Neutral Citation Number: [2020] EWHC 936 (Ch)

Case No: CH-2019-000215

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
On appeal from the County Court at Central London
His Honour Judge Saunders

7 Rolls Building
Fetter Lane
London , EC4 1NL

Date: 21 April 2020

Before :

Mr Justice Zacaroli

- -

Between :

HOMES FOR ENGLAND	**Claimant and First Respondent**
- and –	
(1) NICK SELLMAN (HOLDINGS) LIMITED	**First Defendant and Appellant**
(2) BROMHAM ROAD DEVELOPMENT LLP	**Second Defendant and Second Respondent**

Roger Laville (instructed by **Mike Rattenbury** in house Solicitor) for the **Appellant**
Niraj Modha (instructed by **Acuity Law**) for the **First Respondent**

Hearing dates: 31 March 2020

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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.

MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. This is an application for permission to appeal, with the appeal to follow if permission is granted, in respect of an order of HHJ Saunders dated 11 July 2019. By that order, the judge gave permission under s.261(f) of the Companies Act 2006 (the "2006 Act") for the claimant, Homes of England Limited ("HoE"), to continue a derivative action against the first defendant, Nick Sellman (Holdings) Limited ("Holdings") on behalf of the second defendant, Bromham Road Development LLP ("BRD"), a limited liability partnership ("LLP").

2. The principal question raised by this appeal is whether the test for continuing a derivative action against an LLP is that contained in s.263 of the 2006 Act or the test at common law.

Background

3. HoE and Holdings are each a 50% partner in BRD. BRD is the freehold owner of a property situated at 51 Bromham Road, Bedford (the "Property").

4. The Property was originally financed with a loan from Wellesley Finance plc, secured by a charge over the Property. That loan expired on 14 January 2018. It was a term of the loan that if it was not repaid in full within 14 days of expiry, BRD would incur a charge amounting to 2% of the outstanding indebtedness.

5. BRD was also funded by way of a loan from HoE in the sum of £1.6 million.

6. HoE negotiated alternative financing with the Bank of London and Middle East plc which, on or before 22 January 2018, offered to advance BRD £7.5 million at an annual interest rate of 3.15%. On 22 January 2018 HoE emailed Holdings to request it execute the documentation to enable the refinancing to take place.

7. HoE contends that Holdings, in breach of duties of honesty and good faith owed to HoE and in breach of a duty to act in the best interests of BRD, declined to execute the refinancing documentation straight away, delaying doing so until 20 February 2018.

8. By reason of the delay, the amount required to redeem BRD's loan from Wellesley Finance plc had increased by £206,933.21, which included the 2% charge as a result of late repayment. HoE contends, as a result, the amount by which BRD's loan from HoE could be repaid was reduced by the same amount.

9. In its claim form issued on 5 May 2018 HoE claimed that sum (£206,933.21), together with certain consequential losses, as damages flowing from Holdings' breaches of duty.

10. In its defence, Holdings, among other things, averred that HoE was not legally entitled to claim the relevant losses, because they were suffered by BRD, not HoE, and that any damage suffered by HoE was irrecoverable as reflective loss.

11. In light of this defence, HoE sought, by an application dated 9 August 2018, to amend its claim, to include a derivative claim brought on behalf of BRD. It alleged that Holdings owed duties to promote the success of BRD and/or to act in its best interests, to avoid a conflict of interest and to exercise reasonable skill and care in any management function performed in relation to BRD. It contended that Holdings' failure to execute the refinancing documentation in a timely way was a breach of those duties, which caused BRD to suffer loss. Although the pleading is ambiguous, Mr Modha, who appeared for HoE, clarified that it was intended to identify the increase in the amount required to redeem the loan from Wellesley Finance plc as the loss suffered by BRD for the purposes of the derivative claim.

12. It is common ground that BRD is a "body corporate": see s.1 of the Limited Liability Partnerships Act 2000. Accordingly, the procedure for seeking the court's permission to bring a derivative claim set out in CPR 19.9C applies. By CPR 19.9C(4), "the procedure for applications in relation to companies under section 261, 262 or 264 (as the case requires) of the [2006 Act] applies to the permission application as if the body corporate … were a company."

13. Section 261 (which applies where a member of a company brings a claim derivatively on behalf of the company and seeks the permission of the court to continue it) is the relevant provision in this case, with "member of an LLP" substituted for "member of a company". It provides for a two-stage procedure: first, to consider whether the application discloses a prima facie case and, second, to determine whether to give permission.

14. HoE's application came before HHJ Saunders on 21 February 2019. The judge joined BRD as second defendant and permitted the amendment, but adjourned the question of permission.

15. In written submissions served immediately prior to that hearing, Holdings referred to the two-stage process required by the 2006 Act and said that, at the second stage, the court must consider the factors set out in s.263 of the 2006 Act. That section is applicable "where a member of a company applies for permission" under section 261 or 262. By s.263(2), permission must be refused if the court is satisfied:-

> "(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or
>
> (b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or

> (c) where the cause of action arises from an act or omission that has already occurred, that the act or omission–
>
> (i) was authorised by the company before it occurred, or
>
> (ii) has been ratified by the company since it occurred."

16. By s.263(3), in considering whether to give permission (or leave) the court must take into account, in particular:-

> "(a) whether the member is acting in good faith in seeking to continue the claim;
>
> (b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;
>
> (c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be–
>
> (i) authorised by the company before it occurs, or
>
> (ii) ratified by the company after it occurs;
>
> (d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;
>
> (e) whether the company has decided not to pursue the claim;
>
> (f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company."

17. At the adjourned hearing on 17 May 2019, it was common ground that in considering whether permission should be granted, the test was that set out in s.263 of the 2006 Act. In a reserved judgment dated 11 July 2019, the judge, applying that test, determined to grant permission.

18. Between the date of the adjourned hearing, and the formal hand-down of the judgment on 11 July 2019, Mr Laville, who appears on this appeal for Holdings, was instructed for the first time. He took a new point, namely that s.263 of the 2006 Act does not apply at all to an LLP, that the judge should have applied the common law test applicable to companies prior to the incorporation of the 2006 Act, and that on the facts HoE could not satisfy the common law test. He sought to persuade the judge to give permission to appeal on the basis of this new point. The judge refused to do so because the point was raised for the first time only after judgment had been given.

Grounds of appeal

19. Holdings does not take issue with the judge's exercise of discretion if he was correct to apply the test under s.263 of the 2006 Act. Its appeal is based solely on the new point raised with the judge on 11 July 2019.

20. Accordingly, the substantive issues that arise on this appeal are whether:

    i) The judge was wrong to apply the test under s.263 of the 2006 Act and should instead have applied the test at common law; and

    ii) Had the judge applied the common law test, would he have declined to grant permission?

21. In the face of HoE's objection to this new point being taken on appeal, Holdings advances the following arguments:

    i) The new point having been raised before the judge on 11 July 2019, before his order was sealed, he ought to have reconsidered his own decision, pursuant to the "*Barrell*" jurisdiction, after the decision in *Re Barrell Enterprises* [1973] 1 WLR 19; and

    ii) In any event, this court should exercise its discretion to permit the new point to be taken for the first time on appeal.

22. I will first address the substantive point, before considering whether either the judge should have permitted, or this court should permit, the new point to be taken.

The test to be applied on an application for permission for a member of an LLP to continue a derivative action

23. Chapter 1 of Part 11 of the 2006 Act, in particular sections 260 to 264, applies to derivative actions in respect of companies.

24. The Limited Liability Partnerships Act 2000, s.15, permits regulations to be made, among other things, specifying aspects of legislation concerning companies that will apply to LLPs. The relevant regulations are the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009. It is common ground that these regulations do not apply sections 260 to 264 of the 2006 Act to LLPs.

25. HoE contends, however, that section 263 nevertheless applies to LLPs by virtue of CPR19.9C. Rule 19.9C(1) states that "this rule sets out the procedure where" a body corporate to which Chapter 1 of Part 11 of the 2006 Act does not apply is alleged to be entitled to a remedy and either a claim is made by a member for it to be given that remedy or a member seeks to take over a claim already started by the body corporate for it to be given that remedy. Rule 19.9C(2) and (3) provides that the member who starts, or seeks to take over, the claim must apply to the court for permission, by application notice under CPR Part 23. As I have noted above, Rule 19.9C(4) provides that "the procedure for applications in relation to companies under section 261, 262 or

264" of the 2006 Act applies to the permission application as if the body corporate were a company. Rule 19.9C(5) then applies the provisions of Rules 19.9A and 19.9B relating to the form of the application, evidence, the necessary parties, and the notice to be given.

26. The starting point is that, as Mr Modha points out, although the Court of Appeal in *Harris v Microfusion 2003-2 LLP* [2016] EWCA Civ 1212 recorded (at [13]) that it was common ground in that case that Chapter 1 of Part 11 of the 2006 Act, providing for a statutory derivative remedy, did not apply to LLPs, there is no authority which has determined this to be the correct interpretation of CPR 19.9C.

27. Beyond that, HoE's argument, as developed by Mr Modha during the hearing of the appeal, was put in a number of ways.

28. The first argument advanced by Mr Modha was simply that section 263 applies in this case because Holdings conceded before the judge that it did. I do not accept this argument. The concession is a relevant factor when considering whether to permit Holdings to take a new point on appeal (as to which see below), but the fact that a party concedes a point of law does not make that point of law correct. It may be that a party could not resile from a concession in relation to the applicable test, if there were a binding agreement between the parties, or something which would give rise to an estoppel, but there is no question of that here.

29. Second, Mr Modha submitted that s.263 is to be applied to an LLP by virtue of CPR19.9C.

30. The difficulty with this argument is that CPR19.9C applies only the procedure under ss.261, 262 and 264, not that under s.263. The omission of s.263 appears to be deliberate. None of the sections that are included cross-refers to s.263.

31. Mr Modha suggested that since (1) s.263 applies when the member of a "company" applies under either s.261 or s.262, and (2) CPR 19.9C applies s.261 as if an LLP were a company, it follows that s.263 should be treated as applying to an LLP. I do not accept this. The provisions of CPR 19.9 to 19.9F contain purely procedural matters. The sections of the 2006 Act that are applied to LLPs by Rule 19.9C are themselves concerned purely with procedural matters. S.263, on the other hand, makes a substantive change to the test to be applied in considering an application for permission. Its application to LLPs would itself be a substantive change, and one that is not apt to be brought about by provisions of the CPR concerned with matters of pure procedure.

32. This is supported by the fact that s.260 is also omitted from the provisions applied by CPR 19.9C to LLPs. Section 260 is itself a substantive provision which, by ss.(2), abolishes the common law test in relation to companies by restricting the ways in which a derivative claim can be brought to Chapter 1 of Part 11 of the 2006 Act or pursuant to an order made in unfair prejudice proceedings under s.994 of the 2006 Act. The failure to apply s.260 to LLPs

(and thus the failure to abolish the common law position for LLPs) demonstrates that it was not the intention of the drafter of CPR 19.9C that the position in relation to LLPs should mirror that in relation to companies. It would be surprising if CPR 19.9C was intended to apply the new statutory test under s.263 to LLPs but not in a way which rendered it the exclusive test. This lends support to the conclusion that the omission of s.263 was deliberate.

33. It is further supported by the difference in the forms annexed to the practice direction at CPR 19CPD.9. The form for an application by a company contains a statement that the factors the court must take into account are those set out in s.263. That statement is missing from the form for an application by a body corporate that is not a company.

34. This conclusion also finds support in a leading textbook on LLPs, The Law of Limited Liability Partnerships, 4th edition, ed. Whittaker, at para 14-41:

> "The adoption for LLPs (and other non-company bodies corporates) by CPR, r 19.9C of the procedure for permission applications set out in CA 2006, ss 261, 262 and 264 appears not to include the adoption of the requirements set out in s 263 for deciding the substance of the application in the case of a company. In the case of a permission application by members of an LLP, therefore, it will be the pre-2006 Act, judge-made criteria and principles which will be relevant."

35. HoE's third argument is that even if s.263 is not applied to LLPs by CPR 19.9C, s.261 certainly is, and s.261(4) provides the court with a broad discretion, as follows:

> "On hearing the application, the court may–
>
> (a) give permission (or leave) to continue the claim on such terms as it thinks fit,
>
> (b) refuse permission (or leave) and dismiss the claim, or
>
> (c) adjourn the proceedings on the application and give such directions as it thinks fit."

36. Mr Modha submitted that the words "on such terms as it thinks fit" in sub-paragraph (a) provide the court with a broad unfettered discretion. The discretion is broad enough to permit the court to rely on the concession made by Holdings that the test to be applied was that under s.263. I do not accept this argument. This provision says nothing about the basis upon which the court is to determine whether to give permission. The words relied on by Mr Modha refer to the terms upon which the claim is to continue, on the assumption that the court has determined to give permission. Moreover, the argument is inconsistent with s.263, which specifically provides for the factors to be taken into account upon an application for permission in relation to a company.

37. In a variation to this argument, Mr Modha suggested that s.261(4) might provide a discretion which, in the case of an LLP, was akin to the common law test, but with the "wrinkle" that the exceptions to *Foss v Harbottle* (1843) 2 Hare 461 are not closed. I also reject this variation. If s.261(4) does not (as I have held) provide the court with a broad and unfettered discretion, I do not see how it can be read as requiring the court to apply the common law test, but only in a modified form. On the contrary, I consider that s.261(4) says nothing about the test which the court is to apply in determining whether to give permission.

38. HoE's fourth argument is that even if the common law test applies, then it is satisfied on the facts of this case. In order to bring a derivative claim at common law, it is necessary to show that the case comes within one of the four established exceptions to the rule in *Foss v Harbottle*, of which only the fourth is relevant in this case, i.e. that there is fraud and there is no other remedy.

39. The scope of the fourth exception was identified in *Abouraya v Sigmund* [2014] EWHC 277 (Ch), per David Richards J at [25]:-

> "It follows, on the authorities as they stand, that financial or other loss to the shareholders, albeit normally of a reflective character, is essential to give a claimant shareholder sufficient interest in the proceedings to make the shareholder an appropriate claimant on behalf of the company, whether he is a member of that company or of its holding company. Equally, the authorities require that, in the absence of actual fraud or an ultra vires act, the wrongdoers should themselves have benefitted from the wrongdoing. The significance of this requirement is that their breach of duty cannot be ratified by a majority vote which depends on the votes of the wrongdoers. It is essential to the exception to the rule in *Foss v Harbottle* that the alleged wrongdoing is incapable of lawful ratification: see *Smith v Croft (No.2)* [1988] Ch. 114; (1987) 3 B.C.C. 207."

40. This passage was specifically approved by the Court of Appeal in *Harris v Microfusion 2003–2 LLP* at [15].

41. Mr Modha sought to rely on passages in two earlier authorities, *Estmanco (Kilner House) Ltd v GLC* [1982] 1 WLR 2 (Megarry V.-C.) and *Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] EWHC 348 (Ch) (Briggs J).

42. In *Estmanco* (described in *Harris* as a "very unusual case"), Megarry V.-C. held that the fraud exception to the rule in *Foss v Harbottle* was broad enough to cover the case before him. That case involved a management company set up by the Greater London Council ("GLC") in respect of a block of tenanted flats which the GLC had previously determined to sell off. The GLC had entered into an agreement with the management company under which the GLC promised to use its best endeavours to sell off the remaining flats. The voting rights in respect of the shares of the company remained with the GLC

until all flats were sold. After a change of governance at the GLC, the GLC reneged on the agreement. The management company resolved to sue the GLC, but the GLC used its voting power to prevent the action. In that context, Megarry V.-C. concluded (at pp.15-16) that the GLC had acquired a benefit, in the relevant sense, albeit a political one and that this represented a "fraud" on the minority for the purposes of the exception to the rule in *Foss v Harbottle*, given that:

> "There can be no doubt about the 12 voteless purchasers being a minority; there can be no doubt about the advantage to the council of having the action discontinued; there can be no doubt about the injury to the applicant and the rest of the minority, both as shareholders and as purchasers, of that discontinuance; and I feel little doubt that the council has used its voting power not in order to promote the best interests of the company but in order to bring advantage to itself and disadvantage to the minority. Furthermore, that disadvantage is no trivial matter, but represents a radical alteration in the basis on which the council sold the flats to the minority."

43. So far as *Gilkicker* is concerned, Mr Modha relied on a passage in the judgment of Briggs J, at [53], where he noted that "it is common ground that the court has a discretion whether or not to permit any common law claim to continue which is not limited to a cold analysis of whether the common law requirements set out, for example, in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 are met."

44. Mr Modha's argument was essentially the same as that advanced by counsel in the *Harris* case, as to which McCombe LJ said, at [31]:

> "I do not think that either of these cases (*Estmanco* or *Gilkicker*) supports Mr Harper's wider proposition that the exception to the rule in Foss v Harbottle is 'opened up' in cases, short of deliberate and dishonest breach of duty, in the absence of personal benefit to the party allegedly in breach of duty. For my part, having reviewed the authorities, with the helpful assistance of counsel, I consider that the extent of the relevant exception to the rule is indeed as stated by David Richards J in *Abouraya v Sigmund*."

45. Neither case, therefore, assists HoE's argument in the present case.

46. Applying the test as identified in *Abouraya* on the facts of this case, the following three questions arise: (1) did Holdings' actions cause financial loss to the members? (2) is fraud in the sense of deliberate and dishonest breach of duty pleaded? (3) is it alleged that Holdings acquired a personal benefit at the expense of BRD?

47. As to the first question, I accept that Holdings' actions caused financial loss to the members. Mr Laville submitted that the only loss pleaded was loss to HoE *qua* creditor, being the reduction in the amount which BRD could repay to

HoE. I am satisfied, however, that the pleading does sufficiently include an allegation that (so far as the derivative claim is concerned) the relevant loss was the increased amount that BRD was required to repay to Wellesley, and that was a loss which would also be suffered, reflectively, by the members.

48. As to the second question, there is no allegation of dishonest breach of duty.

49. The more difficult issue is in relation to the third question: personal benefit to Holdings at the expense of BRD. Mr Modha submitted that there was a pleaded allegation of such benefit in the following sentence of paragraph 10 of the Amended Particulars of Claim:

> "While not strictly relevant to the Claimant's claim herein, its reason for doing so [that is delaying in executing the refinancing documentation] is thought to have been to put the Claimant under pressure in relation to an ongoing negotiation regarding a dissolution of the LLP."

50. Mr Modha submitted that, particularly in light of the *Estmanco* decision, this is sufficient to constitute benefit. I do not accept this argument. As the Court of Appeal pointed out in *Harris*, *Estmanco* is a very unusual case, where the relevant company was non-profit making and there was a real and substantial benefit to the GLC, albeit of a political nature.

51. More relevant guidance as to the type of benefit which is required is to be found in the following passage from the judgment of Templeman J in *Daniels v Daniels* [1978] Ch 406, at 413 (a passage also cited with approval in *Harris*):

> "If minority shareholders can sue if there is fraud, I see no reason why they cannot sue where the action of the majority and the directors, though without fraud, confers some benefit on those directors and majority shareholders themselves. It would seem to me quite monstrous particularly as fraud is so hard to plead and difficult to prove, if the confines of the exception to *Foss v Harbottle* were drawn so narrowly that directors could make a profit out of their negligence. Lord Hatherley LC in [*Turquand v Marshall* (1869) LR 4 Ch App 376] opined that shareholders must put up with foolish or unwise directors. Danckwerts J in [*Pavlides v Jensen* [1956] 2 All ER 518, [1956] Ch 565] accepted that the forebearance of shareholders extends to directors who are "an amiable set of lunatics". Examples, ancient and modern, abound. To put up with foolish directors is one thing; to put up with directors who are so foolish that they make a profit of £115,000 odd at the expense of the company is something entirely different. The principle which may be gleaned from [*Alexander v Automatic Telephone Co* [1900] 2 Ch 56] (directors benefiting themselves) from [*Cook v Deeks* [1916] 1 AC 554] (directors diverting business in their own favour) and from dicta in *Pavlides v Jensen* (directors appropriating assets of the

> company) is that a minority shareholder who has no other remedy may sue where directors use their powers intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company."

52. In my judgment, the pleading at paragraph 10 of the Amended Particulars of Claim falls short of an allegation of the type of benefit which is required, on the authority of *Abouraya*, *Daniels* and *Harris*.

The Barrel jurisdiction

53. I can deal shortly with Mr Laville's argument that the judge should have reconsidered his own decision pursuant to the *Barrell* jurisdiction once the point was raised that s.263 did not apply. Since the judge was not asked to do so, I do not think this gives rise to a separate basis of appeal. Instead, Holdings requires permission in order to take this additional new point for the first time on appeal. I see no point in doing so, since it adds nothing to the request to raise the substantive point about the test, itself, for the first time on appeal.

Taking a new point on appeal

54. The circumstances in which an appellant may be allowed to take a new point on appeal are those set out in *Singh v Dass* [2019] EWCA Civ 360, at [16]-[18]

> "16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> "17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (Mullarkey v Broad [2009] EWCA Civ 2 at [30] and [49]).
>
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs …"

55. This was further elaborated on by the Court of Appeal in *Notting Hill v Sheikh* [2019] EWCA Civ 1337, per Snowden J (with whom Longmore LJ and Peter Jackson LJ agreed):

> "26 These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.
>
> 27 At one end of the spectrum are cases such as the Jones case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in the Jones case (at para 38), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at para 52), there might none the less be exceptional cases in which the appeal court could properly exercise its discretion to do so.
>
> 28 At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see eg Preedy v Dunne [2016] EWCA Civ 805 at [43]–[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

56. The first question to be determined is whether the new point is a pure point of law, or is one which would require an investigation into further facts. Mr Modha submits that as the elements of the test are different at common law than under s.263, the factual investigation which would need to be undertaken in respect of the common law test is different. He relies on the fact that, as from shortly before the first hearing of the application for permission, in January 2019, Holdings had itself indicated that the relevant test was that under s.263. If HoE had known that the common law test applied, then it would have made further investigations and may have relied on different evidence.

57. The problem with this submission is that the common law test depends upon an analysis of what is in the pleaded case. When I put to Mr Modha whether it was HoE's case that it might have sought to amend its pleadings had it known that the common law test applied, he said that it would not have done.

58. In those circumstances, further investigation of the facts and further evidence would not have made any difference: the pleading either does or does not allege dishonest breach of duty, and it either does or does not allege personal benefit to Holdings of a kind which satisfies the "benefit" requirement in the cases cited above.

59. Accordingly, it seems to me that the new point does not give rise to any new issue of fact upon which the court would have required any further evidence.

60. HoE relies particularly on the concession made by Holdings before the judge that the test to be applied is that under s.263. Contrary to Mr Laville's submission that there was no concession that the common law test did *not* apply, I consider that Holdings' conduct in this case went beyond merely failing to take the point, given that it positively argued that the relevant test was the statutory one. It is also relevant that to permit Holdings to take the point on appeal will seem particularly harsh for HoE, in circumstances where it was prompted to commence a derivative claim by Holdings' contention that the relevant loss was that of BRD and where Holdings initially indicated its consent to a derivative claim.

61. I accept that these are important points, but they must be balanced against all other relevant factors. As to these:

    i) the proceedings below were of an interlocutory nature, involving a threshold question (permission to bring proceedings in a derivative capacity);

    ii) This case is at the furthest end of the spectrum to cases involving a full trial and determination of disputed questions of fact;

    iii) HoE has had ample time to meet the point, given that it was raised for the first time last July;

    iv) HoE has suffered no other form of irremediable prejudice by the point being taken late, that cannot be compensated for by an appropriate costs award;

    v) The point being a pure point of law, it was not the fault of Holdings itself, as opposed to its legal representatives, that it was not taken below; and

    vi) On the other hand, Holdings would be prejudiced by being unable to take the point, because it would be facing a derivative claim which (on the basis of my conclusion above) as a matter of law ought not to be brought.

62. In my judgment, while taking into account the desirability of finality, weighing in the balance all of the above factors, I consider that the balance comes down in favour of allowing Holdings to take this new point on appeal.

Disposal

63. For the above reasons, I:

i) Give Holdings permission to appeal;

ii) Give permission to take the point on appeal that the applicable test is that at common law, not under s.263 of the 2006 Act; and

iii) Allow the appeal.

Costs

64. I received short written submissions from the parties, after providing them with a draft of this judgment, on the question of costs. I will order that HoE shall pay Holdings' costs of this appeal, on the basis that the appeal was concerned solely with the new point, which was taken at the outset of the appeal process, and Holdings has wholly succeeded in respect of it. I will not, however, disturb the costs order made by HHJ Saunders in respect of the application before him. I do not accept Holdings' submission that HoE should be deprived of its costs because it ought to have known that the applicable test was that at common law and not under s.263 of the 2006 Act. As I have explained above, Holdings' conduct went further than merely acquiescing in an argument advanced by HoE. Holdings positively argued from the outset of the application that the applicable test was that under s.263.

65. Finally, I will reserve the question of costs in relation to the (now struck out) derivative claim, to the extent that any have been incurred separately from the application for permission, to the trial judge. I have been provided with no details as to the circumstances in which such costs may have arisen. It will be a matter for the trial judge to determine, in light of the time that such costs were incurred, and their nature, whether the approach I have taken to the costs of the appeal, or the approach I have taken to the costs of the application before HHJ Saunders, is more appropriate in relation to those costs.