of the legal merits of "pressing on". The responsibility for taking the case to a hearing, in my judgment lies predominantly with Mr Mayall.

110. It is apparent from what I have said above that MW is not entitled to an indemnity. A close analysis requires apportionment of responsibility to provide a just and equitable outcome. The allocation of responsibility may be reasoned but the apportionment is not scientific. In my judgment, taking account of the factors mentioned MW is entitled to a contribution at 40% of the settlement sum.

Conclusion

111. MW and Mr Mayall were made defendants in Mr Percy's Negligence Claim. As defendants they admitted to a direct duty of care owed to Mr Percy notwithstanding that the rejected claim was made on behalf of LWL. As defendants they recognised Mr Percy as the sole owner and manager of LWL, and that LWL acted as his alter ego.

112. In this application MW seek a contribution from Mr Mayall pursuant to the 1978 Act.

113. There is no dispute that MW agreed to make a payment to Mr Percy in bona fide settlement of the Negligence Claim. In my judgment MW is entitled to a contribution from Mr Mayall. When determining entitlement, the party against whom a contribution is sought may seek to challenge whether the claimant had a reasonable cause of action against the defendant who compromised the claim. The extent of the inquiry is limited. The compromising party need only demonstrate that the assumed factual basis disclosed a reasonable cause of action. It is not legitimate to have regard to whether in fact the defendant was liable and consider "collateral defences".

114. On the assumed factual basis, there was a reasonable cause of action against MW. The argument that Mr Mayall was not liable for the "same damage" falls with the argument that the court should have regard to "collateral defences". MW and Mr Mayall were liable for the "same damage".

115. Having regard to the provisions of the 1978 Act, it is just and equitable to apportion the contribution according to responsibility. I assess the share of responsibility for the "same damage" at 40%.

116. I invite the parties to agree an order.