THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2025/0017

BVIHCMAP2025/0018

BETWEEN:

ZVI DEKEL

Appellant

and

CLERKENWELL LIFESTYLE LIMITED

Respondent

Before:

The Hon. Mde. P. Nicola Byer — Justice of Appeal
The Hon. Mr. Gerard St. C. Farara — Justice of Appeal [Ag.]
The Hon. Mde. Marlene I. Carter — Justice of Appeal [Ag.]

Appearances:

Mr. Tom Weisselberg, KC with Mr. Ben Woolgar and Mr. Richard Evans for the Appellant
Mr. Ryan Turner with Ms. Tamara Cameron for the Respondent

2026: February 26;
September 22.

Commercial appeal – Company law – Appeal against denial of leave for derivative action – Section 184C of Business Companies Act – Draft judgment – Whether interlocutory order can be varied by lower court after final disposition – Client's instructions – Ladd v Marshall Principles – Whether leave to adduce fresh evidence on appeal should be granted – Whether indemnity for potential adverse costs against company should be considered – Commercial decisions – Realistic prospect of success – Whether company directors and members acted with dishonesty, bad faith and negligence – Indemnification against company directors – Whether company's articles of association and statutory framework establish complete defence against legal claim – Sections 122 and 132 of Business Companies Act – De jure director – Whether individual deemed shadow director under BVI statutory regime – Sections

2, 120, 121 and 122 of Business Companies Act – Section 6 of Insolvency Act – Proper claimant – Whether local holding company suffered financial loss.

The appellant, Zvi Dekel ("Mr. Dekel"), is a member of Clerkenwell Lifestyle Limited ("CLL BVI"), a holding company incorporated in the British Virgin Islands. CLL BVI wholly owns Clerkenwell Lifestyle (UK) Limited ("CLL UK"), which owns a property in Clerkenwell, London that was acquired for a property development project ("the Project"). Mr. Dekel subsequently invested £4 million in the Project, of which £1.2 million was returned to him. Following the Project's failure, the balance of his investment was expected to be lost.

Importantly, the Project was initially introduced to the appellant by the Geneva Management Group ("GMG"), a corporate services provider that had previously acted as a trustee of various trusts for him. The Project was first managed by GMG Real Estate Limited ("GMG RE"), a sub-entity of GMG. GMG RE was subsequently acquired by Newman Leech ("Mr Leech"), one of the founders of GMG and CEO of a company named RE Capital Switzerland ("RE Capital). GMG RE thereafter became a wholly owned subsidiary of RE Capital, which replaced it as property manager.

On 10th February 2025, Mr. Dekel applied pursuant to Section 184C of the Business Companies Act ("the Act") for leave to bring derivative proceedings in the name of and on behalf of CLL BVI against several proposed defendants arising out of the management and financing of the Project. Mr. Leech was one such named defendant, considering the appellant claimed he had acted for CLL BVI in the capacity of shadow director. Mr. Dekel alleged, among other things, a poor representation of the Project's business plan, flawed financial strategies and a purported conflict of interest between CCL BVI's members and investors, all of which constituted a breach of fiduciary duties, dishonesty, bad faith and negligence. He sought leave to bring the derivative proceedings in England and Wales, where related proceedings concerning CLL UK had already been commenced.

On 4th March 2025 ("the 4th March order"), the learned judge concluded that the BVI Court had jurisdiction to grant leave but ultimately found that under Section 184C of the Act, there was no realistic prospect of success for the derivative claim, and in the exercise of his discretion, denied the application. Importantly, the learned judge gave sufficient regard to all relevant factors including the merits of the claim, the particular details and facts of the matter before him, the nature of the member's actions and the availability of alternative remedies. Consequently, he found that there was insufficient evidence to support the claims based on dishonesty and negligence, that the non-fraudulent claims against the directors were defeated by an indemnity in CLL BVI's articles of association and that the statutory definition of 'director' did not extend to a shadow director. The judge also found that certain losses alleged were losses suffered by CLL UK rather than CLL BVI.

On 26th March 2025, the appellant applied to the court below by way of notice of application, asking the learned judge to either revoke or vary the terms of the 4th March order, while simultaneously requesting leave to appeal. Mr. Dekel submitted that he was willing to indemnify the company against any adverse costs order, a question which had initially been raised in the trial proceedings by the learned judge. At that juncture, counsel for the appellant had failed to furnish the court with an answer. However, upon circulation of the draft judgment for the 4th March decision, counsel for Mr. Dekel informed the learned judge by way of a 'note' that he was willing to provide such an indemnity. To that end, the appellant furnished documentation evidencing good financial standing and submitted that the court retained an inherent jurisdiction to revisit earlier decisions where justice so required it. Nevertheless, on 10th June 2025 ("the 10th June order"), the learned judge declined to revoke or vary the order, holding that such an offer of indemnification had been available at the time of the original hearing, but granted leave to appeal.

Dissatisfied with the rulings of the learned judge, the appellant, on 2nd July 2025 filed two notices of appeal against both orders. In relation to the 4th March order, the appellant disputed all findings of the learned judge, particularly the lack of a realistic prospect of success having regard to the claims of negligence, bad faith and dishonesty; the complete defence against legal claims guaranteed by the CCL BVI's articles of association; the failure to classify Mr. Leech as a shadow director; and the absence of any reflective loss exhibited by CCL BVI. In respect of the 10th June order, the appellant also alleged that the learned judge erred in finding that there was no material change of circumstances and petitioned this Court to vary the order based upon his willingness to indemnify the Company. The appellant also sought leave to adduce fresh evidence supporting his financial standing before this Court as a matter of importance in relation to both appeals. The respondent subsequently filed a counter-notice, opposing the appeal, and proffered their own bases why the decision of the learned judge should be upheld, all of which were inextricably linked to the issues raised by the appellant. Consequently, the respondent bore no issue with the learned judge's findings.

Held: dismissing the appeals; dismissing the application for leave to adduce fresh evidence; affirming both decisions of the learned judge in the court below; and making the further orders at paragraph [209] of this judgment, that:

1. An appellate court will be slow to permit the introduction of fresh evidence before it, especially where the applicant has had considerable opportunity to present such evidence in the court below. Importantly, while the **Ladd v Marshall** principles may generally be applied with greater flexibility in the case of interlocutory appeals, all three requirements remain cumulative in nature. Interlocutory hearings ought not be regarded as a dress rehearsal for an appeal and additionally the requirements under **Ladd v Marshall** are cumulative in nature. Consequently, where the applicant fails to surmount even one of those requirements, the application to adduce fresh evidence is liable to be refused.

   Ladd v Marshall [1964] 1 WLR 1489 applied; **Golden Meditech Stem Cells (BVI) Company Limited v Blue Ocean Creation Investment Hong Kong Limited and Blue Ocean Structure Investment Company Limited** BVIHCMAP2023/0022 (delivered 9th July 2025, unreported) followed.

2. Allegations of dishonesty and bad faith will seldom be supported by direct evidence at the interlocutory stage. However, it is not automatic that every allegation of conflict of interest, poor decision, or commercial self-interest will be deemed sufficient to allow leave to bring a derivative action. The court, in the exercise of its

discretion to determine whether a realistic prospect of success exists, is required to assess the merits of the claim and ask whether the applicant's case is merely fanciful. Importantly, the court must not embark upon a mini trial. Instead, it is charged with the responsibility of determining whether a case is more than arguable based on the evidence presented before it. Bare assertions of poor commercial decisions and conflicts of interest undertaken by company members and claims of dishonesty void of any evidential basis will not suffice. Accordingly, where this duty is correctly discharged at first instance, an appellate court will not readily usurp the discretion exercised by the learned trial judge.

Suppipat and other companies v Narongdej and others [2023] EWHC 1988 (Comm) considered; **Durnont Enterprises Ltd v Fazita Investment Ltd** [2024] B.C.L.C. 1 considered.

3. Though negligence does not require proof of improper motive, the court will not readily entertain such assertions without the establishment of a discernible cause of action with identifiable particulars that determine that a duty of care owed was breached. Mere criticisms regarding the commercial failings, and management of a commercial project will not easily establish a realistic prospect of success. The purported breaches must establish a causative link with any identifiable loss suffered by the company. Similarly, where the court below sufficiently exercises this discretion, an appellate court will not readily intervene.

4. Where a company's articles of incorporation provide for the indemnification of its directors in respect of legal proceedings, such indemnification operates as a complete defense to claims falling within its scope, subject to the statutory conditions of honesty, good faith and acting in the company's best interests. Furthermore, where the articles reflect the indemnification permitted by the BVI Business Companies Act, indemnity should be given its ordinary meaning. Consequently, if neither the articles nor the Act limits the indemnity to claims brought by persons outside the company, complete protection conferred upon company directors applies to derivative proceedings brought in the name and on behalf of the company.

Re City Equitable Fire Insurance Company Ltd [1925] 1 Ch 407 distinguished; Sections 122 and 132 of the **BVI Business Companies Act** applied; **Emerald Bay Worldwide Limited v Barclays Wealth Directors (Guernsey) Limited** Guernsey Court of Appeal, Judgment 02/2014 considered.

5. For the purposes of assessing the statutory duties of directors under the BVI Business Companies Act, the statutory definition of 'director' extends to a person who occupies or acts in the position of a director, however described, but does not extend to a person merely because the directors are accustomed to act in accordance with that person's directions or instructions. The court will not readily enlarge the clear wording of the Act so as to introduce a category of directors which the legislature did not include, regardless of whether such terms are defined in other

statutes. Accordingly, where a court of first instance finds no realistic prospect of success in pursuing a claim against a shadow director under the Business Companies Act on the bare assertion that he or she influences or enjoys commercial leverage, an appellate court will not interfere with such a finding.

Ultraframe (UK) Ltd v Fielding and others EWHC 1638 (Ch) considered; Section 6 of the **BVI Insolvency Act** distinguished; Sections 2, 120, 121 and 122 of the **BVI Business Companies Act** followed.

6. A court of first instance should not be hasty in ascertaining that there is no loss incurred by a holding company, solely on the basis that the immediate or more obvious loss appears to have been suffered by a subsidiary company. At the interlocutory stage, the relevant question is not whether the applicant has proved that it suffered recoverable loss, but whether the proposed claim has a realistic prospect of success on the material before the court. The principle of separate legal personality is paramount. Where there is evidence capable of showing that the parent company itself has suffered some loss, separate and apart from its subsidiary, that may be sufficient for the claim to pass that stage. A failure to consider this reality may be in error. However, such an error will not necessarily undermine the overall judgment where the learned judge's conclusions on the other material issues are independently sound and provide sufficient grounds for the result reached.

   Sevilleja v Marex [2020] UKSC 31 considered; **Financial Ltd Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)** [1982] Ch 204 considered.

JUDGMENT

[1] **BYER JA:** These appeals arise from proceedings commenced in the Commercial Division of the High Court of the Territory of the Virgin Islands and concern the appellant's application for leave to bring derivative proceedings on behalf of the respondent, Clerkenwell Lifestyle Limited ("CLL BVI"), pursuant to section 184C of the **BVI Business Companies Act**[1] ("the Act"). The appeals are brought against interlocutory orders made by Mithani J [Ag.] on 4th March 2025 and 10th June 2025.

[2] By the first order, the learned judge refused the appellant leave to pursue the proposed derivative proceedings. By the second, he declined to revoke or vary that order following the appellant's offer to indemnify CLL BVI against any adverse costs

[1] Act 16 of 2004, Revised Laws of the British Virgin Islands.

liability arising from the proposed claim. By certificate of urgency filed on 2nd July 2025 by the appellants and the order of Ellis JA dated 23rd July 2025 wherein the learned justice of appeal determined that both appeals, although not urgent should be heard at the same time when listed for hearing, these appeals were heard together and approached as if they had been consolidated for the sake of convenience.

Background

The Corporate Structure and Project

[3] The factual background is, in its broad outline, not materially in dispute. However, given the nature of the issues arising in these appeals, it is necessary to set it out with some care in order to properly situate the competing contentions.

[4] CLL BVI ("the Company") is a company incorporated in the British Virgin Islands. Its purpose and function within the relevant corporate structure was that of a holding and fundraising vehicle. In particular, it was established to raise capital from investors for the purpose of financing a property development project located in the Clerkenwell area of London ("the Project").

[5] The Project itself involved the acquisition and redevelopment of a commercial property, together with the construction and operation of a hotel on the site. The underlying real estate asset was held through a subsidiary, Clerkenwell Lifestyle (UK) Limited ("CLL UK"), which owned the property forming the subject of the development. CLL BVI therefore operated as the investment and capital deployment entity within the overall structure.

[6] The appellant's involvement in the Project arose through the Geneva Management Group ("GMG"), a corporate services provider which acted as trustee in respect of structures established for him. GMG included within its group a company, GMG Real Estate Ltd. ("GMG RE"), which initially acted as property manager pursuant to a management agreement dated 1st December 2017.

[7] Subsequently, GMG RE was acquired by Mr. Newman Leech, a founder of GMG and the chief executive officer of RE Capital, together with Skybound Capital. Following that acquisition, GMG RE, later renamed Kaydan Accounting, became a wholly owned subsidiary of RE Capital, which thereafter assumed the role of property manager within the Project structure.

[8] The appellant's proposed derivative claim is directed against a number of individuals and entities who are said to have played a material role in the management and financing of the Project. These include directors of CLL BVI, corporate service providers, and lending entities alleged to be connected to those exercising control over the Project. Among those identified are Mr. Sean Gaskell, a director of CLL BVI, Control Services Corporation, Mr. Christopher McKenzie, and certain lending entities, including CAF6 Luxembourg SARL and Euro Sterling Facilities SARL ("ESF").

The Appellant's Investment and Failure of the Project

[9] The appellant invested approximately £4 million in the Project through the CLL BVI structure. Of that sum, £1.2 million was subsequently returned to him in circumstances which he contends were irregular and unexplained. It is common ground that the balance, amounting to approximately £2.8 million, has been lost following the commercial failure of the Project.

[10] At the time of the appellant's investment, a business plan was prepared and presented which projected a net profit of approximately £17.2 million, a return on equity of approximately 1.75 times, and a net yield exceeding 7 percent. The appellant contends that those projections were materially misleading and bore little relationship to the realistic prospects of the development.

[11] The appellant attributes the failure of the Project to a combination of factors, which may be summarised as follows: First, it is said that the business plan upon which

the investment was solicited was fundamentally flawed, in that it failed adequately to account for regulatory constraints, development risks, and cost contingencies. Secondly, the Project suffered from substantial delays, including delays in obtaining planning permission and securing appropriate financing. Thirdly, the financing structure ultimately adopted is said to have been highly leveraged and unsustainable, involving loans at escalating rates of interest. Fourthly, it is alleged that those responsible for managing the Project failed to pursue alternative strategies which might have mitigated loss or preserved investor value.

[12] A central feature of the appellant's complaint concerns the manner in which the Project was financed. It is alleged that the financing arrangements involved a complex series of loans, including mezzanine and development financing, some of which were provided by entities connected to those exercising control over the Project. According to the appellant, those arrangements gave rise to clear conflicts of interest and resulted in financing costs significantly exceeding those contemplated in the original business plan.

[13] It is further alleged that, notwithstanding the collapse of investor equity, those in control of the Project derived substantial financial benefit through fees, interest payments, and other financial arrangements. The appellant contends that decisions were taken which preferred the interests of connected parties over those of the Company and its shareholders.

The Derivative Leave Application

[14] Against that background, the appellant sought leave under section 184C of the Act to bring derivative proceedings in the name of and on behalf of CLL BVI. The proposed claims include allegations of breach of fiduciary duty, negligence, and improper conduct in relation to the structuring, financing, and management of the Project.

[15] The foundation of the application is the appellant's contention that CLL BVI is under the control of the alleged wrongdoers and is therefore unable or unwilling to pursue the claims in its own name. In those circumstances, the appellant seeks to invoke the statutory derivative regime as a means of vindicating CLL BVI's rights.

[16] The application was commenced by Fixed Date Claim Form (FDCF) filed on 17th September 2024.[2] By this FDCF the appellant sought permission to bring proceedings on behalf of the defendant in England and Wales, as the United Kingdom was the only jurisdiction that permitted the bringing of a derivative claim in respect of both CLL BVI and CLL UK for the wrongs alleged.

The Decisions of the Court Below

The 4th March 2025 Decision

[17] The application for leave to bring derivative proceedings came before the learned judge, Mithani J [Ag.], on 10th and 11th February 2025, with judgment delivered on 4th March 2025 ("the 4th March decision"). The learned judge began by setting out the nature of the application and the statutory framework under section 184C of the Act.

[18] The learned judge first addressed certain preliminary issues concerning jurisdiction and the proper forum. At paragraphs [3] to [8] of the judgment, he considered whether the BVI Court was the appropriate court to grant leave in circumstances where the substantive claim was intended to be pursued in England and Wales. He concluded that, notwithstanding certain complexities, the application for leave fell to be determined by the BVI Court in relation to CLL BVI, but expressed reservations as to the practical difficulties arising from parallel proceedings seeking leave and the risk of inconsistent findings across jurisdictions.

[19] The learned judge then set out the factual background to the application at paragraphs [9] to [16], including the corporate structure, the appellant's investment,

[2] Located at pages 527-532 of the Interlocutory Appeal Bundle, Bundle B filed on 3rd July 2025.

and the alleged misconduct giving rise to the proposed claims. He noted in particular that the appellant had also commenced proceedings in England and Wales against certain overlapping defendants, and that the claims sought to be advanced in the derivative action substantially overlapped with those proceedings.[3]

[20] Turning to the applicable legal principles, the learned judge reviewed section 184C of the Act at paragraphs [18] to [26], emphasising that the court's power to grant leave is discretionary and must be exercised on a case-by-case basis. He identified the statutory factors to which the court must have regard, including whether the member is acting in good faith, whether the proceedings are in the interests of the Company, whether the proceedings are likely to succeed, the costs of the proceedings, and the availability of any alternative remedy.

[21] In relation to the merits of the proposed claim, the learned judge rejected the submission that there exists any strict threshold requirement which must be satisfied before the court considers the statutory factors. However, he held that the merits remain an important consideration within the overall evaluative exercise. At paragraph [25], he stated that the weight to be given to the merits will vary depending on the circumstances, and where the applicant is prepared to indemnify the Company for costs, the merits may assume less significance.

[22] The learned judge then considered in detail the proper approach to assessing whether "the proceedings are likely to succeed" within the meaning of section 184C(2)(c) of the Act. Relying on the decision of this Court in **Basab Inc v Accufit Investments Inc. et al**,[4] he held at paragraphs [31] to [35] of the judgment that the court is required to undertake an evaluative assessment of the material before it, but not a full trial of the issues. He emphasised that the court must consider whether there is a real prospect of success, while avoiding a 'mini trial', and that the applicant

[3] See: Re-Filed Interlocutory Appeal Bundle A, p. 705; Judgment dated 4th March 2025 at paragraphs [16].
[4] BVHCMAP2014/0020 (delivered 9th November 2015, unreported).

must place before the court sufficient material to enable that assessment to be made.

[23] Applying those principles, the learned judge undertook a detailed examination of the proposed heads of claim. At paragraphs [40] to [57] of the judgment, he analysed the claims against the directors, including allegations of breach of duty and reliance on indemnity provisions in the Company's articles of association. He concluded that, in respect of non-fraudulent conduct, the indemnity provisions under article 14 of the articles of association would afford a complete defence, with the result that those aspects of the proposed claim had no real prospect of success.

[24] In relation to the claims based on dishonesty, including allegations of knowing receipt and dishonest assistance, the learned judge found that there was an absence of sufficient evidential material to support such claims. At paragraphs [58] to [64], he held that the appellant had failed to identify a properly pleaded case of dishonesty supported by evidence, and that the material advanced did not demonstrate that such claims were likely to succeed.

[25] The learned judge further considered the position of Mr. Leech as an alleged shadow or de facto director. At paragraphs [46] to [54] of the judgment, he rejected the appellant's contention that Mr. Leech fell within the statutory definition of 'director' for the purposes of the Act, or that there was sufficient evidence to establish that he acted as a shadow director. He concluded that, even if such a case were advanced, the evidential basis for it was insufficient.

[26] Having regard to the totality of the material before him, the learned judge therefore concluded that none of the proposed claims demonstrated any real or reasonable prospect of success. In doing so he explicitly noted that he had considered the existence of parallel proceedings in England and Wales, and the availability of alternative remedies. In the exercise of his discretion, he therefore refused to grant leave to bring the derivative claim on behalf of CCL BVI.

[27] Accordingly, by order dated 4th March 2025, the learned judge dismissed the appellant's application in its entirety.

The 10th June 2025 Decision

[28] Following the delivery of the judgment on 4th March 2025, the appellant applied by notice dated 26th March 2025 for the order to be revoked or varied. The application was advanced on the basis that the appellant was prepared to offer indemnity in respect of any adverse costs orders that might be made against the Company in the contemplated derivative proceedings. At the same time, the appellant also sought permission to appeal against the order of 4th March 2025.

[29] Both applications came before the learned judge on an *ex parte* basis on 10th June 2025 ("the 10th June decision"). At the outset of the hearing, the learned judge indicated that he would deal with the two applications, namely the application for revocation or variation of the earlier order and the application for leave to appeal. Counsel for the appellant confirmed to the judge that the application for revocation or variation was the more substantial of the two and invited the court to address it first.

[30] In support of the revocation application, counsel for the appellant submitted that, prior to the handing down of the March judgment, the appellant had sought to engage with the court on the question of providing an indemnity in respect of adverse costs. It was contended that the learned judge, having indicated in the course of his earlier judgment (4th March decision), that the availability of such an indemnity could have been a material factor in favour of granting leave, it was clear that the subsequent offer of an indemnity constituted a material change of circumstances justifying the reopening of the decision on the extant application. In this regard, it was submitted that the appellant was now willing to indemnify the Company against any adverse costs arising from the proposed proceedings and to

provide evidence of his financial ability to meet such an obligation, including the existence of substantial assets held with Goldman Sachs in London.

[31] The appellant further contended that the court possessed jurisdiction, whether under its inherent powers or otherwise, to revoke or vary its own order notwithstanding that it had already been perfected. In that context, reliance was placed on authorities said to establish that the court retains a jurisdiction to revisit its orders in appropriate circumstances, including where there has been a material change or where justice so requires.[5] It was submitted that the offer of an indemnity, coupled with evidence of the appellant's ability to satisfy any adverse costs liability, rendered this a paradigm case for the exercise of that jurisdiction.

[32] Having heard submissions from counsel for the appellant, the learned judge declined to revoke or vary the order of 4th March 2025. In giving his reasons, the learned judge observed that the matters relied upon by the appellant, including the proposed indemnity, were not new but had been available at the time of the original hearing, and that, absent any material change of circumstances, there must be a measure of finality in orders of the court.[6] He further indicated that, while the court may in principle have jurisdiction to revisit its orders, it should not do so readily in the absence of such a change.[7] The learned judge therefore declined to set aside or vary the order.

[33] The learned judge, however, granted leave to the appellant to appeal both the order of the 4th March 2025 (the derivative leave application) and the order of the 10th June 2025 (the variation application).

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[5] See: Re-Filed Interlocutory Appeal Bundle A, pp. 81 and 86; Janet Chiang v Versa Die Cast Inc. et al BVIHCV2008/0341 (delivered 10th July 2009, unreported); Caribbean Sailing (BVI) Limited v The Owners and Other Persons Interested in the Ship "Kelliste" et al BVIHAD2011/005-009 (delivered 30th October 2015, unreported); Michael Wilson and Partners Limited v Temujin Limited BVIHCV2006/0307 (delivered 30th April 2007, unreported); O'Carol Williams v Jarl Claxton BVIHCV2016/0315 (delivered 30th March 2020, unreported).
[6] See: Re-Filed Interlocutory Appeal Bundle A, p.1065.
[7] See: Re-Filed Interlocutory Appeal Bundle A, p.1066.

The Appeals

[34] Dissatisfied with the learned judge's 4th March decision, the appellant filed a notice of appeal on 2nd July 2025 advancing six extensive grounds of appeal. In summary, the grounds are that:

(1) The learned judge erred in concluding that the appellant's proposed claims founded on dishonesty and bad faith were inadequately pleaded and disclosed no realistic prospect of success;

(2) The learned judge erred in concluding that the appellant's proposed claims in negligence disclosed no realistic prospect of success;

(3) The learned judge erred in concluding that article 14 of the respondent's articles of association afforded a complete defence to the proposed claims, in failing to consider whether the conditions for reliance upon article 14 had been satisfied, and in concluding that article 14 would extend to an alleged shadow director;

(4) The learned judge erred in concluding that the proposed claims against Mr. Newman Leech, as an alleged shadow director of the respondent, disclosed no realistic prospect of success, both as a matter of law and on the evidence;

(5) The learned judge erred in refusing to consider the appellant's offer to indemnify the respondent against any adverse costs liability arising from the proposed derivative proceedings and in refusing to re-open the proceedings to consider that offer; and

(6) The learned judge erred in concluding, insofar as he did so conclude, that any relevant loss was suffered by Clerkenwell Lifestyle (UK) Limited rather than the respondent.

[35] The appellant seeks an order setting aside the 4th March decision and granting leave pursuant to section 184C of the Act to pursue the proposed derivative proceedings on behalf of the respondent. He also seeks his costs here and in the court below.

[36] Dissatisfied with the learned judge's 10th June decision, the appellant filed a further notice of appeal on 2nd July 2025 advancing one ground of appeal. By that appeal, the appellant contends that the learned judge erred in refusing to revoke or vary the order of 4th March 2025 to take into account the appellant's offer to indemnify the respondent against any adverse costs liability arising from the proposed derivative proceedings. The appellant accordingly seeks an order setting aside the 10th June decision and granting him leave, subject to the provision of the proposed indemnity for any adverse costs order, to bring the intended derivative proceedings on behalf of the respondent pursuant to section 184C of the Act. He also seeks his costs here and in the court below.

[37] The appellant's composite skeleton argument contains a helpful roadmap which highlights the extent to which the six grounds of appeal are interrelated and how the resolution of certain grounds may affect the need to determine others. Having considered the parties' submissions, it therefore seems to me that the issues arising on the appeals may conveniently be grouped as follows:

(1) Whether the learned judge erred in refusing to take account of the appellant's proposed indemnity for adverse costs and in declining to revisit the 4th March decision once that indemnity was offered. This issue arises under ground 5 of the appeal against the 4th March decision and lies at the heart of the appeal against the 10th June decision;

(2) Whether the learned judge erred in concluding that the appellant's proposed claims founded on dishonesty, bad faith and negligence disclosed no realistic prospect of success. This issue arises under grounds 1 and 2 of the appeal against the 4th March decision;

(3) Whether the learned judge erred in concluding that article 14 of the respondent's articles of association afforded a complete defence to the proposed claims and, in particular, to the proposed negligence claims. This issue arises under ground 3 of the appeal against the 4th March decision;

(4) Whether the learned judge erred in concluding that the proposed claims against Mr. Newman Leech, as an alleged shadow director of the respondent, disclosed no realistic prospect of success. This issue arises under ground 4 of the appeal of the 4th March decision; and

(5) Whether the learned judge erred, insofar as he made such a finding, in concluding that any relevant loss was suffered by Clerkenwell Lifestyle (UK) Limited rather than the respondent. This issue arises under ground 6 of the appeal of the 4th March decision.

[38] While it is therefore convenient to address the issues in the appeals in that order, there is one additional application that needs to be determined prior to embarking on the issues in the substantial appeals.

The Application to Adduce Fresh Evidence

[39] Together with the notices of appeal, the appellant also applied for leave to adduce further evidence on the hearing of the appeal against the 4th March decision. By notice of application dated 2nd July 2025, brought pursuant to CPR 62.18, 62.19, 62.24, 26.1, and/or this Court's inherent jurisdiction, the applicant seeks permission to rely upon what is described as the 'Adverse Costs Indemnity Evidence' in support of that appeal.

[40] The application arises out of the same sequence of events which gave rise to the second appeal. As already noted, during the hearing of the derivative leave

application in February 2025, the learned judge raised, for the first time, the question of whether the appellant might be prepared to indemnify the Company against any adverse costs exposure in the contemplated proceedings. At that stage, counsel for the appellant did not have instructions to address that issue, a matter which the learned judge accepted.

[41] Following the circulation of the draft judgment on 24th February 2025, and in light of the learned judge's indication at paragraph [99] that the availability of such an indemnity *might* have altered the outcome, the appellant's legal advisers took instructions. By note dated 27th February 2025, the appellant informed the court that the appellant was willing to provide an indemnity to the Company and, if required, to adduce evidence demonstrating his financial ability to support that obligation.

[42] Notwithstanding that communication, the learned judge proceeded to hand down his judgment in substantially the form of the draft on 4th March 2025, indicating that any further application would need to be made in the usual way. The appellant thereafter pursued the revocation application, supported by affidavit evidence exhibiting, inter alia, a draft deed of indemnity, correspondence with the respondent's attorneys, and financial documentation, including a letter from Goldman Sachs International.

[43] The evidence which the appellant now seeks to adduce in the present appeal consists of that same body of material. More particularly, it comprises: (i) the note to the court dated 27th February 2025; (ii) the draft adverse costs indemnity; (iii) the covering letter of 18th March 2025 providing that draft to the respondent; (iv) the Goldman Sachs letter evidencing the appellant's financial position; and (v) the affidavit evidence filed by both parties in relation to the revocation application, including the appellant's third and fourth affidavits and the fourth affidavit of Mr. Gaskell, together with their exhibits.

[44] It is not in dispute that this material is already before this Court in connection with the appeal against the 10th June decision. However, in so far as the appeal against the 4th March decision is concerned, the appellant recognises that the material was not before the learned judge at the time of his decision and therefore constitutes fresh evidence for the purposes of that appeal. He accordingly seeks this Court's permission to rely upon it.

The Counter-Appeal

[45] The respondent, by notice of opposition filed on 14th July 2025 and counter-notice filed on 17th July 2025 in respect of both appeals, opposes the relief sought and contends that the learned judge's decisions, both the 4th March decision and the subsequent 10th June decision, disclose no error of law, fact, or principle and should be affirmed. The counter-notice raises the following 9 grounds:

"(1) As to the March Order:

(a) The refusal of leave was, in any event right, because (each a further or alternative ground):

(i) **Ground 1**: The allegation of breach of s 121 BCA 2004 alleged in Claim No. 1 will fail.

(ii) **Ground 2**: Claim No. 1 will fail because the alleged breach was authorised or ratified.

(iii) **Ground 3**: Some of the claims for which leave was sought are barred by a period of limitation.

(iv) **Ground 4**: Some of the proposed defendants to claims were not, in fact, directors at the time of the wrongs allegedly perpetrated by them.

(v) **Ground 5**: The duty only to exercise a power for a proper purpose cannot be breached by an omission to exercise a power and, in any event, does not give rise to a monetary remedy in and of itself.

(vi) **Ground 6**: Mr Leech cannot have breached s 121 BCA 2004, even if he were a shadow director, because shadow directors have no legal power.

(vii) **Ground 7**: The knowing receipt claims cannot be advanced where the contract under which the benefit was received remains on foot.

(viii) **Ground 8**: The Court should, in any event, decline to grant leave as a matter of discretion given the circumstances of the Company and the absence of a fraud on the minority or (properly understood) wrongdoer control.

(2) As to the June Order:

(i) **Ground 9**: The Court had no jurisdiction / power to vary the March Order after it had been sealed.

(ii) **Ground 10**: Alternatively, there was no ground to vary the March Order so as, instead, to grant leave."

[46] Before turning to the issues which arise for determination, it is necessary to say something about the respondent's counter-notice. The counter-notice does not seek to challenge any aspect of the decisions made by the learned judge. Rather, it advances a number of alternative grounds upon which the respondent contends that the learned judge's refusal of leave to commence derivative proceedings may be upheld. In those circumstances, the matters raised in the counter-notice do not arise as freestanding grounds of challenge to the decision below, but are advanced as alternative bases upon which the orders under appeal may be affirmed. In my mind, whether it becomes necessary to consider those matters will depend upon the conclusions reached on the substantive grounds of appeal.

[47] As the application to adduce fresh evidence bears directly upon the issues arising under ground 5 of the appeal against the 4th March decision, and upon the appeal against the 10th June decision, it is convenient to address that application first. I shall then consider the substantive issues in the appeals before turning to the alternative grounds advanced by the respondent in its counter-notice.

Application to Adduce Fresh Evidence

[48] Before considering the merits of the application, it is necessary to identify the principles governing the admission of fresh evidence on appeal. Those principles are well established. In **Ladd v Marshall**,[8] the court stated that fresh evidence will ordinarily be admitted only where three conditions are satisfied. First, the evidence could not, with reasonable diligence, have been obtained for use at the trial. Secondly, the evidence would probably have an important influence on the result of the case, although it need not be decisive. Thirdly, the evidence must be apparently credible, though it need not be incontrovertible.

[49] More recently, this Court in **Golden Meditech Stem Cells (BVI) Company Limited v Blue Ocean Creation Investment Hong Kong Ltd and Blue Ocean Structure Investment Company Limited**[9] reaffirmed that, whilst the principles in **Ladd v Marshall** may be applied with a greater degree of flexibility in interlocutory appeals, the three requirements remain cumulative. Accordingly, an applicant seeking to adduce fresh evidence on appeal must satisfy each of those requirements before leave may properly be granted.

Appellant's Submissions

[50] Learned King's Counsel for the appellant submitted that the requirements in **Ladd v Marshall** were satisfied. As to the first limb, he argued that the issue of an adverse costs indemnity only arose during the hearing before the learned judge and that, prior to that time, neither the respondent's evidence nor its submissions suggested that such an indemnity would be required. Counsel submitted that he was without instructions on the point and that it was unrealistic to expect instructions, supporting documentation and evidence of means to be obtained before the hearing concluded.

[51] Learned King's Counsel further submitted that the appellant's willingness to provide indemnity emerged shortly after circulation of the draft judgment and was

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[8] [1954] 1 WLR 1489.
[9] BVIHCMAP2023/0022 (delivered 9th July 2025, unreported).

communicated to the court before the judgment was delivered. He argued that the indemnity, the supporting financial material and the evidence subsequently filed in support of the application to revoke or vary the order were all matters which could not reasonably have been placed before the learned judge at the February hearing.

[52] As to the remaining limbs of **Ladd v Marshall**, learned King's Ccounsel submitted that the evidence would have had an important influence on the determination of the application and was plainly credible. In that regard, he relied on the learned judge's observations concerning the significance of an indemnity for adverse costs and pointed out that no real challenge had been mounted to either the authenticity of the documents or the appellant's ability to satisfy the proposed indemnity.

Respondent's Submissions

[53] Learned counsel for the respondent submitted that the application should be refused. Counsel argued that the material now relied upon could have been placed before the learned judge had the appellant chosen to do so and that no satisfactory explanation had been provided for his failure to advance the point earlier. Reliance was placed on **Win Business (Caeofeidan) Limited Formerly Win Business (Africa) Ltd v Anadarko China Holdings 2 Company et al**[10] in support of the proposition that a party should not ordinarily be permitted to advance a new case on appeal.

[54] Counsel further submitted that the appellant could not overcome the first limb of **Ladd v Marshall** by relying on documents which were created after the hearing had concluded. Whilst accepting that the indemnity itself post-dated the hearing, counsel argued that this did not render it fresh evidence for the purposes of the rule. Rather, it demonstrated that the evidence now sought to be relied upon could have been assembled and advanced at an earlier stage.

[10] BVIHCMAP2022/0044 (delivered 5th July 2023, unreported).

[55] Counsel also submitted that, if the application failed, the appeal against the March order would have to be determined solely on the material which had been before the learned judge. In those circumstances, counsel invited the Court to refuse the application and uphold the learned judge's decision.

Appellant's Reply

[56] In reply, learned King's Counsel submitted that the note sent to the court following circulation of the draft judgment stood on a different footing from the remaining documents because it had been before the learned judge before his judgment was handed down. Learned King's Counsel maintained that the note, and indeed the remaining documents, satisfied the requirements in **Ladd v Marshall** and should therefore be admitted.

Discussion

[57] The principles governing the admission of fresh evidence on appeal are not in dispute. Although this appeal arises from an interlocutory application and the Court's approach is therefore less rigid than in the case of an appeal following a full trial, the authorities make clear that the three requirements identified in **Ladd v Marshall** remain cumulative and must each be satisfied before fresh evidence may properly be admitted. However, it must be noted that even though the relaxation recognised in interlocutory matters is directed to the <u>way</u> those requirements are applied, it does not <u>dispense</u> with them altogether. As this Court observed in **Golden Meditech Stem Cells (BVI) Company Limited**, even where a more flexible approach is adopted, the Court must remain mindful of the duty upon litigants to put their full case before the court at first instance and of the undesirability of interlocutory disputes being re-argued on materially different evidence which was not before the judge whose discretion is under review.[11]

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[11] Golden Meditech Stem Cells (BVI) Company Limited v Blue Ocean Creation Investment Hong Kong Limited and Blue Ocean Structure Investment Company Limited BVIHCMAP2023/0022 (delivered 9th July 2025, unreported) at paragraphs [23] and [26].

[58] In my judgment, the appellant faces considerable difficulty in satisfying the first limb of the **Ladd v Marshall** test in relation to the proposed indemnity itself, the draft deed of indemnity and the supporting financial material. The essence of the appellant's submission is that the issue of an adverse costs indemnity only emerged during the course of the February hearing and that it was unrealistic to expect instructions, supporting documentation and evidence of means to be assembled before the hearing concluded. There is some force in that submission. The transcript demonstrates that the question of an indemnity was raised by the learned judge during the hearing and that he recognised the practical difficulty of obtaining instructions and supporting material at that stage.[12] The learned judge subsequently observed that the provision of an indemnity, together with sufficient security, might well have altered the outcome of the application. However, once the significance of the indemnity issue became apparent during the hearing, it was incumbent upon the appellant to act with reasonable expedition to put forward any proposed indemnity and supporting material. The fact that the issue first arose during the hearing may explain why the evidence was not then available, but it does not, without more, answer the question whether such material could, with reasonable diligence, have been obtained and placed before the court at an earlier stage than ultimately occurred.

[59] The difficulty for the appellant is that, once the issue of an adverse costs indemnity emerged during the hearing, it would have become apparent that the matter was potentially material to the learned judge's exercise of his discretion. If, as the appellant now contends, further evidence was required to address that issue, one would have expected an application for an adjournment or for permission to file additional evidence. No such application was made. Whilst I accept that a formal deed of indemnity and supporting evidence of means could not reasonably have been produced immediately, the absence of any attempt to obtain time to place such material before the court makes it difficult to conclude that the evidence could not,

[12] Transcript of proceedings before the court on 11th February 2025, at internal pages 75-77; Re-Filed Interlocutory Appeal Bundle A, pp. 994-996.

with reasonable diligence, have been adduced before the learned judge reached his decision. Accordingly, whilst the late emergence of the issue, it having been raised by the judge and not advanced by the appellant as part of his application for leave, explains why the evidence was not available at the outset of the hearing, it does not establish the first limb of **Ladd v Marshall**.

[60] The appellant's position, on first blush, in relation to the note submitted to the learned judge on 27th February 2025 appears more attractive. Unlike the remaining documents, that note was before the learned judge prior to the handing down of his first decision, although it was not produced as evidence before the judge at the hearing itself to be considered in the exercise of his discretion under section 184C of the Act. Arguably, it is not evidence which the appellant seeks to place before this Court for the first time, it having been produced in support of the revocation application. It forms part of the procedural history leading to the 10th June decision and is relevant to the appellant's complaint that the learned judge ought to have revisited his earlier decision once the offer of an indemnity had been communicated. However, it must be remembered that the purpose of the provision of draft judgments in these circumstances is not to have the parties offer any fundamentally different argument or to seek to produce a document that had not been placed before the court at the trial of the matter. In any event, this note was not evidence of an indemnity for adverse costs orders in the proposed derivative proceedings. It was simply an indication to the court and the other side of the appellant's (claimant in the court below) intention to undertake to do something without any evidentiary support for the same. In my mind, the note was ineffective and of no evidential value such as to make any difference to the outcome of the proceedings at the stage of the circulation of the draft judgment. Its provision in the application under consideration simply provided context as opposed to a meaningful indication that the note was 'before the court' and could not amount to fresh evidence to be considered sufficient to satisfy the first limb of **Ladd v Marshall**.

[61] As to the second and third limbs of **Ladd v Marshall**, I am prepared to accept that the proposed evidence is both credible and potentially influential. There is no suggestion that the draft indemnity, the supporting financial material or the appellant's stated willingness to protect the respondent against adverse costs are fabricated or inherently unreliable. Nor can it seriously be disputed that such evidence might have had an important influence upon the learned judge's assessment of the costs risks associated with the proposed derivative proceedings, particularly in light of his own observations regarding the significance of an indemnity and adequate security. The authorities make clear that the evidence need not be decisive; it is sufficient if it would probably have an important influence on the outcome. In my view, that threshold is met.

[62] Nevertheless, the difficulty for the appellant remains that the requirements in **Ladd v Marshall** are cumulative. Even applying the more flexible approach appropriate to interlocutory appeals, I am not persuaded that the appellant has demonstrated that the substance of the proposed evidence could not, with reasonable diligence, have been advanced before the learned judge. The authorities emphasise that interlocutory hearings are not to be treated as a dress rehearsal for an appeal and that a party seeking to advance a new case on appeal must provide a cogent explanation for failing to advance that case below. The appellant's explanation goes some way towards accounting for the absence of the formal documents, but it does not satisfactorily explain why the willingness to provide an indemnity, or evidence directed to that issue, could not have been raised earlier once the concern regarding costs exposure became apparent before the learned trial judge.

[63] In those circumstances, I would decline to admit the proposed indemnity, draft deed of indemnity and supporting financial evidence as fresh evidence on the appeal against the 4th March decision. I would, however, have regard to the note which was placed before the learned judge prior to hand down, not as fresh evidence satisfying **Ladd v Marshall**, but insofar as it forms part of the factual matrix relevant to the appellant's separate challenge to the learned judge's refusal on 10th June 2025 to

revoke or vary the March order after the offer of an indemnity had been communicated. It is to that issue that I now turn.

Issue 1 – Whether the learned judge erred in refusing to take account of the appellant's proposed adverse costs indemnity and in declining to revisit the 4th March decision once that indemnity was offered

Appellant's Submissions

[64] Learned King's Counsel for the appellant submitted that ground 5 of the appeal against the 4th March decision, and the appeal against the 10th June decision, centered on the learned judge's treatment of the appellant's proposed adverse costs indemnity. Counsel contended that the learned judge acted unfairly in refusing to consider the indemnity before the handing down of the judgment and in subsequently refusing to revoke or vary the 4th March decision once the indemnity had been formally offered.

[65] Learned King's Counsel submitted that the indemnity issue was raised by the learned judge during the February hearing and not by the respondent. When the possibility of an indemnity was discussed, counsel for the respondent accepted that an offer of an adequate indemnity would substantially address the Company's concern regarding exposure to adverse costs. King's Counsel argued that the question of an offer of an indemnity therefore went directly to one of the principal objections to the grant of leave.

[66] Learned King's Counsel accepted that the indemnity had not been advanced at the hearing but submitted that the learned judge had expressly recognised that it was unrealistic to expect counsel to obtain instructions on such a significant financial commitment during the course of the hearing. In those circumstances, it was unfair thereafter to rely on the absence of that very indemnity as a reason for refusing to consider it.

[67] Learned King's Counsel relied on the learned judge's observations during the hearing and at paragraph [99] of the 4th March decision, where the learned judge expressly indicated that, had the appellant been willing to indemnify the Company against adverse costs and provide sufficient security, he would have been minded to grant leave. Counsel submitted that this demonstrated that the indemnity was a highly material consideration which might have altered the outcome of the application.

[68] Learned King's Counsel further submitted that, after circulation of the draft judgment, the appellant acted promptly by informing the court that he was willing to indemnify the Company and provide evidence of means. The appellant thereafter produced a draft indemnity, evidence that assets in excess of £15 million were held with Goldman Sachs International and an offer to provide such security as the court considered appropriate.

[69] Learned King's Counsel argued that the learned judge ought either to have adjourned the handing-down of the judgment to permit the indemnity to be considered or, alternatively, ought to have reopened the matter once the indemnity and supporting evidence were before the court. Had he done so, there would have been no prejudice to the respondent. Furthermore, such action would have allowed the parties to address the adequacy of the indemnity and any associated security.

[70] Turning to the June application, learned King's Counsel submitted that the indemnity materially altered the discretionary balance under section 184C of the Act. If the derivative claim succeeded, the Company and its shareholders would benefit. If it failed, the appellant would bear the adverse costs consequences. Counsel submitted that the learned judge failed to give proper weight to those considerations.

[71] Learned King's Counsel further argued that the learned judge had jurisdiction to revoke or vary the 4th March decision. Relying on **Lloyds Investment**

(Scandinavia) Ltd v Ager-Hanssen[13] and **Tibbles v SIG plc**,[14] he submitted that the court retained power to revisit an interlocutory order where there had been a material change of circumstances or where the interests of justice so required.

[72] Learned King's Counsel submitted that the proposed indemnity, draft deed, evidence of means and offer of security constituted new material which had not been before the court at the leave hearing. This was therefore not an attempt to relitigate the same application but to place before the court material which the learned judge had himself identified as potentially decisive.

[73] Learned King's Counsel also criticised the conduct of the June hearing, submitting that the learned judge in his dealing with the matter, made it clear to the parties that he had not pre-read the skeleton arguments, did not have access to the relevant bundles and gave insufficient consideration to the significance of the indemnity, the absence of prejudice to the Company and the potential benefit to shareholders.

[74] In summary, learned King's Counsel submitted that the indemnity removed the principal costs concern identified by the learned judge and that the refusal to consider it before judgment, and thereafter to reopen or vary the 4th March decision, constituted an error of principle.

Respondent's Submissions

[75] Learned counsel for the respondent submitted that ground 5 of the appeal against the 10th June decision disclosed no basis for appellate intervention. The learned judge's refusal to adjourn the handing down of the judgment and his subsequent refusal to revoke or vary the 4th March decision were both clearly case management decisions which fell squarely within the ambit of his discretion.

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[13] [2003] EWHC 1740 (Ch).
[14] [2012] 1 WLR 2591.

[76] Counsel submitted that, following circulation of the draft judgment, the appellant did not make a formal application to reopen the hearing, adduce further evidence or adjourn hand-down. Instead, his attorneys sent an informal note indicating that he was willing to provide an indemnity. Relying on **Great Panorama International Ltd v Qin Hui et al**,[15] counsel argued that any request to revisit a draft judgment or adduce further evidence required a formal application on notice.

[77] Counsel submitted that the learned judge expressly indicated that any request for review should be pursued in 'the ordinary way' which clearly meant by way of application. No such application was made before judgment was handed down or before the 4th March decision was sealed. In those circumstances, the learned judge was entitled to proceed on the material properly before him.

[78] Counsel further submitted that in any event, the proposed indemnity was not a new circumstance but a matter which could always have been advanced by the appellant. The possibility of an indemnity was discussed during the hearing, and the appellant had every opportunity to pursue the point before judgment was delivered.

[79] Counsel argued that instead, what the appellant sought to do was to reformulate his case after seeing the draft judgment. The proposed indemnity represented a new basis upon which leave was sought and would have required a further substantive hearing to address its adequacy, the need for security and its significance under section 184C of the Act.

[80] As to the June application, counsel submitted that contrary to the appellant's contention, the proposed indemnity did not constitute a material change of circumstances. It was not an external event arising after judgment but a step which the appellant could have taken earlier but failed to do. The application was therefore no more than an attempt to obtain a second opportunity to advance the case in a different form.

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[15] BVIHC(COM)2019/0180 (delivered 13th August 2020, unreported).

[81] Counsel relied on the importance of finality of decisions of a court and on the authorities of **Nice Management Corp. v Registrar of Corporate Affairs**,[16] **PT Ventures, SGPS, S.A. v Vidatel Limited**,[17] **Jhaveri Darsan Jitendra v Lakshmi Anil Salgaocar et al**[18] and **Sun Vessel Global Limited v HQ Aviation Limited et al**.[19] He submitted that, once the 4th March decision had been sealed, the court was functus officio unless it had an express statutory or procedural power to vary or discharge the order, or the correction sought fell within the slip rule.[20] Counsel further submitted that no such power applied to the order in the present case and that the correction sought was not one which could properly be made under the slip rule.[21] Alternatively, even if the court possessed a power analogous to that conferred by rule 3.1(7) of the English Civil Procedure Rules, the circumstances in which that power would ordinarily be exercised, namely, a material change of circumstances since the order was made, a misstatement of the facts upon which the original decision was based, or a manifest mistake, did not arise.[22]

[82] Counsel further submitted that in any event the indemnity addressed only one aspect of the section 184C analysis. It did not cure the defects identified by the learned judge in the proposed claims, nor did it answer the broader considerations relevant to the exercise of the court's discretion.

[83] Counsel therefore submitted that the learned judge was entitled to decline to act on an informal post-draft communication, was entitled to refuse to reopen the matter

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[16] BVIHC(COM)2020/173 (delivered 2nd February 2021, unreported).
[17] BVIHCM2021/0039 (delivered 27th June 2022, unreported).
[18] BVIHC(COM)2017/213 (delivered 2nd July 2020, unreported).
[19] BVIHCMAP 2022/0017 (delivered 9th January 2023, unreported).
[20] Respondent's Written Submissions, paras 77–82, Re-Filed Interlocutory Appeal Bundle A, pp. 201–202.
[21] Respondent's Written Submissions, paras 78–82, Re-Filed Interlocutory Appeal Bundle A, pp. 201–202; Respondent's Submissions in Opposition to the Revocation/Variation Application, paras 8–10, Re-Filed Interlocutory Appeal Bundle A, pp. 628–629.
[22] Respondent's Written Submissions, para 83, Re-Filed Interlocutory Appeal Bundle A, pp. 202–203; Respondent's Submissions in Opposition to the Revocation/Variation Application, paras 11–12, Re-Filed Interlocutory Appeal Bundle A, pp. 629–630.

after sealing and correctly relied upon principles of finality and case management in dismissing the June application.

Discussion

[84] The appellant's complaint under this issue is directed at two related decisions of the learned judge. The first is his refusal, when determining the application for leave on 4th March 2025, to take account of the appellant's subsequently proposed adverse costs indemnity. The second is his refusal, by order dated 10th June 2025, to revoke or vary the March order after the appellant had offered to indemnify CLL BVI against any adverse costs liability arising from the proposed derivative proceedings and had produced in support of that application the actual documents evidencing the intended indemnity and evidence of his financial means. Although advanced separately in the two appeals, the issues are inextricably linked and may conveniently be considered together.

[85] It is necessary at the outset to identify precisely what the learned judge decided. At no point in the learned judge's determinations, did he make a finding or come to any conclusion that an adverse costs indemnity was irrelevant to the exercise of his discretion under section 184C of the Act. Quite the contrary. Throughout both the hearing and the judgment, the learned judge recognised that the potential exposure of CLL BVI to adverse costs constituted a significant obstacle to the grant of leave and that an adequate indemnity, coupled with sufficient security, might materially alter the position. Indeed, the learned judge expressly observed that had the appellant been willing to indemnify the Company against adverse costs and provide sufficient security, the outcome of the application may have been different.

[86] The appellant submits that, having identified the absence of an indemnity as a matter of central importance, the learned judge erred in refusing to revisit his decision once such an indemnity was offered after circulation of the draft judgment and before the handing down of the judgment. Counsel argues that the judge himself raised the issue during the hearing, acknowledged the practical impossibility of

obtaining instructions and supporting material before the hearing concluded, and thereafter proceeded to determine the application on the basis of a deficiency which the appellant had not previously been called upon to address. In those circumstances, it is said that fairness required the learned judge either to receive the proposed indemnity or to reopen the matter once the offer was made.

[87] There is an undeniable surface attractiveness to this submission of the appellant, that the question of an indemnity assumed greater significance during the hearing than it had previously occupied in the parties' respective cases. In fact, the transcript of the proceedings reveal that the learned judge actively explored whether the cost concerns identified by the respondent could be addressed through an indemnity from the appellant. Counsel for the appellant in addressing the court stated:

> "Your Lordship fairly points out to my learned friend, well, if Mr. Dekel chose to give an indemnity, all of this would fall away. I obviously have no instructions on that point, My Lord. I couldn't sensibly have obtained them in the time available and Mr. Dekel would need to consider matters."[23]

The learned judge later responded:

> 'I appreciate you don't have instructions and I think it's unrealistic to expect you to get those instructions at such a late stage.'[24]

Counsel replied:

> 'My Lord, I am grateful for that indication.'[25]

[88] Although it is clear that the learned judge accepted that counsel could not realistically obtain instructions on the spot, it always remained open to the appellant to seek a short adjournment in order to ascertain his position and, if appropriate, place evidence before the court concerning any proposed indemnity. No such application was made. Instead, the hearing concluded and the matter was not raised again until after circulation of the draft judgment. Even then, what was provided was

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[23] Lines 19-24 of the Transcript of proceedings before the court on 11th February 2025, at internal page 75; Re-Filed Interlocutory Appeal Bundle A, p. 994.
[24] Lines 13-16 of the Transcript of proceedings before the court on 11th February 2025, at internal page 77; Re-Filed Interlocutory Appeal Bundle A, p. 996.
[25] Lines 17-18 of the Transcript of proceedings before the court on 11th February 2025, at internal page 77; Re-Filed Interlocutory Appeal Bundle A, p. 996.

no more than a note indicating a willingness to *offer* an indemnity. It was not accompanied by a formal indemnity, evidence of means or any material capable of enabling the court to assess whether the concerns which had been identified during the hearing had in fact been addressed. Nor was the respondent afforded any opportunity to make submissions on the adequacy of the proposal or to contend that it did not provide sufficient protection. In those circumstances, the appellant's position must be considered in light of the equally important requirements of finality and procedural fairness. The authorities relied upon by the respondent demonstrate that any power to reopen, revoke or vary an order is tightly constrained by the need for finality. In **Tibbles v SIG plc**,[26] Rix LJ explained that:

> "…The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion..."[27]

Of particular relevance to the circumstances of this case, Rix LJ continued:

> "…where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate."[28]

He further observed that:

> "…the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order…"[29]

[89] The importance of finality is still more pronounced where the order was intended to be final. In **Vodafone Group Plc and other companies v IPCom GmbH & Co KG**,[30] Lewison LJ reiterated the principle that 'the interests of justice, and of litigants

[26] [2012] 1 WLR 2591.
[27] ibid at paragraph 39(i).
[28] ibid at paragraph 39(v).
[29] ibid at paragraph 39(vii).
[30] [2023] EWCA Civ 113.

generally, require that a final order remains such unless proper grounds for appeal exist'.[31] He further stated:[32]

> "…the subsequent event must have been unforeseen (and possibly unforeseeable) in order to revisit a previous order intended to be final".[33]

[90] In the present case, the respondent's argument is that there was, in reality, no material change of circumstances at all. The appellant's evidence was that he would have been willing to provide the indemnity had he been asked to do so earlier. The only change, therefore, was that the learned judge identified the absence of an indemnity as a significant concern and the appellant subsequently responded by offering one. On that analysis, the appellant was not seeking to draw the court's attention to some newly emerged fact or unforeseen development. Rather, he sought to place before the court material which reflected a litigation position he could and, more likely ought, to have adopted when filing his leave application to bring derivative proceedings, and at minimum, from the first time it was mentioned by the learned judge during the course of the hearing of said application. Indeed, by section 184C(2)(d) of the Act one of the mandatory factors which a court is required to consider when determining whether to grant leave to bring derivative proceedings is 'the costs of the proceedings in relation to the relief likely to be obtained'. Accordingly, there is considerable force in this submission by the respondent. The authorities consistently emphasise that parties are expected to advance their full case at first instance and that the court should be slow to permit a litigant to revisit a concluded determination by relying upon evidence which could, with reasonable diligence, have been assembled and adduced earlier.[34]

[91] The appellant seeks to answer that criticism by contending that the indemnity only became relevant once the learned judge himself raised it. I am unable to accept that submission for the reasons mentioned in paragraph [90] above and for the additional

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[31] ibid at paragraph 37.
[32] As held by Hughes LJ in Roult v North West Strategic Health Care Authority [2009] EWCA Civ 444.
[33] ibid at paragraph 38.
[34] Win Business (Caeofeidan) Limited v Anadarko China Holdings 2 Company et al BVIHCMAP2022/0044 (delivered 5th July 2023, unreported).

reason that the issue of costs exposure lay at the heart of the respondent's opposition to the derivative claim from the outset. The respondent's position throughout was that the proposed proceedings would expose CLL BVI to substantial costs risks and potential prejudice. An indemnity was merely one possible mechanism by which those concerns might have been addressed. Thus, while the learned judge's observations undoubtedly sharpened the focus upon the issue, they did not create it. Viewed objectively, the possibility that the court might regard the Company's costs exposure as a significant factor in the exercise of its discretion under section 184C of the Act was foreseeable well before the hearing commenced.

[92] Moreover, the appellant's argument encounters a further difficulty. The learned judge's decision to refuse leave was not founded solely upon the absence of an indemnity. His judgment contains extensive findings concerning the merits of the proposed claims, including the effect of article 14 of the articles of association, the viability of the dishonesty allegations, the negligence claims, the claims against Mr. Leech, and the question whether any relevant loss was suffered by CLL BVI. Those findings formed an integral (and perhaps more significant) part of the evaluative exercise required under section 184C of the Act. The offer of an indemnity, even if accepted, could not by itself cure deficiencies which the learned judge had identified in the substantive merits of the proposed proceedings. Indeed, the respondent correctly submits that an indemnity is not a substitute for a claim possessing a realistic prospect of success, which is a critical and mandatory factor under section 184C(2)(c) of the Act.

[93] The appellant nevertheless relies heavily upon the learned judge's own observation that an indemnity coupled with adequate security might have altered the outcome. In my view, that observation must be read in context. The learned judge was not making a definitive finding that leave would necessarily have been granted had an indemnity been offered. Rather, he was identifying a factor which could have weighed heavily in the balance and which, if present, might have affected the overall exercise of discretion. The observation cannot properly be construed as a

concession that the merits findings were immaterial or that the provision of an indemnity would inevitably have led to a different result.

[94] In assessing whether the learned judge erred in refusing to revisit the March order, it is also significant that he expressly recognised that the admissibility and significance of the proposed indemnity might ultimately fall for consideration by this Court under the principles in **Ladd v Marshall**.[35] He did not purport finally to determine the admissibility of the material for appellate purposes. Rather, he concluded that it was not appropriate for him, exercising the limited jurisdiction to revoke or vary his own order, to reopen a concluded determination on the basis of material which had not been before him at the hearing. That approach was entirely consistent with the principles of finality identified in **Tibbles**, and the authorities which caution against permitting litigants a second opportunity to improve their cases after judgment.

[95] Drawing these matters together, I am not persuaded that the learned judge erred either in declining to take account of the proposed indemnity when determining the application on 4th March 2025, or in refusing subsequently to revoke or vary that order. The appellant's offer of an indemnity was undoubtedly relevant and potentially influential. However, it was not material which the learned judge was obliged to receive after judgment had effectively been reached, nor did it amount to the kind of unforeseen development which would justify reopening a concluded determination. To hold otherwise would undermine the important principle that parties must ordinarily advance their full case at first instance and would blur the distinction between an appeal and an application to revisit a final decision. In those circumstances, I would dismiss this ground of appeal.

[96] Having concluded that the learned judge did not err in refusing to take account of the proposed indemnity when determining the application on 4th March 2025, and further that he did not err in declining subsequently to revoke or vary that order, it

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[35] See: Re-Filed Interlocutory Appeal Bundle A, p. 1021.

follows that ground 5 of the appeal and the appeal against the order of 10th June decision cannot succeed. That conclusion, however, does not dispose of the appeal against the 4th March decision. The appellant maintains that, quite apart from the issue of the proposed indemnity, the learned judge erred in refusing leave to bring the derivative proceedings by reason of a number of errors in his assessment of the proposed claims and in the exercise of his discretion under section 184C of the Act. It therefore remains necessary to consider the remaining grounds of appeal to determine whether the learned judge was correct to refuse leave to pursue the proposed derivative proceedings on behalf of CLL BVI. I now turn to those grounds.

Issue 2 – Whether the learned judge erred in concluding that the appellant's proposed claims founded on dishonesty, bad faith and negligence disclosed no realistic prospect of success

Appellant's Submissions

[97] Learned King's Counsel for the appellant submitted that the learned judge erred in concluding that the proposed claims founded on dishonesty and bad faith disclosed no realistic prospect of success. He argued that the judge approached the application as though he was determining the merits of the claims rather than considering whether they were sufficiently arguable to justify the grant of leave.

[98] Learned King's Counsel submitted that the learned judge failed properly to engage with the evidence contained in Mr. Dekel's affidavits, the draft amended pleading and the written and oral submissions advanced on the appellant's behalf. In particular, he argued that the judge overlooked a number of matters which, taken cumulatively, supported an inference that the directors and those associated with them acted otherwise than in the interests of the company.

[99] Learned King's Counsel relied first on the management agreement entered into in relation to the Project. He submitted that the fee structure created an incentive for the property manager to prolong the Project and thereby increase the fees earned by it, notwithstanding that delay was contrary to the interests of investors.

[100] Secondly, learned King's Counsel relied upon a number of related-party loan arrangements, including the CAF6 and ESF facilities. He submitted that the evidence showed that loans connected to Mr. Leech and associated entities were advanced on terms more favourable to those lenders than to the Company and gave rise to obvious conflicts of interest. Particular reliance was placed on the allegation that certain financing arrangements enabled connected parties to profit from transactions entered into by the Project companies.

[101] Thirdly, King's Counsel submitted that the Project had been financed through an unsustainable debt structure and that senior financing had been used to repay connected lenders and return capital to investors in circumstances which were not in the interests of the Company. He argued that these matters were capable of supporting claims founded on both dishonesty and bad faith.

[102] King's Counsel further submitted that the learned judge failed to recognise that direct evidence of dishonesty is seldom available at an interlocutory stage. He argued that the court was required to consider whether the surrounding circumstances and documentary material were capable of supporting the pleaded inferences and not whether dishonesty had already been proved.

[103] As to negligence, King's Counsel submitted that the appellant had identified a number of respects in which the Project was negligently managed, including an unrealistic business plan, significant delays, excessive borrowing, the incurring of unnecessary financing costs and the failure to consider alternative strategies which might have preserved investor value. He argued that the learned judge failed to engage with those complaints and provided no adequate explanation for concluding that the negligence claims had no realistic prospect of success.

[104] Learned King's Counsel therefore submitted that the learned judge wrongly excluded claims which were properly arguable and that leave ought to have been granted.

Respondent's Submissions

[105] Learned counsel for the respondent submitted that the learned judge correctly concluded that the proposed claims founded on dishonesty and bad faith lacked any realistic prospect of success. Counsel further argued that the appellant had identified no basis upon which an appellate court could interfere with the judge's evaluation of the evidence.

[106] Counsel submitted that allegations of dishonesty and bad faith are subject to onerous requirements of pleading and proof. Relying on **Suppipat and other companies v Narongdej and others**,[36] he submitted that, although the ordinary civil standard of proof applies, cogent evidence is required where fraud or dishonesty is alleged, and the cogency of that evidence must be commensurate with the seriousness of the allegation. Further, dishonesty cannot properly be inferred from facts which are equally consistent with honesty or negligence. There must be a pleaded and proved fact which 'tilts the balance and justifies an inference of dishonesty', and the primary facts proved must render dishonesty more probable than innocence or negligence. Counsel contended that the appellant had adduced neither direct evidence of dishonesty, nor evidence of primary facts capable of supporting such an inference.[37]

[107] Counsel further submitted that many of the appellant's complaints concerned alleged omissions rather than positive acts. In those circumstances, it was necessary to identify the steps which the directors believed ought to have been taken in the interests of the Company but consciously failed to take. Relying on

[36] [2023] EWHC 1988 (Comm).
[37] ibid at paragraphs 901 to 904.

Durnont Enterprises Ltd v Fazita Investment Ltd and others,[38] counsel argued that in any event no such case had been pleaded and no evidence of conscious impropriety had been advanced.

[108] Counsel further rejected the appellant's contention that the learned judge failed to consider the evidence contained in Mr. Dekel's second affidavit. He submitted that the judge expressly considered that evidence and concluded that it fell far short of establishing a sustainable claim in dishonesty. Counsel in fact relied on paragraph 64 of the 4th March decision that having assessed the affidavit evidence before him including Mr. Dekel's second affidavit, the learned judge found as a fact that it went 'nowhere near to satisfy me that a claim for dishonesty could be maintained by the applicant and if it was, that it would be successful.' Thus, the respondent contended, this complaint therefore amounted to no more than disagreement with the judge's evaluation of the material before him.

[109] Counsel likewise submitted that there was no merit in the criticism that the learned judge failed to consider the draft amended particulars of claim in the English proceedings. Indeed, counsel for the respondent submitted that this was an unfair manner in looking at the 4th March decision, especially when the learned judge expressly recognised that deficiencies in pleading could be remedied once leave is granted.[39] Having thus considered this, the respondent contended that the learned judge went further to address the broader question whether there was any evidential basis capable of supporting allegations of dishonesty. Counsel therefore argued that this approach was, if anything, more favourable to the appellant.

[110] Counsel also rejected the suggestion that the learned judge failed to consider the appellant's written and oral submissions. On the contrary, the respondent contended that the judgment demonstrated detailed engagement with the appellant's case,

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[38] [2024] 2 B.C.L.C. 1.

[39] See: Re-Filed Interlocutory Appeal Bundle A, p. 719; Judgment dated 4th March 2025 at paragraphs [64].

including express reference to the written submissions, affidavit evidence and the arguments advanced at the hearing.[40]

[111] Turning to the proposed negligence claims, counsel submitted that the learned judge was correct to conclude that they likewise disclosed no realistic prospect of success. The appellant had failed to identify any applicable standard of care, any conduct falling below that standard, or any causal connection between the alleged breaches and the losses said to have been suffered.

[112] Counsel argued that, in order to demonstrate a realistic prospect of success, the appellant was required to identify how the alleged negligence caused loss to CLL BVI. This required not only an analysis of any loss suffered by CLL UK, but also an explanation of how such loss translated into loss suffered by CLL BVI in its capacity as shareholder or lender. No such analysis had been undertaken.

[113] Counsel submitted that the allegations of negligence therefore amounted to little more than hindsight criticism of commercial decisions taken during the course of a complex property development project. He argued that the learned judge was entitled to conclude that the complaints were, at their highest, allegations of commercial misjudgment and did not disclose a viable claim for negligence.

[114] Counsel therefore submitted that the learned judge correctly concluded that the proposed claims founded on dishonesty, bad faith and negligence lacked a realistic prospect of success.

Discussion

[115] The appropriate starting point is the nature of the exercise which the learned judge was required to undertake under section 184C(2)(c) of the Act. As the learned judge correctly recognised, and as this Court explained in **Basab Inc v Accufit Investments Inc**, the court is not required at the leave stage to conduct a trial of

[40] The respondent cited paragraphs [9], [61] and [64] of the 4th March decision.

the proposed claims. Equally, however, the court is not required merely to accept allegations at face value because they are pleaded. Rather, the court must undertake an evaluative assessment of the available material in order to determine whether the proposed proceedings are likely to succeed or, put differently, whether they possess a realistic prospect of success. The exercise therefore occupies a position somewhere between a strike-out application and a full trial and necessarily requires the court to examine whether the allegations advanced are supported by a sufficient evidential foundation.

[116] Against that background, I am unable to accept the appellant's submission that the learned judge impermissibly conducted a mini-trial of the proposed claims. A careful reading of the judgment demonstrates that the learned judge was fully alive to the limited nature of the inquiry before him. Indeed, he expressly directed himself by recognizing that the court was not determining whether the claims would ultimately succeed, but whether there was sufficient material before the court to conclude that they were realistically arguable.[41] The real question, therefore, is not whether the learned judge applied the wrong test, but whether he erred in concluding that the material relied upon by the appellant was incapable of supporting the pleaded allegations of dishonesty, bad faith and negligence.

[117] In relation to the dishonesty and bad faith claims, the appellant's principal complaint is that the learned judge failed properly to appreciate the cumulative significance of the surrounding circumstances. The appellant points to the management agreement, the related-party financing arrangements, the CAF6 and ESF loans, the alleged conflicts of interest, the increasing debt burden imposed upon the Project and the financial benefits allegedly derived by connected parties notwithstanding the ultimate failure of the venture. It is submitted by the appellant that, viewed collectively, those matters were capable of supporting an inference that those

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[41] See: Re-Filed Interlocutory Appeal Bundle A, pp. 708 -711; Judgment dated 4th March 2025 at paragraphs [28]-[35].

responsible for the management of the Project acted otherwise than in the interests of CLL BVI.

[118] The appellant is correct to submit that allegations of dishonesty will seldom be supported by direct evidence at an interlocutory stage. Courts routinely recognise that dishonesty is ordinarily established by inference from primary facts and surrounding circumstances. However, it does not follow that every allegation of conflict, poor decision-making or commercial self-interest is capable of sustaining an allegation of dishonesty. As the authorities relied upon by the respondent make clear, allegations of fraud, dishonesty and bad faith are serious allegations which require a proper evidential foundation and cannot rest upon speculation or suspicion alone. The court must therefore be satisfied that the primary facts relied upon are capable of supporting the inferences sought to be drawn from them.

[119] In my judgment, the learned judge was entitled to conclude that the appellant's proposed dishonesty claims did not meet that threshold. The difficulty confronting the appellant is that the matters relied upon to support his allegations of dishonesty are, for the most part, consistent with commercial decisions which subsequently proved unsuccessful. The existence of related-party transactions, management fees, financing arrangements involving connected entities and borrowing at high rates of interest may well justify scrutiny. They may also, depending upon the circumstances, support claims based upon breach of duty, conflict of interest or lack of due care. However, they do not, without more, establish dishonesty or bad faith.

[120] Indeed, what is noticeably absent from the appellant's case is any clearly identified evidential basis from which the court could infer that those involved knew that the transactions were contrary to the interests of the company and nevertheless pursued them for an improper purpose. The learned judge repeatedly returned to that difficulty. His conclusion was not that the allegations were insufficiently particularised in a pleading sense alone. Rather, it was that the evidence filed in support of the application failed to identify primary facts capable of supporting the

serious inferences of dishonesty which the appellant sought to advance. After having detailed the evidence that was led before him, the learned judge at paragraphs [70] and [71] had this to say in relation to this claim:

> "[70] So far as dishonesty is asserted against a director or any other person under this head of claim, there is no evidence about how that person acted dishonestly. What I have set out above is the most that is said about why the claim against the directors involves dishonesty.
>
> [71] This head of claim cannot even get off the ground. What is said against the directors by the Applicant is little more than a bare assertion. It is not supported by any particulars about how the proposed defendants to the Claim who are alleged to have been dishonest were, in fact, dishonest. Nor does it seem to me to be possible for an inference of dishonesty to be made against them based on the paucity of information that is provided by the Applicant."[42]

Then at paragraph [75], the learned judge stated 'based on the information and material thus far provided to this court the likelihood of any claim based on dishonesty succeeding is remote.' In my judgment, that was a conclusion which was open to the learned judge based on the material before the court.

[121] The negligence claims stand on a somewhat different footing. Unlike dishonesty, negligence does not require proof of improper motive or conscious wrongdoing. The appellant therefore argues that even if the dishonesty claims were weak, the learned judge erred in concluding that the negligence claims likewise lacked any realistic prospect of success. Particular reliance is placed upon the allegedly unrealistic business plan, the delays encountered by the Project, the borrowing strategy adopted, the financing costs incurred and the failure to pursue alternative options which might have preserved value for investors.

[122] On the surface, those complaints appear to present a stronger case than the allegations of dishonesty. However, the hurdle that the appellant faces is in identifying precisely how those matters translate into actionable negligence claims

[42] See: Re-Filed Interlocutory Appeal Bundle A, at page 721; Judgment dated 4th March 2025.

against the proposed defendants. As the learned judge recognised, the fact that a commercial project ultimately fails does not, without more, establish that those responsible for it acted negligently. Property developments are inherently speculative enterprises. Business plans prove inaccurate. Financing costs increase. Markets deteriorate. Delays occur. Courts must be careful not to evaluate commercial decisions with the benefit of hindsight. Thus, I agree with the learned judge's determination set out at paragraph [77] of the decision where he said:

> "There is no evidence, even by reference to the usual industry standards, of how the alleged acts constitute a breach of the duty of care. Nor can I see a causative link between the breach and any loss suffered by CLL BVI. I agree with the Respondent that the most that can be said about the complaints that the Appellant makes is some form of commercial misjudgment about certain aspects of the Project. That does not, by itself, give rise to a breach of any duty of care."[43]

[123] In the present case, the appellant identified numerous criticisms of the management of the Project. What the learned judge found lacking was evidence demonstrating that the relevant decisions fell outside the range of decisions reasonably open to those charged with managing the Project at the time they were taken. The evidence before the court was largely directed towards demonstrating that the Project performed poorly and ultimately failed. It did not sufficiently address why the decisions complained of were negligent when made, rather than simply unsuccessful when viewed retrospectively.

[124] Moreover, the learned judge was entitled to consider the negligence claims against the broader backdrop of the proposed proceedings. The allegations were advanced in conjunction with claims founded upon conflicts of interest, improper purpose, dishonesty and bad faith. Having concluded that the evidential basis for those more serious allegations was lacking, the learned judge was entitled to scrutinise carefully whether the remaining complaints amounted to more than criticism of commercial decisions which, with hindsight, proved disadvantageous. His conclusion that they did not was one which was reasonably open to him on the material before the court.

[43] See: Re-Filed Interlocutory Appeal Bundle A, at page 722; Judgment dated 4th March 2025.

[125] Ultimately, the appellant's submissions invite this Court to reach a different evaluative conclusion from that reached by the learned judge. However, this Court's function is not to substitute its own assessment merely because it may have approached the matter differently. The question is whether the learned judge erred in principle, took into account irrelevant considerations, failed to take into account relevant considerations, or reached a conclusion which was not reasonably open to him. Having carefully reviewed the evidence, the pleadings and the parties' submissions, I am unable to identify any such error.

[126] In my judgment, the learned judge was entitled to conclude that the material relied upon by the appellant failed to provide a sufficient evidential foundation for the proposed claims founded on dishonesty and bad faith and likewise failed to demonstrate that the proposed negligence claims possessed a realistic prospect of success. Accordingly, I would dismiss grounds 1 and 2 of the appeal.

Issue 3 – Whether the learned judge erred in concluding that article 14 of the respondent's articles of association afforded a complete defence to the proposed claims and, in particular, to the proposed negligence claims

[127] The resolution of this issue turns principally upon the proper construction and effect of article 14 of the respondent's articles of association. The material provisions of article 14 provide as follows:

> "14.1 Subject to the limitations hereinafter provided the Company shall indemnify against all expenses, including legal fees, and against all judgments, fines and amounts paid in settlement and reasonably incurred in connection with legal, administrative or investigative proceedings any person who:
>
> (a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that the person is or was a director of the Company; or
>
> (b) is or was, at the request of the Company, serving as a director of, or in any other capacity is or was acting for, another body

corporate or a partnership, joint venture, trust or other enterprise.

14.2 The indemnity in Regulation 14.1 only applies if the person acted honestly and in good faith with a view to the best interests of the Company and, in the case of criminal proceedings, the person had no reasonable cause to believe that their conduct was unlawful."[44]

Appellant's Submissions

[128] The appellant's challenge to the learned judge's conclusion on article 14 proceeded on three bases. First, article 14 was incapable of operating as a defence to a claim brought by the Company against its own directors. Second, that even if it were capable of doing so, the learned judge failed to consider whether the conditions necessary for reliance on the indemnity had been satisfied. Third, that the learned judge erred in concluding that the article would extend to an alleged shadow director.

[129] The appellant maintained that the central issue was one of construction. Whilst it was accepted that article 14 could not avail a director who had acted dishonestly or in bad faith, there was no agreement that it extended to claims brought by the Company itself. According to the appellant, the article was directed to claims brought against directors by third parties and not claims brought by the Company for breach of duty.

[130] Counsel submitted that this was not a settled area of the law. No direct BVI authority was identified, and the authorities relied on by the parties did not speak with one voice. In those circumstances, it was argued that the learned judge ought not to have treated the point as straightforward or as capable of finally disposing of the negligence claims at the leave stage.

[44] See: Interlocutory Appeal Bundle C (Exhibits)- Part 1, p. 80; internal page 69.

[131] The appellant relied principally on **Re City Equitable Fire Insurance Company Ltd**.[45] It was submitted that the reasoning of Romer J. supported the proposition that an indemnity of this nature was confined to third-party claims and did not operate as a shield against claims brought by the Company itself. Therefore, according to counsel, article 14 was to be construed in the same way.

[132] Whilst reliance was placed by the respondent on **Tethys Petroleum Ltd v Lilley**,[46] **John v Price Waterhouse (a firm)**,[47] and **Viscount of the Royal Court of Jersey v Shelton**,[48] counsel for the appellant maintained that none of those decisions addressed the precise question which arose in the present case. The issue therefore remained open and was not one which ought to have been resolved summarily against the appellant.

[133] The appellant further contended that the respondent's construction sat uneasily with section 122 of the Act, which states that:

> "122. A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation—
> (a) the nature of the company;
> (b) the nature of the decision; and
> (c) the position of the director and the nature of the responsibilities taken by him or her."

If correct, it would permit directors to avoid liability to the Company itself for negligent breaches of duty. Counsel argued that such a result was inconsistent with both commercial common sense and the policy which underpins the statutory duty of care.

[134] In any event, it was submitted that the learned judge proceeded on the basis that the absence of dishonesty was sufficient to engage article 14. That, according to

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45 [1925] 1 Ch 407.
46 [2023] EWHC 725 (Ch).
47 [2002] 1 WLR 953.
48 [1986] 1 WLR 985 (PC).

counsel, was an error. The article required more than honesty. It also required good faith and conduct undertaken in what the director considered to be the best interests of the Company. Those questions were not addressed by the learned judge and had not been established by those seeking to rely on the indemnity.

[135] The appellant also challenged the learned judge's conclusion that article 14 would extend to an alleged shadow director. Counsel submitted that a person who was not a director de jure could not simply claim the benefit of an indemnity contained in the Company's articles and that the learned judge's conclusion on that issue was unsupported by any substantive analysis.

[136] Put shortly, the appellant's case was that article 14 raised an arguable question of construction which could not properly be treated as affording a complete answer to the proposed negligence claims and that the learned judge therefore erred in refusing leave on that basis.

Respondent's Submissions

[137] The respondent's case was that the learned judge was plainly correct to conclude that article 14 afforded a complete answer to the proposed negligence claims. Article 14 reproduced, in substantially identical terms, the indemnity provided for under section 132 of the Act and conferred upon the directors the fullest protection permitted by law.

[138] According to the respondent, the appellant's challenge to article 14 had narrowed considerably by the time the matter came before the learned judge. The only issue which remained, concerned the proper construction of the article. The appellant maintained that it was confined to claims brought by third parties. The respondent contended that there was no basis, either in the language of the article or the statutory scheme, for reading in such a limitation.

[139] The respondent submitted that article 14 was expressed in the widest possible terms. It extended to all expenses, judgments, fines and settlement sums incurred in connection with civil, criminal, administrative and investigative proceedings. On its ordinary meaning, the language admitted of no distinction between claims brought by third parties and claims brought by the Company itself.

[140] The respondent further submitted that the appellant's construction produced an inherently improbable result. If the shareholders intended directors to be protected from the consequences of proceedings arising from the discharge of their duties, there was no obvious reason why that protection would exist where proceedings were brought by third parties but disappear where the same complaint was pursued by the Company. Properly construed, the indemnity was intended to operate in all cases save those involving dishonesty or bad faith.

[141] Nor, according to the respondent, was the appellant's construction consistent with section 132 of the Act. Article 14 reflected the language of the statute and the two fell to be construed together. If section 132 were confined to third-party claims, it would mean that the legislature had chosen to regulate only a comparatively narrow category of indemnities whilst leaving indemnities against claims brought by the company itself to the general law. The respondent submitted that such a result was difficult to reconcile with the breadth of the statutory language.

[142] Reliance was placed on the decision of the Guernsey Court of Appeal in **Emerald Bay Worldwide Limited v Barclays Wealth Directors (Guernsey) Limited**.[49] The respondent submitted that the Court there considered an indemnity in materially identical terms and concluded that it extended to claims brought by the company itself. Whilst not binding, the decision was said to be highly persuasive and supported the conclusion reached by the learned judge.

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[49] Guernsey Court of Appeal, Judgment 02/2014.

[143] The respondent further submitted that **Re City Equitable Fire Insurance Company Ltd** did not assist the appellant. It was contended that, that decision concerned the construction of a different indemnity provision operating within a wider scheme, and turned on considerations which did not arise in the present case. Far from supporting the appellant's case, the respondent argued that the decision demonstrated that there was nothing unusual in a company indemnifying its directors against claims brought by the company itself.

[144] The respondent also rejected the suggestion that article 14 should be construed restrictively. There was, it was said, no ambiguity in the language which required resolution and no basis upon which the Court could depart from the ordinary meaning of the words used. In any event, authorities such as **John v Price Waterhouse** demonstrated that indemnities contained in a company's articles were capable of extending to claims brought by the company itself.

[145] The respondent likewise took issue with the appellant's reliance on public policy and commerciality. According to the respondent, there was nothing uncommercial about a company providing directors with protection against liability arising from the discharge of their duties. Indeed, the authorities demonstrated that such arrangements were long recognised at common law and formed an important part of the commercial framework within which directors agreed to act.

[146] As to the effect of article 14, the respondent submitted that the matter was settled by authority. Reliance was placed on **Viscount of the Royal Court of Jersey v Shelton** for the proposition that an indemnity of this nature prevents a cause of action from accruing to the company against the director. It followed, the respondent argued, that the appellant's proposed claims in claims nos. 1 to 4 of the particulars of claim for breach of section 121 and 122 of the Act, including the complaints advanced in claims nos. 1 to 4 concerning the Management Agreement, the CAF6 mezzanine loans, the ESF loans and the alleged failure adequately to supervise and

intervene in the management of the Project, could not succeed.[50] Only the proposed claim under section 120(1) of the Act, alleging that the directors had failed to act honestly and in good faith and in what they believed to be the best interests of the company, fell outside the scope of the indemnity to the extent that it depended upon allegations of dishonesty or bad faith.

[147] The respondent therefore maintained that the learned judge was correct to conclude that article 14 afforded a complete defence to the proposed negligence claims and that, for that reason alone, leave was properly refused.

Discussion

[148] The appellant's challenge to the learned judge's conclusion on article 14 raises an issue of considerable importance concerning the scope and effect of indemnity provisions contained in a company's articles of association. The question is not whether article 14 ultimately affords a defence to the proposed claims. Rather, the issue at this stage is whether the learned judge was entitled to conclude, on an application for leave under section 184C of the Act, that article 14 presented such a formidable obstacle to the proposed negligence claims that those claims were not likely to succeed. In addressing that question, it is necessary to examine both the terms of article 14 and the statutory framework within which it operates.

[149] The starting point for consideration of this issue is section 132 of the Act, upon which article 14 is modelled. Section 132 provides, so far as material, that:

> "132. (1) Subject to subsection (2) and its memorandum or articles, a company may indemnify against all expenses, including legal fees, and against all judgements, fines and amounts paid in

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[50] Section 121 of the BVI Business Companies Act, 2004 provides: "A director shall exercise his or her powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company." Section 122 provides: "A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation—(a) the nature of the company; (b) the nature of the decision; and (c) the position of the director and the nature of the responsibilities undertaken by him or her." Section 120(1) provides: "Subject to this section, a director of a company, in exercising his or her powers or performing his or her duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company."

settlement and reasonably incurred in connection with legal, administrative or investigative proceedings any person who—

(a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that the person is or was a director of the company; or

(b) is or was, at the request of the company, serving as a director of, or in any other capacity is or was acting for, another body corporate or a partnership, joint venture, trust or other enterprise. (Amended by Act 26 of 2005)"

[150] Section 132 therefore expressly permits a company to indemnify a director or former director against expenses, judgments, fines and amounts paid in settlement incurred in connection with legal proceedings, provided that the statutory conditions are satisfied. The legislative scheme therefore recognises that directors may, in appropriate circumstances, be protected from liability arising out of the discharge of their functions. It therefore follows that section 122, which imposes obligations upon directors, to perform their duties with care, diligence and skill cannot be read in isolation. Rather sections 122 and 132 are intended to operate together, the latter qualifying the practical consequences of liability in circumstances where the statutory conditions are satisfied.

[151] I am therefore unable to accept the appellant's submission that article 14 is necessarily confined to claims brought by third parties. Neither the language of section 132 of the Act, nor the language of article 14 draws any distinction between proceedings brought by third parties and proceedings brought by the company itself. The provision is drafted in broad and unqualified terms. Had the legislature intended to confine indemnification to third-party claims, it would have been a simple matter to say so. No such limitation appears in the statute or in the article.

[152] In that regard, the respondent's reliance on **Emerald Bay Worldwide Limited v Barclays Wealth Directors (Guernsey) Limited** is significant. Although not binding on this Court, the Guernsey Court of Appeal was concerned with an indemnity

provision expressed in materially similar terms. The court rejected the contention that the indemnity was confined to third-party claims and held that, on its proper construction, it was capable of extending to claims brought by the company itself. McNeill JA stated that "The result is that although the duty in s.122 is not modified or excluded by the articles of association, the result is exoneration from liability in certain circumstances, such as loss incurred by the director's company."[51] The reasoning of the court was rooted in the ordinary meaning of the language used and in the commercial purpose served by such indemnities. I find that reasoning persuasive. It accords with the broad language employed in article 14 and with the statutory permission granted by section 132.

[153] Nor, in my view, does **Re City Equitable Fire Insurance Company Ltd** carry the appellant's case as far as his counsel suggested. That decision turned upon the construction of a differently worded provision operating within a different statutory framework. Whilst Romer J recognised limits upon the effectiveness of protective provisions, the case does not establish a general rule that indemnities or exculpatory clauses cannot apply in relation to claims brought by the company itself. At its highest, the decision demonstrates that the scope of such provisions depends upon their particular language. It does not compel the narrow construction for which the appellant contends.

[154] I likewise do not accept the submission that the respondent's construction is inconsistent with the policy underlying section 122 of the Act. The legislature has chosen to impose duties on directors whilst simultaneously permitting companies to indemnify them in specified circumstances. That balance reflects a legislative judgment that directors who act honestly and in good faith should, in appropriate cases, be protected from the financial consequences of litigation. The Court's task is to give effect to that statutory balance rather than to re-fashion it.

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[51] Guernsey Court of Appeal, Judgment 02/2014 at paragraph 51.

[155] However, the appellant's second criticism of the learned judge's reasoning has greater force. Article 14 does not operate automatically. Its protection is available only where the director has acted honestly and in good faith and in what he believed to be the best interests of the company. The existence of those conditions is therefore an essential part of the operation of the indemnity. In principle, a court must be satisfied that there is a proper basis for concluding that those requirements are met before treating the indemnity as a complete answer to a claim.

[156] That said, it is important to view the issue in its proper procedural context. The learned judge was not conducting a trial of the proposed claims. He was determining whether the proceedings were likely to succeed for the purposes of section 184C(2)(c) of the Act. Earlier in his judgment, the learned judge concluded that the appellant's allegations of dishonesty and bad faith were inadequately pleaded and unsupported by sufficient evidential material. The appellant has separately challenged those conclusions. However, if the learned judge was correct in his assessment of those allegations, there was little before him capable of demonstrating that the directors had acted otherwise than honestly and in good faith.

[157] Put another way, the appellant's challenge to article 14 depends to a substantial degree upon the very allegations of dishonesty and bad faith, which the learned judge had already found to be lacking in substance. Once those allegations are removed from consideration, the proposed negligence claims stand exposed to an indemnity provision which, on its face, appears capable of providing a complete defence. In those circumstances, it was open to the learned judge to conclude that the claims faced a substantial legal obstacle which materially undermined their prospects of success.

[158] The appellant further submits that the issue was not sufficiently settled to justify dismissal of the negligence claims at the leave stage. There is some force in the observation that there is no direct BVI authority addressing the precise scope of

article 14. Nevertheless, the absence of local authority does not mean that the issue was incapable of determination. The learned judge was entitled to construe the article by reference to its language, the statutory context, and the available persuasive authorities. Having done so, he concluded that article 14 afforded a complete defence to the negligence claims. I am not persuaded that this conclusion was outside the range of conclusions reasonably open to him.

[159] The appellant's final complaint concerns the learned judge's conclusion that article 14 would extend to an alleged shadow director. In my judgment, it is unnecessary to determine that question for the purposes of this issue. The status of Mr. Leech and the viability of the proposed claims against him arise for separate consideration under the appellant's challenge to the learned judge's treatment of shadow directors. Even if the learned judge erred in concluding that article 14 would extend to a shadow director, that would not undermine his conclusion that the negligence claims against the de jure directors faced a complete defence under the article.

[160] Accordingly, whilst I accept that the learned judge might have more fully articulated the basis upon which the statutory conditions for reliance upon article 14 were satisfied, I am not persuaded that he erred in principle in concluding that article 14 presented a complete defence to the proposed negligence claims. Having regard to the language of the article, the effect of section 132 of the Act, and the absence of a sufficiently pleaded and evidenced case of dishonesty or bad faith, the learned judge was entitled to conclude that those claims were not likely to succeed. The appellant has therefore failed to demonstrate any basis upon which this Court should interfere with that aspect of the learned judge's decision. Ground 3 of appeal is therefore dismissed.

Issue 4 – Whether the learned judge erred in concluding that the proposed claims against Mr. Newman Leech, as an alleged shadow director of the respondent, disclosed no realistic prospect of success

Appellant's Submissions

[161] The appellant challenged the learned judge's conclusion that Mr. Leech could not be liable to the respondent as a shadow director. Learned King's Counsel submitted that the learned judge approached the issue from the wrong perspective by focusing on whether BVI company law recognises the statutory office of shadow director rather than on the substance of the allegations pleaded against Mr. Leech.

[162] Learned King's Counsel accepted that the expression 'shadow director' does not appear in the Act and that the claim was not dependent upon importing the English statutory concept into BVI law. Rather, he submitted that the term had been used as a convenient label to describe the role which Mr. Leech was alleged to have performed within the respondent's corporate structure.

[163] Counsel argued that the particulars of claim alleged that Mr. Leech was a person in accordance with whose directions the de jure directors were accustomed to act and that he exercised functions ordinarily associated with a director. Those allegations, he submitted, were directed to establishing the factual circumstances in which fiduciary duties arose and not to asserting the existence of a particular statutory office.

[164] It was therefore contended that the learned judge erred in treating the absence of an express statutory recognition of shadow directorship as determinative of the claim. Counsel submitted that the relevant inquiry was rather whether the facts alleged were capable of giving rise to fiduciary obligations owed by Mr. Leech to the respondent. On the appellant's case, those duties arose by reason of the degree of control and influence which he exercised over the affairs of the company.

[165] King's Counsel further submitted that the learned judge adopted an unduly narrow interpretation of section 2 of the Act. He argued that the statutory definition of 'director', which includes a person occupying or acting in the position of director by whatever name called, was sufficiently broad to encompass a person exercising the functions ordinarily associated with that office, notwithstanding the absence of formal appointment.

[166] In that regard, learned King's Ccounsel submitted that the learned judge failed to account for the overlap which may exist between *de facto* and shadow directors. Relying on **Palmer's Company Law**[52] and the decision in **Re Mea Corporation Ltd**; **Secretary of State for Trade and Industry v Aviss and others**,[53] he argued that the two concepts are not invariably distinct and that a person may fall within both categories depending on the facts.

[167] Learned King's Counsel also submitted that the concept of shadow directorship is now a well-established feature of company law throughout common law jurisdictions and should not be regarded as dependent solely upon express statutory recognition. He further relied on section 6 of the **Insolvency Act**[54] , which expressly recognises shadow directors in the insolvency context and argued that it was inherently improbable that the legislature intended such persons to be subject to liability only upon insolvency whilst remaining immune from liability for breaches of duty committed prior thereto.

[168] Finally, King's Counsel submitted that the learned judge's approach produced an undesirable result as a matter of policy. If correct, it would permit a person effectively to control the affairs of a company from behind the scenes whilst avoiding responsibility to the company and its shareholders for the consequences of that conduct. Learned King's Counsel therefore maintained that the pleaded allegations

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52 At 8.225.
53 [2006] EWHC 1846 (Ch).
54 Act 5 of 2003, Revised Laws of the British Virgin Islands.

against Mr. Leech disclosed a realistic prospect of establishing that he owed fiduciary duties to the respondent and that leave to pursue the proposed derivative claim against him ought to have been granted.

Respondent's Submissions

[169] In relation to the proposed claim against Mr. Leech as an alleged shadow director, learned counsel for the respondent submitted that the learned judge was correct to conclude that the claim disclosed no realistic prospect of success. Counsel argued that the concept of a 'shadow director' is entirely a creature of statute and that any consequences flowing from that designation depend upon the particular statutory framework in which it appears. Reliance was placed on the decision of Lewison J in **Ultraframe (UK) Ltd v Fielding**,[55] where it was explained that the category of shadow director serves specific statutory purposes and does not, without more, render such a person a director for all legal purposes.

[170] Counsel submitted that the Act contains no reference, whether express or implied, to shadow directors. Rather, the statutory definition of 'director' is confined to de jure and de facto directors. In this regard, counsel relied upon the commentary in **British Virgin Islands Commercial Law**,[56] which recognises that the Act does not extend the definition of director to include shadow directors.

[171] Counsel further submitted that the legislative intention is reinforced by comparison with the **Insolvency Act**. While that Act contains provisions which expressly extend the concept of director to include persons who would ordinarily be regarded as shadow directors, no corresponding provision appears in the **Business Companies Act**. Counsel argued that this distinction was deliberate. Had the legislature intended persons acting as shadow directors to be subject to the duties imposed by

[55] [2005] EWHC 1638 (Ch).
[56] Colin Riegels and Ian Mann (eds), British Virgin Islands Commercial Law (4th edn., Sweet & Maxwell 2018) para 2.271.

sections 120 to 122 of the **Business Companies Act**, it would have said so expressly, as it did in the insolvency legislation.

[172] Counsel therefore maintained that even if Mr. Leech's conduct was capable of attracting the label of 'shadow director' for the purposes of the **Insolvency Act**, that designation would not render him a director for the purposes of the **Business Companies Act** or subject him to the statutory duties upon which the proposed derivative claims were founded. Accordingly, the proposed claims against him were bound to fail as a matter of law and the learned judge was correct to conclude that they disclosed no realistic prospect of success. The respondent therefore invited this Court to dismiss this ground of appeal.

Discussion

[173] The resolution of this issue requires the Court to determine whether the learned judge was correct to conclude that the proposed claims against Mr. Leech, insofar as they depended upon him being a shadow director of CLL BVI, disclosed no realistic prospect of success. The question is not whether Mr. Leech in fact exercised influence over the affairs of the Company. Rather, the anterior question is whether BVI law recognises a shadow director as owing the statutory duties relied upon by the appellant and, if so, whether the material before the learned judge was capable of establishing that Mr. Leech fell within that category. In my judgment, the learned judge did not err in concluding that the proposed claims against Mr. Leech lacked a realistic prospect of success.

[174] It is convenient to begin with the statutory framework. Sections 120, 121 and 122 of the **Business Companies Act** impose duties upon directors of BVI companies. However, unlike the legislation in certain other jurisdictions, the Act does not contain any express reference to shadow directors. Nor does the definition of 'director' in section 2 expressly extend to persons in accordance with whose directions or instructions the directors of a company are accustomed to act, that is as a shadow director. This omission is striking when contrasted with the position under the

Insolvency Act, where the legislature has expressly extended the concept of director to include persons who would ordinarily be regarded as shadow directors. The existence of that express provision in one statute and its absence in the other is a powerful indication that the omission was deliberate rather than inadvertent.

[175] The appellant nevertheless submits that the concept of a shadow director is recognised either through the broad definition of director contained in the Act or through the common law. Reliance was placed on the proposition that the statutory duties imposed by sections 120 to 122 of the Act should not be capable of avoidance merely because an individual chooses to operate behind formally appointed directors. There is undoubtedly force in the policy argument that those who effectively direct the affairs of a company should not escape accountability merely because they lack formal appointment. However, policy considerations cannot override the language chosen by the legislature.

[176] In construing the Act, the court must give effect to the statutory scheme enacted by the legislature. The Act draws a distinction between directors and other persons involved in the management or affairs of a company. Whilst the definition of director is broad enough to encompass de facto directors, there is no indication that it was intended also to encompass shadow directors. Indeed, had the legislature intended such an extension, it could readily have adopted language similar to that found in the **Insolvency Act** or in other common law jurisdictions where shadow directors are expressly recognised. Its failure to do so is difficult to ignore.

[177] In this regard, the learned judge was entitled to place weight on the commentary in **British Virgin Islands Commercial Law**,[57] which recognises that the Act does not extend the definition of director to include shadow directors. Whilst academic commentary is not determinative, it is a legitimate aid where it reflects the apparent structure and language of the legislation. The commentary accords with the natural

[57] Colin Riegels and Ian Mann (eds), British Virgin Islands Commercial Law (4th edn., Sweet & Maxwell 2018).

reading of the Act and with the legislative distinction drawn between the Act and the **Insolvency Act**.

[178] The appellant sought to rely on authorities recognising that, in appropriate circumstances, persons who are not formally appointed directors may nevertheless owe fiduciary obligations. However, those authorities do not establish the proposition necessary for the appellant's case. The proposed claims against Mr. Leech were advanced principally as claims for breach of the statutory duties imposed by sections 121 and 122 of the Act. The question before the learned judge was therefore not whether some other cause of action might theoretically be available against Mr. Leech, but whether the specific claims pleaded had a realistic prospect of success. In my view, the learned judge was entitled to conclude that they did not.

[179] Even if the appellant was correct that BVI law recognises shadow directors for certain purposes, a further difficulty arises. The authorities demonstrate that a shadow director is not established merely because an individual exercises influence or enjoys commercial leverage. It must be shown that the board, or a majority of it, was accustomed to acting in accordance with that person's directions or instructions. The concept requires more than persuasion, advice or influence; it requires a relationship of habitual compliance.

[180] The learned judge concluded that there was no evidence that the board of CLL BVI, or a functional majority thereof, was accustomed to act in accordance with Mr. Leech's directions or instructions. The appellant challenges that finding, relying on evidence said to demonstrate Mr. Leech's extensive involvement in the management and financing of the Project. However, much of that material demonstrates no more than that Mr. Leech occupied an influential commercial position within the wider project structure. Influence and control are not synonymous. The evidence relied upon by the appellant falls short of demonstrating

that the directors of CLL BVI habitually acted upon Mr. Leech's instructions as a matter of course.

[181] Nor does the material identify specific board decisions which were taken pursuant to instructions issued by Mr. Leech and followed by the directors because they regarded themselves as obliged to do so. At its highest, the evidence demonstrates that Mr. Leech was heavily involved in aspects of the Project and that he may have exercised considerable commercial influence. That is insufficient to establish the relationship required by the authorities concerning shadow directors.

[182] The appellant also argued that the learned judge adopted an unduly restrictive approach at the leave stage and that the court should not determine difficult questions of law on an application under section 184C of the Act. I accept that leave applications are not mini-trials and that the court must be cautious before rejecting a claim solely because the law is developing or uncertain. However, the statutory requirement remains that the proposed proceedings are likely to succeed. Where a proposed claim depends upon a legal proposition which finds no support in the language of the governing statute and is contradicted by the structure of the legislative scheme, the court is entitled to conclude that the claim lacks a realistic prospect of success.

[183] In my judgment, the learned judge was entitled to conclude both that the Act does not recognise shadow directors as owing the statutory duties imposed by sections 120 to 122 and that, in any event, the evidential material fell well short of establishing that Mr. Leech satisfied the requirements ordinarily associated with that concept. Either conclusion was sufficient to undermine the viability of the proposed claims against him. Taken together, they provide a compelling basis for the learned judge's decision.

[184] Accordingly, I am unable to accept the appellant's contention that the learned judge erred in concluding that the proposed claims against Mr. Leech disclosed no realistic prospect of success. Ground 4 of the appeal therefore fails.

Issue 5 – Whether the learned judge erred, insofar as he made such a finding, in concluding that any relevant loss was suffered by CLL UK rather than the respondent

Appellant's Submissions

[185] Learned King's Counsel submitted that it was unclear whether the learned judge intended, at paragraph [81] of the judgment, to find that any loss arising out of the matters complained of had been suffered by CLL UK rather than by the respondent. He contended that the better reading of the judgment was that no such finding was in fact made. However, insofar as the learned judge did reach that conclusion, it was unsupported by the evidence and wrong in principle.

[186] Learned King's Counsel argued that the proposed claims were intended to be advanced on behalf of both CLL UK and the respondent in the contemplated English proceedings. In those circumstances, the fact that different entities within the corporate structure may have suffered different aspects of the alleged loss did not provide a basis for refusing leave under section 184C of the Act. He submitted that loss may have multiple causes and may be suffered at more than one level within a corporate group. Reliance was placed in this regard on paragraphs 10A and 10B of Mr. Dekel's second affidavit, in which, it was said, demonstrated that the respondent had suffered loss notwithstanding the involvement of CLL UK in the underlying project.

[187] King's Counsel further submitted that it would be wrong for a potentially valid claim to fail at the permission stage on the basis of a premature determination as to which company ultimately sustained the relevant loss. He argued that any question concerning the proper allocation of loss between the respondent and CLL UK, including any overlap or duplication, could be addressed in the pleadings and

determined in the English proceedings. Accordingly, counsel submitted that there was no basis for concluding, at the leave stage, that the loss was suffered only by CLL UK and not by the respondent, and that any such issue ought properly to be left for determination in the substantive proceedings.

Respondent's Submissions

[188] Learned counsel for the respondent submitted that the learned judge was correct to conclude that the appellant had failed to establish a sustainable case that the respondent had suffered any recoverable loss. Counsel argued that this was a point which the respondent had advanced at first instance in relation to several of the proposed claims and which the learned judge accepted.

[189] Counsel submitted that, in relation to claim no. 1 of the particulars of claim, the appellant had failed to plead or evidence any sustainable loss because the respondent had received services pursuant to the management agreement. Any assessment of loss would necessarily have required consideration of the fact that, had the impugned agreement not been entered into, the respondent would in any event have been required to engage alternative management services. In those circumstances, counsel submitted that no properly arguable case on loss had been demonstrated.

[190] Counsel further submitted that claims nos. 2, 3, 6 and 7 disclosed no sustainable case on loss because the relevant loan arrangements had been entered into by CLL UK and not by the respondent. Accordingly, any loss arising from those transactions would have been suffered, if at all, by CLL UK as the contractual counterparty. Counsel argued that the same analysis applied to the knowing receipt claims, since any receipt of the relevant benefits occurred at the level of CLL UK rather than the respondent.

[191] Counsel submitted that the learned judge addressed this issue at paragraphs [78] and [79] of the judgment and concluded, in clear terms, that if any loss had been

suffered, it was suffered by CLL UK and not by the respondent. In those circumstances, the proper claimant in respect of such losses was CLL UK. Counsel further observed that the appellant's proposed ground of appeal had not featured in the draft grounds provided to the learned judge and was unsupported by any substantive argument demonstrating that the learned judge's conclusion was wrong.

[192] Counsel therefore submitted that the appellant faced the additional difficulty that ground 6 sought to challenge which was, in substance, a finding of fact made by the learned judge. No basis had been advanced upon which this Court could properly interfere with that finding. To the contrary, counsel maintained that the finding was fully supported by the evidence and represented the only conclusion properly open to the learned judge on the material before him.

Discussion

[193] This issue arises from the learned judge’s observation at paragraph [81] of the judgment that, “to the extent that any company has suffered any loss, it has to be [CLL UK], not [CLL BVI]”, and that to grant leave would effectively permit the appellant to pursue claims vested in CLL UK rather than the respondent company. The appellant contends that the learned judge thereby misdirected himself as to the proper claimant and wrongly concluded that the proposed causes of action belonged exclusively to CLL UK. The respondent maintains that the learned judge was correct, as the losses alleged by the appellant were losses suffered by the owner of the underlying development asset, namely CLL UK, and not by CLL BVI, whose role was limited to that of a holding and fundraising vehicle.

[194] It is convenient to begin by identifying the nature of the inquiry required at the leave stage. The question is not whether the appellant has established that CLL BVI in fact suffered recoverable loss. Nor is it whether the respondent will ultimately succeed in demonstrating that the claims belong to another entity within the corporate structure. Rather, the court must determine whether the learned judge

was correct to conclude that the proposed claims lacked a realistic prospect of success because the alleged loss was suffered by CLL UK and not by CLL BVI.

[195] In approaching that question, it is important to recognise the separate legal personality of each company within the Clerkenwell structure. Although CLL BVI and CLL UK formed part of the same overall project, they remained distinct legal entities with separate rights and liabilities. The mere fact that a subsidiary owns the underlying asset does not necessarily mean that only the subsidiary can suffer loss arising from wrongdoing affecting the wider enterprise. The critical question is whether the pleaded wrongdoing is alleged to have caused loss to the company on whose behalf the derivative claim is sought to be brought.

[196] The appellant's proposed claims are not confined to allegations that the Clerkenwell development itself was mismanaged. Rather, they include allegations that those controlling the Project caused CLL BVI to enter into disadvantageous arrangements, permitted conflicts of interest to arise, approved excessive fees and financing structures, and diverted value from the investment vehicle through transactions which preferred the interests of connected parties over those of the Company and its investors. Properly analysed, those allegations are directed at the affairs of CLL BVI itself and not merely at the operation of the underlying development asset.

[197] In that regard, the appellant is correct to submit that a holding company may suffer loss independently of its subsidiary. Where directors cause a holding company to deploy its assets imprudently, to incur liabilities unnecessarily, or to enter into transactions which diminish its value, the resulting loss is suffered by the holding company even if the underlying commercial activity is carried out through a subsidiary. The fact that the economic consequences of the wrongdoing may also be reflected in the fortunes of the subsidiary does not necessarily deprive the holding company of a cause of action.

[198] Equally, however, the respondent is correct to emphasise that a shareholder cannot recover for loss which merely reflects loss suffered by another company. In **Sevilleja v Marex Financial Ltd**,[58] Lord Reed, explaining the rule established in **Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)**,[59] stated that:

> "a shareholder cannot bring a claim in respect of a diminution in the value of his shareholding, or a reduction in the distributions which he receives by virtue of his shareholding, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, even if the defendant's conduct also involved the commission of a wrong against the shareholder, and even if no proceedings have been brought by the company.'

Accordingly, where the true loss is suffered by a subsidiary, a parent company or shareholder cannot ordinarily recover merely because the value of its investment has diminished as a consequence. The law therefore requires careful attention to the identity of the person whose rights have allegedly been infringed and who has sustained the relevant loss.

[199] The difficulty with the learned judge's reasoning is that it appears to have treated the question as admitting of only one answer. The evidence before the court disclosed a more nuanced position. Whilst some aspects of the proposed claims undoubtedly concerned matters affecting CLL UK, particularly those relating directly to the ownership, financing and ultimate disposal of the development property, other aspects of the claims were directed to decisions allegedly taken at the level of CLL BVI itself. The proposed pleading alleged that CLL BVI was used as the vehicle through which investor funds were raised and deployed and that the Company was thereby exposed to losses resulting from the conduct complained of.

[200] At the leave stage, the court is not required finally to determine the proper claimant in respect of every alleged wrong. The exercise is necessarily a provisional one. Where there is a realistic argument that the company on whose behalf leave is sought has suffered loss independent of any loss suffered by another entity within

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58 [2020] UKSC 31 at paragraph 9.
59 [1982] Ch 204.

the group, the court should be slow to reject the claim summarily. Questions concerning the precise characterisation of the loss, the application of reflective loss principles and the allocation of claims between different corporate entities will often be better determined at trial on a fuller evidential record.

[201] The respondent nevertheless submits that the learned judge's conclusion should be upheld because the entirety of the value within the Project resided in CLL UK and any reduction in that value could only have been suffered by that company. I am unable to accept that submission in its absolute form. The pleaded case extends beyond allegations of diminution in the value of the underlying property. It includes allegations concerning the raising, management and deployment of investor capital through CLL BVI. If those allegations were established, it is at least arguable that CLL BVI itself sustained loss distinct from any loss suffered by CLL UK.

[202] This conclusion is reinforced by the nature of a derivative claim. The statutory leave jurisdiction is intended to permit a shareholder to pursue claims belonging to the company where those controlling the company are unwilling to do so. At the leave stage, the court must assess whether the proposed claims have a realistic prospect of success. It is not ordinarily the function of the court to finally resolve complex issues concerning causation, loss and corporate attribution unless it is clear that the claim is bound to fail. In my judgment, the material before the learned judge did not establish that proposition.

[203] I therefore consider that to the extent that the learned judge concluded that any relevant loss could only have been suffered by CLL UK and not by CLL BVI he went too far. The evidence and proposed pleadings disclosed an arguable case that at least some of the alleged wrongdoing caused loss directly to CLL BVI. Whether that case will ultimately succeed is a matter for another day.

[204] However, the respondent is correct to submit that the issue cannot be viewed in isolation. Even if the learned judge erred in his treatment of the proper claimant

issue, that conclusion would not of itself justify the grant of leave. This is because the learned judge refused leave on a number of independent grounds, including his conclusions regarding the absence of realistically arguable claims in dishonesty, negligence and breach of statutory duty, together with the effect of article 14 of the Company's articles of association. Accordingly, whilst I am not persuaded that the learned judge was correct to conclude that all relevant loss was necessarily suffered by CLL UK, any such error, in my mind, does not affect the ultimate disposition of the application. The appeal therefore gains no practical assistance from this ground.

Conclusions on the Appeals

[205] For the reasons which I have set out above, I am not persuaded that the learned judge erred in refusing the appellant leave to bring the proposed derivative proceedings on behalf of CLL BVI. Whilst I have accepted that there is some force in the appellant's criticism of the learned judge's treatment of the proper claimant issue, that conclusion does not affect the ultimate disposition of the application. In particular, I have concluded that the learned judge was entitled to find that the appellant's proposed claims founded upon dishonesty and bad faith disclosed no realistic prospect of success, that the proposed negligence claims were met by the substantial obstacle presented by article 14 of the Company's articles of association, and that the proposed claims against Mr. Leech as an alleged shadow director were not realistically arguable. I have further concluded that the learned judge did not err in refusing to admit or take account of the adverse costs indemnity evidence in the manner contended for by the appellant and was entitled to decline to reopen or revisit his earlier decision on the basis of that material.

[206] It follows that none of the grounds advanced by the appellant discloses any basis upon which this Court could properly interfere with the learned judge's evaluative assessment under section 184C of the Act or with the exercise of his discretion in refusing leave to bring the proposed derivative proceedings. Nor am I persuaded that the learned judge erred in declining to revoke or vary the 4th March decision following the appellant's subsequent offer of an adverse costs indemnity. In my

judgment, both the 4th March decision and the 10th June decision were properly made and ought not to be disturbed on appeal.

[207] Having concluded that none of the grounds advanced by the appellant succeeds, it follows that the appeals must be dismissed. In those circumstances, it is unnecessary for this Court to determine the matters raised in the respondent's counter-notice. The respondent's primary position throughout has been that the orders of the learned judge ought to be affirmed, and the appeals dismissed. Having reached that conclusion, no further issue arises for determination and the counter appeal is rendered academic.

[208] In any event, the counter-notice does not seek to disturb any part of the orders made below. Rather, it advances a number of alternative bases upon which the respondent contends that the learned judge's refusal of leave may be upheld. Those issues would therefore arise only in the event that the appellant had succeeded in demonstrating error in the learned judge's reasoning. Since I have concluded that the appellant has failed on all grounds of appeal, consideration of the alternative grounds identified in the counter-notice would serve no practical purpose and could not affect the outcome of the appeals.

Disposition

[209] For the reasons given above, I make the following orders:

(1) The appeals are dismissed and the 4th March and 10th March 2025 orders of the court below affirmed.

(2) The application for leave to adduce fresh evidence is dismissed.

(3) The counter notice of the respondents is now academic and is rendered otiose.

(4) The appellant shall pay the respondent's costs of the application to adduce fresh evidence and of the appeals, such costs to be assessed

by a judge of the Commercial Division if not agreed within 21 days of the date of this order.

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

I concur.
Marlene I. Carter
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar