Neutral Citation Number: [2023] EWHC 1066 (Ch)

Case No: BL-2021-001553

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LISTS (Ch D)

Rolls Building
Fetter Lane
EC4A 1NL

Date: 05/05/2023

Before :

HHJ PARFITT
(sitting as a Judge of the High Court)

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Between :

(1) MARGARET ANNE RYAN	**Claimant**
(2) PATRICK ANTHONY RYAN	
- and -	
(1) HSBC UK BANK PLC	**Defendant**
(2) 05181121 PLC	

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Stephen Davies KC (instructed by **Horwich Farrelly Limited**) for the **Claimants**
Bridget Lucas KC (instructed by **Eversheds Sutherland (International) LLP**) for the **First Defendant**

Hearing dates: 28 & 29 March 2023

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.00am on Friday 5th May 2023

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HHJ PARFITT

HHJ Parfitt :

Introduction

1. The Claimants seek permission under section 261 of the Companies Act 2006 ("the 2006 Act") to bring derivative proceedings against the First Defendant ("HSBC"). For present purposes those proceedings have been helpfully set out in a proposed re-amended particulars of claim ("PRAPOC").

2. The application is supported by the witness statements of Mr Mark Dennis dated 3 September 2021 and 17 February 2022, Ms Margaret Ryan dated 8 September 2021 and 14 March 2023 and Mr Tony Ryan dated 17 February 2022. The application is opposed by HSBC with evidence contained in the witness statements of Mr David Flack dated 28 January 2022 and Mr Mark Howman dated 22 March 2022. For reasons addressed below there is no evidence from the Second Defendant ("MCPLC"), who is the nominal claimant to the derivative claim.

3. The Claimants were the moving force behind a number of companies which included MCPLC. The business of those companies included acquiring and developing residential sites with a specialisation in modular construction for community housing. It was, to all appearances, a successful business. MCPLC was AIM listed in 2013 and the PRAPOC refer to it having a market value in April 2014 of £187m. The business was arranged in two separate triangles, described in the PRAPOC as "Public Group" and "Private Group". MCPLC was at the apex of the Public Group and a company called, Mar City Developments Ltd ("MCDL"), was at the apex of the Private Group. The Claimants were the ultimate beneficial owners of the Private Group and the PRAPOC say they owned or controlled 46.2% of the Public Group.

4. At all material times, HSBC was the banker to the business and provided facilities to both the public and private sides and to the Claimants personally.

5. By the end of the events with which this dispute is concerned the business had failed. The PRAPOC refer to cashflow pressure by late 2014. It is common ground that the AIM listing was suspended on 20 April 2015. MCDL went into administration in 2016 and MCPLC had ceased trading by the Summer of 2021 (the Claimants having been removed from their management role in MCPLC in December 2015). MCPLC has only been restored to the register on the application of the Claimants so that the PRAPOC action might be brought. MCPLC has nominal assets (perhaps about £250.00) and relevant debts of about £20 million owed to HSBC. I am told there are other historic creditors whose debts are outstanding but no reference has been made to these except to note their existence.

6. In the briefest of summaries, the Claimants blame HSBC for the failure of the business. The Claimants say that despite HSBC saying it intended to stand by the business and support the Claimants to manage it, HSBC took over MCPLC and then ran it down, caring only for its own interests and not that of the Claimants or MCPLC. This has given rise to personal claims and the intended derivative claims, both are set out in the PRAPOC.

7. The personal claims include a claim for damages under section 2 of the Misrepresentation Act 1967 or negligence for representations made by HSBC to the

Claimants in February 2015 from which the Claimants understood HSBC would continue to support the business and so the Claimants trusted HSBC to do so. Part of the Claimants' reliance case is that they entered into a £10 million personal loan, as to which the Claimants claim an unfair relationship under the Consumer Credit Act 1974. There is a separate misrepresentation claim in negligence related to alleged advice given by HSBC not to pursue an indicative third party share purchase offer in October 2015. There are claims in unlawful means conspiracy, based on breaches of duty on the part of HSBC and the MCPLC CEO appointed on 24 June 2015.

8. The Claimants also seek a declaration that HSBC acted as a shadow director of MCPLC once HSBC transferred management of the banking relationship to its Loan Management Unit ("LMU") which the PRAPOC describe as "its section specialising in customers in financial distress".

9. This declaration provides a bridge between the personal claims and the derivative claims. The essence of the derivative claims is that HSBC acted as a shadow director throughout the relevant period and, as such, wrongly pursued its own interests to run down the business to a managed failure rather than the success that was in the interests of MCPLC.

10. The gist of the Claimants' position before me is that these claims arise from the genuine and strongly held belief of the Claimants based on the facts set out in the witness statements in support. The Claimants point out that they have limited access to documents pending disclosure, but even those documents that HSBC has chosen to put before the court on this application provide significant support for the derivative claims. MCPLC has nothing to lose but everything to gain if the derivative claims can be added to the personal ones. The Claimants have said they will meet the costs that might arise as a result of the derivative claims being added but broadly those costs will be incurred in the personal claims anyway. The Claimants say the claims clearly pass the relevant statutory tests for permission.

11. HSBC's position is that permission should not be granted. The contemporary documents, such as public announcements, filed accounts, board minutes, emails and correspondence show HSBC acting as banker throughout, protecting its own interests but also helping the business so far as it could until that ceased to be appropriate. The Claimants' theory of HSBC unlawfully acting to run down the business for its own benefit is manifestly inconsistent with what happened: HSBC has been left with an irrecoverable debt owed by MCPLC of about £20 million and is presently suing the Claimants for the balance of the £10 million provided to them in February 2015 by way of personal loan to be put into the business. So the total HSBC losses because of this business collapse is close to £30 million.

12. Mr Davies KC appeared for the Claimants and Ms Lucas KC appeared for HSBC. I thank them both for their full and helpful written and oral submissions. MCPLC was not represented.

The Law

13. An application for permission to bring a derivative claim can only be made by a member of the company. There is no dispute that the Claimants have such standing in this case.

14. As relevant, section 260(3) of the 2006 Act limits derivative claims to causes of action arising from breaches of duty by a director of the relevant company. Section 260(5) provides that shadow directors are to be treated as directors for this purpose.

15. Section 251 of the 2006 Act states that a "shadow director…means a person in accordance with whose directions or instructions the directors of the company are accustomed to act".

16. In *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 between [1264] and [1269], Lewison J (as he then was) described the boundary between a lender acting in its own interest and a lender who overstepped the mark so as to become a shadow director. The judge said: "In my judgment, where the alleged shadow director is also a creditor of the company, he is entitled to protect his own interests as creditor without necessarily becoming a shadow director" [1267]. In addition, Lewison J agreed with the submission that "a lender is entitled to keep a close eye on what is done with his money, and to impose conditions on his support…a position of influence (even a position of strong influence) is not necessarily a fiduciary position. To find otherwise would place a wholly unfair and unnatural burden on men of business." [1268]. It was accepted by counsel for the company in *Ultraframe* that "a lender was entitled to lay down terms relating to the running of the business in the absence of which he would not be prepared to lend…" and "[counsel] was inclined to accept that a lender could lay down terms relating to the running of the business, in the absence of which he would call in his loan", all without becoming a shadow director.

17. It has not been necessary at this stage in the dispute for there to be detailed reference to the nature and extent of the duties owed by a shadow director as opposed to an actual director. The PRAPOC make no distinction, eliding at paragraphs 75 and 76 the source and breaches of duty of the impugned actual director and the alleged shadow director. It is sufficient if I refer to the discussion in *Instant Access Properties Ltd v Rosser* [2020] 1 BCLC 256, Morgan J [255] to [275] which identified some of the difficult and fact sensitive questions that can arise as to whether shadow directors owe fiduciary duties.

18. Under section 261(2) of the 2006 Act, the court must dismiss a potential derivative claim if "the application and the evidence…do not disclose a prima facie case for giving permission…". If the application is not dismissed at that stage (and this one was not) then it moves to the next stage.

19. Permission at the second stage is governed by section 263 of the 2006 Act. As relevant this includes a mandatory ground for refusing permission at 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" and a wider ground at s.263(3) but which still involves bearing in mind the duty to promote success of the company: "In considering whether to give permission…the court must take into account, in particular…(b) the importance that a person acting in accordance with section 172…would attach to continuing it".

20. There are other matters that the court is required to take into account which were touched on in the hearing but which in the particular circumstances of this case are

not sufficiently relevant to spend time on beyond my referring to them briefly in the discussion section of the judgment below.

21. A number of judges have commented on and provided helpful guidance about the requirements of section 263. Most usefully, for present purposes, in *Iesini v Westrip Holdings Ltd* [2011] 1 BCLC 498, Lewison J summarised:

> *"85. As many judges have pointed out (e.g. Warren J. in Airey v Cordell [2007] BCC 785 at 800 and Mr William Trower QC in Franbar Holdings Ltd v Patel [2009] 1 BCLC 1 at 11) there are many cases in which some directors, acting in accordance with s. 172, would think it worthwhile to continue a claim at least for the time being, while others, also acting in accordance with s. 172, would reach the opposite conclusion. There are, of course, a number of factors that a director, acting in accordance with s. 172, would consider in reaching his decision. They include the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; and disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on. The weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case.*
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> *86. In my judgment therefore (in agreement with Warren J and Mr Trower Q.C.) s.263(2)(a) will apply only where the court is satisfied that no director acting in accordance with s 172 would seek to continue the claim. If some directors would, and others would not, seek to continue the claim the case is one for the application of s. 263(3)(b). Many of the same considerations would apply to that paragraph too."*

22. It follows that the mandatory refusal will only apply if no hypothetical director acting properly could continue the claim but if the potential claim survives that test (it could properly be continued) then similar considerations arise to answer a different question, which is how important would it be to continue the claim? The answer to that question is part of the wider analysis required by sub-section (3).

23. The parties differed to some extent about the nature and extent of any merits test (although not in a way which I consider makes any difference to the outcome). In short, Ms Lucas, referred to *Iesini* at [79] where Lewison J commented that since a prima facie case is the test at the first stage, "something more must be required" at the second stage but Mr Davies, quoted, among other cases, *Korchevtsev v Severa* [2022] EWHC 2324 (Ch), Leech J at [18]:

> *18. On an application for permission the Court has to be satisfied that there is a prima facie case of wrongdoing. This test is not precisely the same as the test for a "good arguable case" on an application for an interim injunction and Ms Potts suggested that the threshold might be a lower one. I accept that this might be so in some cases. But in my judgment, there is no practical difference between the two tests in the present case where there are heavily contested issues of fact. I explain briefly why I take this view.*

> *19. A good arguable case for the purposes of a freezing injunction is one which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50% chance of success: see Madoff Securities International Ltd v Raven [2011] EWHC 3102 (Comm) at [145]. Moreover, it is trite that the Court must not try to resolve conflicts of evidence on the affidavits or decide difficult questions of law which call for detailed argument and mature consideration. In Bhullar v Bhullar [2016] 1 BCLC 106 Morgan J set out the test to be applied in deciding whether to grant permission to continue a derivative claim at [25] (in very similar terms):*
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> > *"It is one thing to ask whether the claimant has shown a prima facie case in the absence of an answer from the defendant and another thing to ask whether the claimant has still shown a prima facie case when one takes into account the suggested answer. If the facts relied upon by either the claimant or the defendant are not disputed, there may be little difficulty. But what if the claim and the suggested answer depend, as they often will, on disputed facts? Further, what if the resolution of that dispute will in due course require the trial judge to reach conclusions as to the credibility of witnesses? I consider that the court has to recognise that it cannot resolve disputes of fact at a hearing which does not involve any cross-examination of witnesses and which takes place in advance of any formal disclosure of documents. It will not be unusual to find that the claimant can establish a prima facie case, if one ignores the evidence relied upon by the defendant, but yet the claimant would fail at trial if the defendant's evidence were to be accepted. In such a case, I consider that it is still open to the court to hold that the claimant has made out a prima facie case because it would be wrong to assume that the defendant's evidence will be accepted at the trial and it may simply not be possible to predict with any degree of confidence whether the defendant's evidence will be so accepted."*

24. I suspect there is not much difference between the parties in this area. The case will need to carry enough conviction at this preliminary stage to justify moving forward. I recognise that this is necessarily relative but, as Mr Davies said, in any particular application there will be different relevant factors in play of which the prospective chances of success will always be one. At the margins it is easy: no notional director would pursue a hopeless case, just as any director would pursue a strong case for a substantial sum with a good chance of recovery.

25. I was less impressed by Mr Davies' submission (supported by reference to *Stainer v Lee* [2010] EWHC 1539) that a weak case with a large potential recovery would be sufficient. If Mr Davies' point was that this was a rule then I disagree: a poor case does not get more attractive to a rational notional director because it also incompetently assesses its own quantum but, if the point is more limited, then I agree that given a case with some real chance of success, the larger the credible loss the more important it might be to pursue it.

26. Mr Davies had another submission, which I address below, that in the particular circumstances of this case there was little point in applying any merits test since the company had nothing to lose and everything to gain by pursuing the claims.

27. In any event, Ms Lucas said this case would fail any realistic merits test once it is remembered that the starting point for the claim to make commercial sense must be that there is a realistic chance of a potential gain in excess of £20 million, since that is the level of the debt owed by MCPLC to HSBC. There must be something worth litigating about or the sought after permission is futile.

The PRAPOC Narrative

28. There is little in the general narrative which is not disputed in some way. A striking feature of the submissions was that Mr Davies spent much time going through the narrative in the PRAPOC and stressing it was supported by the Claimants' witness statements and set out their belief about what had really happened, whereas Ms Lucas spent the equivalent time taking the court through the documents and asking the court to bear in mind what those documents would demonstrate at trial (reference was made to the *Gestmin* line of authority about documents meriting more weight than unsupported memory).

29. In order to apply the statutory tests, the court needs, at least in part, to place itself in the position of a notional director. Subject to Mr Davies' arguments about MCPLC's special circumstances, it can be expected that any director would wish to assess the merits of the claim, to the extent it can be done given the preliminary nature of the material available. A broad based understanding of the nature of the case against such documents as are currently available, bearing in mind that there has been no disclosure and so it can be assumed that any documents contrary to HSBC's interests will only be revealed later, is a practicable way to carry out a reality check on the claim at this early stage. Any notional director would wish to do this.

30. The Claimants' overarching narrative is that the problems with HSBC were caused by LMU. I will take that as the starting point for my narrative summary. The PRAPOC and Mr Davies' submissions emphasised an allegation that an HSBC executive told the Second Claimant that LMU was "the wild west" (presumably with the implication that it was a lawless free for all). The Claimants were not given "official" notice of the transfer to LMU until 24 March 2015 but at least one individual from LMU was increasingly involved on the account from about December 2014. The Claimants see these manoeuvres as suspicious and indicative of an overarching plan against the interest of the business.

31. HSBC raised serious concerns with the business and the Claimants in December 2014 and January 2015. The concerns were around debt and corporate governance. A particular example is a letter dated 7 January 2015. In summary, those concerns included the visibility of cashflow requirements as stated by MCPLC's reporting combined with that reporting not taking account of payment obligations to HSBC.

32. The PRAPOC and Mr Davies' submissions recognised that cashflow problems existed at this time (the PRAPOC suggests that these could be attributed to HSBC not being more generous with a revolving credit facility but there is no suggestion of any breach of contract in the operation of that facility).

33. On 20 February 2015, MCPLC gave a public trading update. This notified the market that following an internal review "of the application of the Company's accounting policies" the expected profit before tax for year end 31 December 2014 would be

"substantially below market expectations and not in line with market expectations as announced on 28 January 2015". The update also included information about repayment of a debtor balance between MCPLC and MCDL. In short, MCDL's debt to MCPLC was £31.2 million as at 30 June 2014 but was expected to decrease to £19.5 million by "next week" because of an anticipated cash payment of £10 million. The balance was expected to be set off against the value of properties to be transferred from the private side to the public side, with the balance of the debt to be eliminated by the end of December 2015.

34. The announcement is relevant because it flags a number of issues that recur during the narrative period addressed in the PRAPOC: (a) an urgent need for £10 million (the PRAPOC says ways of raising this were being discussed from December 2014); (b) the outstanding private side debt owed to the public side; (c) the possible transfer of properties from the private side to the public side to in part clear that debt.

35. Another substantial shareholder in MCPLC was Hendersons Global Investors ("Hendersons"). Hendersons had a nominee on the board of MCPLC and in January 2015 made an offer to lend £15 million. The PRAPOC say the board regarded this offer as unattractive and that Hendersons' intentions were hostile.

36. At some point the possibility of £10 million coming from HSBC was raised. The Claimants' case is that HSBC suggested this should be by way of personal loan to the Claimants. HSBC say the Claimants made the request. Before me, Ms Lucas suggested this made little difference but I do note that the Claimants' case of an overarching LMU initiated managed failure plan is supported by the allegation that HSBC wanted this borrowing because, among other things, it provided an opportunity to get control via charges of the Claimants' shareholding in MCPLC. On the other hand, at present, there is nothing to support the assertion that it was HSBC who asked the Claimants to borrow the money personally.

37. The PRAPOC refer to Mr Armstrong of HSBC being told by those higher up in HSBC to sort things out. The PRAPOC refer to Mr Armstrong suggesting a further loan to the private side but then the loan documents being drawn to be a personal loan

38. About this time, HSBC, MCPLC and MCDL instructed BDO to prepare a report addressing the cashflow problems. The report is dated 18 February 2015. It says a draft was seen by the companies' directors who confirmed there were no material errors of fact. It refers to the £29.3 million debt owed by MCDL to MCPLC. It refers to cash flow problems and steps that had already been taken to address these like mothballing sites and restricting new acquisitions. The report refers to MCPLC having an urgent need for £10 million and that consideration was being given to raising this by personal loan or a loan from Henderson. HSBC debt at this time was about £25 million. The personal loan was being progressed and it was both boards' favoured option rather than borrowing from Hendersons. The BDO report was part of HSBC's requirements before agreeing the loan. In summary, BDO recommended that the £10 million would meet short term cashflow requirements, particularly if HSBC deferred payments it was otherwise entitled to and/or recognised that its payments were tied to property sales. In the longer term, property sales were going to be key. The report reflected the same factual circumstances as were contained in the market statement made on 20 February 2015 referred to above.

39. The Claimants rely on an internal credit memo of HSBC addressing the application for a personal loan. The note was an iterative document and the later comments are dated 18 and 19 February 2015 (it reflects comments added after its initial version and refers to having been resubmitted and the subject of much debate). The Claimants point to aspects of this document as showing that the personal loan was irregular and that there was a tension between the HSBC senior management, broadly in favour and supportive of the Claimants, and the relationship managers, broadly against the Claimants. Elements the Claimants stress include a comment that the Claimants' shareholding in MCPLC was accepted for security even though it was given a nil value rating and the Claimants' obvious inability to fund loan repayments from their own resources.

40. I am conscious that much of this will be a categorisation relevant to the personal claims but for present purposes I note that my impression of the document as a whole (and this goes for all the various credit memoranda that I was taken to or referred to) is that they show a typical reflection of views relevant to the decisions discussed within the document. No doubt some of this shows individuals who are more risk averse making sure their views are recorded but I do not find anything sinister in this or anything which points to a smoking gun for the purpose of the derivative claims. Examples are provided by the points emphasised by the Claimants. It is clear from the document as a whole that the shares were treated as important security (albeit caveated because although new to HSBC's security portfolio, its value was necessarily dependent on the main business being backed) and that there was no expectation that repayments would come from the Claimants personally but rather from private side sales.

41. In any event, the Claimants took out a personal loan for £10 million on terms that the money would be paid into the private side, so enabling the private side to make the £10 million payment to the public side described in the public announcement of 20 February and envisaged in the BDO report.

42. The Claimants also say (but were not able to demonstrate this on any documents before me) that the £10 million – or its value equivalent – was then transferred to HSBC to reduce debts. Certainly, on the documents before me this seems less certain. The BDO report refers to an intention that the majority of the money would meet trade debts and no more than 40% roll over into the month when substantial bank payments were envisaged. In any event, I do not follow why the ultimate destination of the money would be relevant assuming that the money was due and owing and bearing in mind that it is no part of the PRAPOC that HSBC acted as a shadow director in causing MCPLC to make that payment. It is not said that HSBC's ultimate receipt of the funds was a condition of the borrowing. It appears that from the end of January 2015 and thereafter one or more of HSBC's loans were in default.

43. The Claimants received independent legal advice about the personal loans and this was recorded in writing. Ms Lucas drew particular attention to a late amendment to the loan conditions that increased the trigger share-price for the share security. I agree that this aspect needs to be borne in mind when assessing for present purposes the Claimants' case that the share security was part of what the PRAPOC calls the "LMU Purpose". In short summary, it is not the case that HSBC treated the share-security as without value. On the contrary, for the purpose of their internal decision making, reflected in such credit memoranda as have been disclosed, the value of the share

security was a significant factor. Although that value was caveated because its value was not independent of the business bearing the primary repayment risk.

44. The Claimants answer any assumption that might otherwise be made against them, because after receiving independent advice and being fully aware of the risks the Claimants made their own choice to enter the personal loans and so expose their shareholdings to the potential security based control of HSBC, by reliance on the representations of support from senior management.

45. A further aspect of these events stressed in the PRAPOC is the reference in the internal memo to the weakening of the Claimants' management control arising as a result of the Personal Loan. The PRAPOC say that this was in contrast to the representations, which they relied on, about HSBC being the funding option that would give them management support. This was done in a context when HSBC knew that the Claimants had had problems of this sort before when their businesses were based in Ireland.

46. The LMU Purpose is a key allegation in the PRAPOC. This is an intention to take control of the business so as to wind it down for the benefit of HSBC. I got the impression from Mr Davies' reply submissions that he rather invited the court not to spend too much time focusing on this part of the Claimant's case but more on the allegation of shadow director. However, the LMU Purpose allegation remains a key element of the claim set out in the PRAPOC. It informs the overall narrative arc of the PRAPOC, because it alleges this purpose was formed as part of the transfer to LMU, informed and justified (from HSBC's perspective) the personal loans, is the true explanation of the involvement of Mr Martyn Everett ("ME") as CEO and other external advisors, motivates HSBC's actions thereafter, such as encouraging or requiring the Claimants' removal from the MCPLC board, and is referred to in all but two of the allegations of breach against HSBC (the exceptions being advising against the Siahaf offer and not telling the Claimants about ME's track record).

47. The PRAPOC supplements the LMU Purpose allegation with a similar internally-defined phrase "Creditor Turnaround" (paragraph 28d(iii)). This is said to be HSBC determining to manage MCPLC so as to keep it out of formal administration but alive for the predominant purpose of reducing HSBC's debt. My references to the LMU Purpose allegation throughout this judgment are inclusive of this allegation.

48. The parties dispute whether it would have been apparent to the Claimants before they were informed on 24 March 2015 about the transfer to LMU. The PRAPOC allege that this transfer was itself contrary to the representations but do not refer to anything that the Claimants did as a consequence.

49. On 20 April 2015, MCPLC was suspended from AIM pending the appointment of a new nominated advisor.

50. The next significant event relied on in the PRAPOC is the appointment of ME. It is the Claimants' case that HSBC required ME's appointment. HSBC say that ME was strongly recommended but other options were available and the ultimate decision was made by the board of MCPLC, in particular the Claimants. There is a brief board minute in which the Second Claimant explains why ME is a good appointment

without reference to it being a requirement of HSBC. The PRAPOC explain this as the Second Claimant making the best of the situation.

51. The Claimants' case is that ME was a bad appointment from the business' point of view because, it is alleged, his track record was poor. The Claimants criticise his prior involvement with HSBC and his close working relationship with other individuals who ME brought in to assist him. This is another aspect of the LMU Purpose and is another aspect of the general complaint about management control being taken away from the Claimants and given to technocrats who were not supportive of the business.

52. The PRAPOC assert that ME was appointed to do HSBC's bidding and to bring about the LMU Purpose. The facts pleaded to support these allegations are however lacking but the PRAPOC assert that this is because disclosure has not taken place yet and such disclosure will contain those particulars.

53. A general allegation about ME's conduct is that ME "delayed and/or postponed" agreeing the amount owed by the private side to the public side. No particulars are provided. The PRAPOC allege that such debt varied between 10 million and 31 million and I have referred above to the Second Claimant's statement to the market that the valuation was £29.5 million as at February 2015.

54. The documents and correspondence in the bundle, again largely drawn from what HSBC have chosen to put before the court at this stage, show a different narrative to that suggested by the Claimant. The documents show that as the Claimants found themselves less in control on the public side of the business, they argued for a greater reduction in the amount owing from the private side. This was seen as exacerbating the conflict inherent in the Claimants' position straddling both public and private side and so, from the ME perspective, led to the moves to have them removed from the public side. I note that in a report prepared by Menzies for the private side and dated 7 March 2016, Menzies set out that the true position was that MCPLC owed MCDL just over £7 million. Since this might make a £26 million difference to MCPLC's balance sheet, it is at least understandable why there were problems and that those problems were seen to create a conflict.

55. The relevance of recognising the existence of this competing narrative from that set out in the PRAPOC is to assess the strength of the case to the limited extent required for this decision. ME being an HSBC cat's-paw (the expression is from Harman J's judgment in *Re Unisoft*) and carrying out the LMU Purpose gains weight if there are no alternative explanations. The existence of other explanations supported by such documents as there are at present does not make those explanations necessarily right but they change the landscape in which the present decision needs to be made.

56. The PRAPOC see the appointment of other professionals who had experience of working with HSBC, a Mr Johnson (who appears to have shared the same services company as ME), Deloitte, BDO and Dentons as being part of HSBC's plan to take control.

57. Another of the credit memoranda highlighted in Mr Davies' written submissions is that for 26 June 2015, around the time of ME's appointment. The highlighted sections include a comment that there is some benefit to the current position over an administration because of the better visibility (I summarise) that HSBC will have,

given ME and the new advisors. The commercial disadvantages of an administration are commented on and the particular risk arising from the personal loan being secured on the shares (insolvency = no security value). The conclusion was that it would be better to fund an on-going business and try and agree a way forward. For the Claimants this reveals the LMU Purpose but from an objective perspective it looks like a bank having due regard to its own interests in the context of a struggling client.

58. The next highlighted credit memorandum is that of 7 July 2015. The general impression from this memorandum is much the same as others. The view was that keeping the business going was preferable from HSBC's perspective to an insolvency situation (not least because of the problems with building out sites after an insolvency event and the share security on the personal loan). HSBC are more comfortable with the new additions to the management / advisor structure.

59. The PRAPOC rely on a HSBC credit memorandum of 24 July 2015 and the minutes from a board meeting of the same date as providing factual evidence which supports the case of (a) HSBC being a shadow director and (b) using that role to drive the LMU Purpose. The board minutes reflect the funding decision being given to ME during the meeting.

60. It is common ground that during June and July 2015 HSBC introduced further funds into MCPLC. For the Claimants this is part of the parasitic conduct of HSBC keeping its host alive while it strips out maximum benefit. For HSBC this was the business and HSBC dealing with each other on a banker / customer basis and HSBC making decisions to help the business while being concerned for and where appropriate protecting its own position.

61. The Credit Memorandum addressed a proposed £1.2 million extra loan of the £3.9 million asked for by management to cover a period down to 31 October 2015 which would allow the build out of 6 sites so as to deliver £13m of sales and £16m of completed stock units over that period. The strategy post October 2015 would be prepared by ME and Deloitte. The memo notes that ME was appointed as part of HSBC's approval conditions and that Mr Johnson and Deloitte, Dentons and EEF are advisors and HSBC regard this as a positive. Essential work streams are said to have been addressed relative to sites, there was greater cash visibility, ME was authorising payments, it was hoped the public / private side issue would be completed by the end of August and there were restructuring plans. The HSBC exposure, including the personal loan, was about £34.7 million. The memorandum continues, about discussions on going with HCA as another significant creditor. There is discussion of the alternative to funding being insolvency but there is concern that this would impact on security values, especially the share charge.

62. The memo included detailed comments on the proposed loan from HSBC's Mr Howman and Mr / Ms Hughes. Mr Howman referred to recent short term funding being required to stave off winding up petitions (both in the immediate past and the immediate future) and HCA needing to also recognise the benefit of keeping the group alive. Mr Howman did not think HSBC had sufficient information to know what the best decision will be ("whether insolvency is a more viable option"). Mr Howman's position on the long term situation was "…the Bank should be expecting a capital impairment in some form…in a solvent trading…to…the value of the Ryan's loan security shortfall. In an insolvent trading, the impairment could be sizeable,

despite the hard work of all parties recently to salvage the position". Mr / Ms Hughes' input was briefer and even less optimistic: the problems were caused by those involved previously (on both the HSBC side and the MCPLC side), the better outcome for creditors/lenders is to avoid insolvency but material losses look increasingly likely.

63. The board meeting was attended by ME, the Claimants, another director and people from Dentons and Deloittes. ME reported about the current urgent problems. ME had had meetings with HSBC and HCA as the group's secured creditors. The conditions of the emergency funding received so far included the appointment of ME, Mr Johnson and other advisors. There was then a focus on Project Wales which was the plan to stabilise the situation. It was said that without the funding the group would likely have to cease to trade. The board discussed alternative sources of funding. Next steps included keeping the communication channel between ME and HSBC open. The board decided it was reasonable to continue to trade given the measures being taken.

64. Mr Davies' skeleton highlighted a further credit memorandum dated 30 July 2015. The extract was similar to those referred to above: it was better for HSBC for current projects to be completed and sold at non-distressed prices.

65. The case in the PRAPOC is that the credit memoranda and the board minutes show HSBC and ME working in tandem to control MCPLC and bring about the LMU Purpose: "the board accepted each and every proposal advanced by or on behalf of HSBC". I recognise that my own impression of the notes and minutes is limited and without the benefit of the context that comes from a trial but nevertheless there is clearly an alternative narrative where these documents reflect a board doing its job and HSBC carrying out a banking role balancing its own interests with the funding requests coming from its customer. Like the credit memoranda I have discussed above, there is nothing in these documents which gives the Claimants the better of the argument for present purposes rather, at this time, the Claimants' position looks far less likely but that, of itself, does not mean that it might not prevail if something turns up. The notional director would balance risk against potential reward bearing these aspects in mind.

66. The PRAPOC refers to an increase in the personal loan by £250,000 in the August to September 2015 period and HSBC taking additional security as a consequence. It is inferred "pending disclosure" that this was all done as part of the LMU Purpose. Again (and understandably from the Claimants' perspective) the facts are not available to support the inference at this time but the hope expressed is that disclosure will force HSBC to reveal what was really happening.

67. The next event was "the Siahaf Offer". This consists of two non-binding letters from Siahaf (I was told this was an asset rich property development vehicle) one dated 30 September 2015 and the other dated 30 October 2015. The letters were addressed to the MCPLC board and expressed an interest in acquiring 100% ownership of MCPLC. The Siahaf Offer is relevant because the PRAPOC say that Mr Howman of HSBC and ME advised, at a meeting on 16 October 2015, against pursuing it because the business would be worth more in 12 months' time. This is said to have been negligent and part of the LMU Purpose.

68. The PRAPOC also say that the potential purchasers should have been shown the Project Wales plan which was available at this time. This plan is dated 2 October 2015 and says it was prepared by the group with the assistance of Deloitte and was intended to provide a summary of the business plan for the board, HSBC and HCA. The gist of the plan was a three year strategy which with the support of HSBC and HCA would get the business on a better footing and allow it to move forward. The document reflects the cash-flow and governance issues already referred to above. One of its key dependencies was the completion of the related party transaction, which was assumed to provide a net inflow of £15.3 million, part of which was also accounted as cash receipts from Colindale of £13 million which was reflected in the positive cash outcome for FY16 of £13 million which then carried forwards into the proposals for the next two years (enabling new sites to be purchased and so on).

69. I have referred above to how the assumed resolution of the related party issue did not occur and how for the private side Menzies reported a revaluation stating a net loss to the public side. I have no idea, and it is not necessary for the purpose of this decision to have an idea about who might have had the better of those arguments about the correct debt balance. However, what is clear is that the complaint in the PRAPOC about HSBC / ME not following the Project Wales plan appears to be undermined by the failure of that key assumption. On page 38 the plan summarises: "The Plan assumes that the net exposure to a related party…can be recovered by receiving all sales proceeds from Colindale…and obtaining a number of assets in line with the related party transaction". I note that the HSBC debt was assumed to go up from £22.6 million at FY15 to £23.9 million at FY16 and to remain there for the period of the plan.

70. Likewise it is hard to ignore the inconsistent ways in which the Project Wales report (and its predecessors) is treated in the PRAPOC: in paragraph 18E it is said to be an HSBC named "proposed restructuring proposal" which seems to refer to paragraph 18D b. to "allow LMU…to structure the businesses" (i.e. part of the LMU Purpose); in a similar way one of the criticised advisor roles was to help the preparation of the Project Wales plan "as required by LMU" (paragraph 36 b.); it is said to have been done for the purpose of the Creditor Turnaround (paragraph 36A a.); and then in a different context at paragraph 42B it is said to be an ideal document to present to Siahaf or other investors, at paragraph 56 HSBC and ME are criticised for not pursuing the Project Wales business plan and at paragraph 88 b. it is relied on as supporting a net asset position, if implemented, of between £25-£29 million. There is a lack of consistency here which would concern the notional director.

71. Paragraph 42A of the PRAPOC alleges that ME deliberately delayed circulating the plan to LMU until 14 October 2015 to gain a tactical advantage over the Claimants. It is a small point but this appears incorrect as the report was circulated by an email dated 2 October 2015 (page 848 of the bundle).

72. Paragraphs 45 to 47 of the PRAPOC describe a meeting on 16 October 2015. The Second Claimant understood the purpose of the meeting was to talk with HSBC about sales proceeds from MCDL units being used to reduce the personal loan. The First Claimant, who was unwell with what proved to be a tumour on her hip at the time, was asked to dial in. Thereafter the meeting was very different. ME was present, along with Dentons, Deloitte, Pinsent Masons (HSBC's instructed lawyers) and HSBC. The working relationship of the board was discussed. In an email dated 20

October 2015 to Mr Howman, the First Claimant expressed her concern about how this occurred and asked for some time to take advice. I can understand why.

73. HSBC's explanation was set out in a reply email from Mr Howman of the same day. In short summary, HSBC was concerned about the conflicts between the public and private side and suggested that ME focus on the public side, while the Claimants focus on the private side. HSBC's concerns in this respect were set out in more detailed letters to both MCPLC and the Claimants on 5 November 2015. The First Claimant provided a response dated 7 November 2015 and referring to the meeting of 16 October 2015 as first evidencing the breakdown of the relationship with HSBC. Time was sought to try and refinance.

74. The PRAPOC then refer to some of the correspondence that led to the Claimants' losing their place on the board of MCPLC. The conclusion that is asked to be drawn about this includes that it was done at HSBC's insistence as part of the LMU Purpose.

75. Ms Lucas took me to correspondence sent by solicitors for the Claimants (not those presently acting) to MCPLC's solicitors at the time which asserted that HSBC were not requiring the Claimants' removal but were open to them remaining in a non-executive role and that HSBC were not against the removal of ME: "the Bank has made it clear that its continued support is not dependent on the removal of [the Claimants]".

76. Finally, it is sufficient in this rundown of the narrative described in the PRAPOC to refer to the general assertion that ME presided over a slow and expensive "Creditor Turnaround" under the direction or instruction of LMU. There are no essential facts provided to support this conclusion but subsequent reference is made to the filed accounts. However, the accounts at least on their face do not give this impression, referring to seeking to give the business a viable commercial future and to seek to rebuild shareholder value.

77. Ms Lucas referred me to the letter from the board of MCPLC to its shareholders describing the reasons for the business failure dated 17 June 2021. While recognising that for present purposes, Mr Davies would say that this is exactly what they would say, not least because the Claimants' criticisms and the substance of the present claim had already been ventilated in solicitor correspondence for some years, I note that explanations are provided that are inconsistent with the alleged LMU Purpose. Essentially, that the continued cashflow problems meant further developments were not possible and no third party funders or business purchasers could be found. It was not until late 2019 that a managed wind-down plan was put in place.

The Detailed Submissions

78. Mr Davies made a number of points in support of getting permission. I summarise and categorise them here but without repeating matters I have already summarised above:

    i) As MCPLC has no purpose save for the potential litigation and nothing to lose in bringing the proceedings, a notional director would be bound to pursue the claim as there is no risk, in particular where the Claimants have said they will bear the costs risk and the claim is going to trial anyway on the personal claims. ("The Unusual Circumstances");

ii) From the time LMU became involved, HSBC gradually took over the running of MCPLC for its own purposes and acted as a shadow director by obtaining control over the Claimants' shares, appointing ME without good reason, controlling all cash and asset movements, getting professionals appointed who HSBC was happy with on a take it or leave it basis, wanting the Colindale proceeds to be paid into MCPLC, directing the business to stop acquiring new sites, so stopping it functioning as a going concern and using tightening corporate governance controls to increase HSBC's own influence all comparable to the Australian case of *SCBA v ANTICO* [1995] NSWSC 31 ("the LMU Purpose" and "the Shadow Director").

iii) In support of the shadow director issue, the Claimants will say that subjectively they believed they had no choice but to do what HSBC wanted and this evidence cannot be discounted on an application of this kind.

iv) The quantum of the loss would be a matter of expert evidence and evidence of fact from third parties who would have funded the business and could easily be very substantial as the business had a market value of well in excess of £100 million before the events, led by HSBC, that led to its downfall and it was a great company, with great prospects which would have been successful ("the Quantum Issue");

v) It was wrong for HSBC to run the business for its own benefit rather than put the business into administration so that appropriate insolvency procedures have to be followed, as per *MacPherson v European Strategic Bureau* [2000] 2 BCLC 683, Chadwick LJ [46] – [49] ("the *MacPherson* Point").

vi) The court should not criticise the Claimants for not providing in their evidence details of their assets to support the promise to fund the litigation and meet adverse costs orders because it would be wrong to put the Claimants in a position of having to make such disclosure to the defendant in the personal claim ("the *Hughes* Point")

vii) The purpose of this hearing is to consider what is in the interests of MCPLC and not HSBC, consequently the court should bear in mind that HSBC will be able to make applications for summary judgment or strike out if it considers it appropriate, the court should not and need not pre-empt such protections by raising the bar too high on the permission application.

79. Ms Lucas's submissions for HSBC focused on the following points:

i) The claim makes no sense in the context of HSBC being a creditor for £20 million so the alleged plan was wholly unsuccessful (even more so bearing in mind the personal loan potential loss), it is speculative and unrealistic not being based on the documents but on unsupported inferences which are themselves often directly inconsistent with the documents.

ii) There is nothing wrong with what HSBC transparently did on the documents which was to support the business while being mindful and protective of its own interests, this includes considering options such as administration or

winding up in its own discussions but there is no obligation on any bank to fund a business in the hope eventually things will get better.

iii) There is nothing wrong with HSBC imposing conditions as to its continued support and it can do those things without becoming a shadow director.

iv) The hypothetical director would have regard to the merits and to the potential risks in the litigation which would include making the situation worse for a major creditor.

v) If the Claimants' offers to fund and meet adverse costs orders are relevant then they needed to be substantiated by evidence of assets to show that those promises have weight (see *Hughes v Burley* [2021] EWHC 104, [141]).

vi) The shadow director allegations fail to identify any particular instruction to the board which was followed and then caused loss but rather are all encompassing and assume, without justification even at this stage, whatever was done was done at the bidding of HSBC as part of the LMU Purpose.

Discussion

80. *The Unusual Circumstances* This is a bad argument which has no traction. At best it assumes that so long as MCPLC has nothing to lose by bringing proceedings then the notional director is bound to continue them. The obvious flaw in this reasoning is that the statutory tests require there to be positive reasons for continuing the proceedings: the negative mandatory filter at section 263(2)(a) applies to circumstances where the success of the company could not be furthered by the continuing of the claim, and the more general considerations at section 263(3) from different perspectives ask the question whether the pursuit of the claim would be better done than not done.

81. In short, the statutory test is not fulfilled by what might be described as a "Hail Mary" claim – a last throw relying not on probabilities but possibilities when there is nothing more to lose.

82. I also disagree with the proposition that MCPLC would have nothing to lose. It cannot be ignored that in continuing proceedings against its only significant creditor, MCPLC may increase that creditor's indebtedness beyond that which the Claimants might be willing to cover (I will assume for this purpose that the Claimants might be able to do so).

83. *The LMU Purpose* The LMU Purpose is supported in the evidence by reference to the conduct of banks in relation to small / medium business lending more generally, e.g. the critical 2014 Tomlinson Report and the Promontory Report (and others). In addition, the Claimants rely on what happened in relation to a business called the Redhall Group, where ME and HSBC and Hendersons were also involved and the gist of what occurred, the Claimants say, was founders being driven out in favour of technocrats and a good business being destroyed.

84. The notional director would bear these factors in mind but would also recognise that such anecdotal "nature of the beast" type evidence operates at the evidential margins, perhaps acting as a brake on any unconscious establishment bias in favour of large

banks. It rightly should encourage a focus on the actual circumstances of the case with an open mind. I will assume such a mind on the part of the notional director.

85. The obvious difficulty with the LMU Purpose allegation is that it requires such a reductive view of what was a more complex situation. It ignores the chance of a positive business turnaround (which is stressed in the business plans in the evidence and the MCPLC filed accounts) against a pre-determined HSBC plan to kill-off the business in favour of asset realisation for its own purpose. It ignores more likely possibilities: that the bank wanted to support the business as far as it could but at the same time take whatever steps it considered necessary and appropriate to protect its own risk, in favour of an overarching conspiracy. The notional director would have these points in mind. The notional director would also have regard to the temptation of such allegations to those in the Claimants' position – it absolves them of any blame for the loss of a likely cherished and lucrative business.

86. The notional director would bear in mind that the actual outcome, where HSBC remained substantially the last creditor standing, with an irrecoverable £20 million plus whatever remains outstanding on the personal loan, is inconsistent with the existence of the LMU Purpose (at the most general level the HSBC position described in the business plans, where it would have carried about £24 million of debt through the three years of trading out of the cashflow problems, is not so very different from where it ended up). The notional director would have in mind that the answer to this in Mr Davies' skeleton: that it just shows how incompetent ME was, undermines the LMU Purpose allegation which assumes ME was appointed because HSBC knew what he would do for them, not that he could not do it.

87. The potential unlawfulness of the LMU Purpose was supported by reference to *MacPherson v European Strategic Bureau* [2000] 2 BCLC 683, in particular Chadwick LJ between [46] and [49]. In that case an agreement between shareholders / directors (some of whom wished to leave the company) and their insolvent company whereby incoming company assets would be paid out to themselves in priority to creditors was held to be outside the purpose of the company's business, outside the directors' powers, in breach of their duties and wrongfully ignored the interests of creditors.

88. The gist of the passages to which I was referred can be seen in the following quotations:

> *The intention was to effect an informal winding up of the business…they wished to take out what, as they saw it was due to them in respect of the value which they had contributed by their efforts. But it is not an objective which can be said to have anything to do with the promotion of the prosperity of the company...it is inconceivable that that provision would have taken the form that it does but for the fact that the parties wished to achieve the objective which I have identified – namely, a distribution of assets as if on a winding up* [46]
>
> *…in each case it would have been necessary to make provision for all the creditors of the company before there could be a distribution to the corporators* [47]

> *…to enter into an arrangement which seeks to achieve a distribution of assets, as if on a winding up, without making proper provision for creditors is, itself, a breach of the duties which directors owe to the company…*[48]

89. Mr Davies' argument was because the credit memoranda show HSBC considering the financial benefits for them of keeping MCPLC out of insolvency (e.g. it being less expensive to complete on-going projects) and since what took place can be described as a managed wind-down outside of formal insolvency then this was wrong in a similar way to *MacPherson*. The allegation depended on the assertion that HSBC was a shadow director. It ignored that the essence of *MacPherson* is that directors / members cannot prioritise their own interests over those of the company's creditors. It ignores the predominant and undisputed fact in the present case that HSBC was always and remains the most significant creditor and as a creditor was entitled to look to its own interests.

90. I do not consider the *MacPherson* case adds any credibility to the LMU Allegation which remains properly categorizable, even at this interim stage, as a speculative theory without potentially credible factual building blocks.

91. *Shadow Director* I agree with Ms Lucas that based on the PRAPOC and such evidence as is currently available, the shadow director allegation also lacks essential core facts. It is striking that the allegation morphed during submissions to include not only that ME was the cat's-paw of HSBC but that HSBC's shadow control also operated through the Claimants. This seemed to me to be another example of how the allegations against HSBC are all encompassing but that they only achieve that because of an unsubstantiated assumption that HSBC should be to blame for the loss of the Claimants' business. Unsubstantiated, in this context, referring to the lack of essential facts to provide a platform for the conclusion sought.

92. A related but different aspect of this assertion is how inconsistent it is, even at this interim stage, with the type of artefact evidence that is more likely than unsupported witness evidence to carry weight at trial. For example, the allegations about the Claimants not making their own decisions regarding the personal loan or appointment of ME. The Claimants took their own legal advice prior to entering into the personal loans and the Claimants drafted and approved a board minute which praised ME as someone who would be a good appointment. This is not a conflict of disputed witness statements where a fair interim assumption might be that the Claimants' evidence will be accepted (as described by Morgan J in *Bhuller*) but a present fact about the nature of the proposed claim: it appears inconsistent with a significant number of such of the contemporary documents as are currently available.

93. This problem is not answered by Mr Davies' points that there has been no disclosure and that the court should assume that HSBC will have cherry picked the documents which it wants to put forward. These are reasonable points which require to be borne in mind when weighing the existing merits for the section 263 tests. But even at this stage, in the circumstances of the present case these points do not go very far. At heart they are essentially hopeful, something may turn up, whereas the documents relied on by HSBC have turned up and have turned up in circumstances where (a) their validity is not questioned and (b) there is an overall consistency within those documents about the narrative revealed by them and, (c) that consistency is at a general level in accordance with what commercial people might expect. None of these things mean

that the case might not look substantially different as the litigation process moves forward or that unlikely things are not capable of being established and succeeding, but that, again, is only to recognise that something might turn up.

94. In a different context, the quantum of the proposed claim is also largely speculative at the present time. In its largest extent, the PRAPOC assert a business value based on what is said to have been the 23 February 2015 share price despite the obvious fact that such a value proved to be illusory soon after. There is a fall back reliance on the indicative offer at £55 million made by Siahaf (but that was nothing more than indicative and might, for example, assume that £30 million had come or was coming from the private side to the public side as per the February AIM announcement). There is no attempt to link the alleged breach of duties to any specific loss caused to the company. Mr Davies, in submissions, said, rightly, that the quantum will all need to be the subject of expert evidence at trial and factual witnesses to be called to say they would have lent additional funds to the company and/or would have been willing to purchase it and so on. All of these things may come to pass but for present purposes all that can be said with any degree of certainty is that the Claimants believe that the claims have a high value.

95. Having made these particular observations, I turn to the conditional test as to whether "a person acting in accordance with the general duty of directors…to promote the success of the company would not seek to continue with the claim". As Lewison J, said in *Iesini* [79] "the court will have to form a view on the strength of the claim in order properly to consider the requirements of s.263(2)(a) and 263(3)(b). Of course any view can only be provisional where the action has yet to be tried; but the court must, I think, do the best it can on the material before it".

96. In my view no person concerned to promote the success of MCPLC would seek to continue this proposed claim. The claim is weak. It is speculative and requires something to turn up which will turn the likely prospects of success towards MCPLC rather than HSBC. It does not matter if the merits test is described as "the better of the argument" or a "serious question to be tried" or more pragmatically as sufficient merit to make taking the claim forward worth doing for the better success of the company. The prospective claim fails all those tests.

97. In addition, it is not a claim which provides an obvious platform for an early ADR so justifying a pursuit for that purpose. On the contrary, given HSBC is the only substantial creditor of MCPLC in a sum of more than £20 million, and the likely quantum of MCPLC's claim is difficult to assess at present, the prospects of any offer coming that could be considered a success appears fanciful on the material before me.

98. I take account that it may well be unusual for a court to be satisfied under section 263(2)(a) (see **Gore-Browne**, 18-15 "It will be difficult for derivative claims to be dismissed at the initial stage…") but it is the combination of the nature of the claim with HSBC being the only substantial creditor (and another substantial financial loser as a result of the corporate failure) which makes such a dismissal appropriate. It is not possible to identify a good reason which would lead anyone to continue the claim for the success of MCPLC. As things stand, the only rational decision would be to refuse to allow the claim to continue.

99. If I was wrong about that and a notional director would consider that pursuing the claim would be consistent with the duty to pursue the success of the company, then the same factors I have identified above and in the narrative section of this judgment would still lead to my refusing permission. The merits are still relevant and even at this interim stage the problems with the claims which at best might be described as having a speculative chance of success, would be a predominant factor relative to the other statutory factors and other relevant circumstances.

100. I will comment briefly on the other statutory factors.

101. *Good Faith* While there was some concern on the Claimants' part that good faith might be an issue, Ms Lucas confirmed that no suggestion of bad faith was being made by HSBC against the Claimants.

102. *The Company deciding not to pursue the claim* This has no relevance. The company is without directors at present. MCPLC did not pursue a claim against HSBC while it was in business but from the Claimants' perspective that was hardly surprising given the alleged wrongful control by HSBC and from a more neutral perspective that was hardly surprising given its continued operation required the financial support of HSBC. Either way this factor does not add anything to the decision to continue or not.

103. *Whether the claimant has another remedy*. In *Cullen Investments v Brown* [2015] BCC 539, a derivative claim was added to personal claims because it covered off a defence being raised that a relevant duty was owed to the company and not the personal claimants. In a similar way, in the present case, the Claimants say that the gravamen of their losses (the business was taken from them) is a loss which is suffered by the company. It follows that the Claimants cannot have personal claims for losses which have impacted the value of their shareholding so far as that value is reflective of the value of the company. In so far as these claims are properly MCPLC's then there is no alternative remedy. It is not relevant, because I do not see "public interest" as a justification for litigation within the "success of the company" criteria, that the existence of the personal claims will mean that the allegations against HSBC can be brought to light in any event.

104. *Views of members with no personal interest* There is no evidence of any such views.

105. I have not had to consider in any detail issues arising out of the Claimants' statement in their witness statement that they would fund the pursuit of MCPLC's claims and cover any adverse costs orders. In *Hughes*, at [142] the lack of evidence about the applicant's means to fund the litigation and meet adverse costs orders was the decisive factor against granting permission. HSBC relies on this, should other factors potentially justify permission. The Claimants accept that they have not substantiated their costs promises but argue that they should not have to put forward such evidence for the collateral benefit of HSBC to the personal proceedings (presumably because it will give HSBC an unfair advantage in settlement discussions and/or an unfair benefit in any enforcement proceedings). The Claimants say that the position is akin to a *Beddoes* type application and if the court wants to see further evidence of assets then it should do so in secret.

106. I do not need to resolve this problem in this case. First, because my view on the merits is that it would be wrong for the claim to be continued in any event. Second, because

unlike in *Hughes* there is no question of the company's resources being depleted by the prospective litigation. In substance MCPLC has no resources. It cannot bring any claim unless the Claimants fund it. So the court does not need to be satisfied, from MCPLC's perspective, that its assets will not be depleted by the proposed litigation. There are no assets.

107. It follows that the only concern might be whether the pursuit of the litigation would add to MCPLC's debts. Since the only significant creditor is HSBC then it does seem to me that HSBC is entitled to argue that the court cannot give the Claimants' intention to fund the claim, inclusive of adverse costs orders, any significant weight. Such arguments include the Claimants owing HSBC about £9 million under the personal loan (subject to any defences and set off (if available) arising from the personal claims). Such arguments are with HSBC's creditor hat on rather than its defendant hat. But on the facts of this case, it does not impact the outcome.

Conclusion

108. The application is dismissed.