Neutral Citation Number: [2021] EWCA Civ 1176

Case No: A3/2020/1162

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Stephen Houseman QC (sitting as a Deputy Judge of the High Court
[2020] EWHC 1136 (Ch) and [2020] EWHC 1352 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2021

Before:

LORD JUSTICE HENDERSON
LORD JUSTICE WARBY
and
SIR DAVID RICHARDS

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Between:

(1) BOSTON TRUST COMPANY LIMITED **(2) BOSTON FIDUCIARY MANAGEMENT LIMITED**	**Claimants/ Respondent**
– and –	
GORDON VERHOEF	**Defendant/ Appellant**

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Mark Tempest (instructed by **Woodroffes Solicitors**) for the **Appellant**
Anna Dilnot QC (instructed by **Osborne Clarke**) for the **Respondents**

Hearing dates: 28 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 28 July 2021.

Sir David Richards:

Introduction

1. This is an appeal against an order giving conditional permission to continue a derivative action.

2. The claimants issued the proceedings, on the basis that they were registered shareholders of the fourth defendant Tellisford Limited (Tellisford). They seek relief on behalf of three subsidiaries of Tellisford. After a full hearing of the permission application, Mr Stephen Houseman QC, sitting as a Deputy Judge of the High Court, held that it was a suitable case in which to give permission, save that the claimants were not registered shareholders and did not otherwise have standing to pursue the derivative claims. The claimants had issued proceedings for rectification of the register of members of Tellisford to show them as shareholders and it appeared to the judge that they had at least a good arguable case for rectification. In those circumstances, by an order dated 28 May 2020, he granted permission to continue the action, on the condition that the claimants became registered as shareholders of Tellisford, whether pursuant to their rectification claim or otherwise.

3. The judge gave the defendants permission to appeal, limited to whether the court had jurisdiction to grant conditional permission and, if so, whether he had been right to exercise his discretion to grant it. He observed that there was no prior authority for the grant of conditional permission (and we have been shown none) and both sides agreed that it was a suitable case for permission to appeal. The defendants' application for permission to appeal on other grounds was refused both by the judge and by Lewison LJ. The present appeal is brought by the fifth defendant, Gordon Verhoef (the appellant).

4. The significance of these issues in these proceedings is now much reduced because, by an order of the High Court made on 23 July 2020 (the rectification order), it was ordered that the register of members of Tellisford be rectified so as to record the claimants as the joint holders of 95 A ordinary shares from 3 June 2016 and 5 B ordinary shares from 9 October 2018.

5. The effect of this order is that the claimants are deemed to have been members of Tellisford for all purposes from the dates specified in the order: see *Re Starlight Developers Ltd* [2007] EWHC 1660 (Ch), [2007] BCC 929 (*Re Starlight*) at [10], citing the decision of this court in *Re Sussex Brick Company* [1904] 1 Ch 598. It follows that, for all relevant legal purposes, the claimants are deemed to have been members of Tellisford, with standing to bring these proceedings, both when the present proceedings were issued in October 2019 and when the permission application was heard in April 2020.

6. Mr Tempest, appearing for Mr Verhoef, submitted that we should approach the appeal on the basis of the facts as they appeared at the date of the judge's order. In my judgment, this is not a legitimate approach for the court to adopt. In view of the legal effect of the rectification order, and the judge's conclusion that on all relevant grounds other than standing permission should be granted, it can now be seen that the proper order was the grant of unconditional permission.

7. The claimants submitted that the judge was right to make the conditional order and that it should remain in place. They fulfilled the condition imposed by the order by obtaining the rectification order, so since 23 July 2020 they have had unconditional permission. Mr Verhoef opposed this course.

8. We took the view at the hearing of the appeal that we should hear argument on the issues raised by the appeal, both because it raised an issue of principle with potential impacts beyond this case and because the judge's order for conditional permission should not remain in place if we were satisfied that it should not have been made.

Background

9. The first to third defendants (the operating companies) are trading subsidiaries of Tellisford, which is the holding company for a group carrying on a well-established stone restoration and repair business in the UK under the Szerelmey name. The ultimate controllers of the group are Mr Verhoef and Mr Earl Krause. They, together with Mr Verhoef's wife and Mr Krause's son, are the directors of Tellisford. The share capital of Tellisford comprises 190 A ordinary shares and 10 B ordinary shares. Family trusts established by Mr Verhoef and by Mr Krause each own 95 A ordinary shares. The B ordinary shares were owned by a Mr David Maughan but by a stock transfer form dated 9 October 2018 he transferred 5 shares to Mr Krause's trust.

10. Having worked closely together for some 60 years, the relationship between Mr Verhoef and Mr Krause broke down in late 2015/early 2016 and, as is common ground, Mr Verhoef excluded Mr Krause from participation in the business.

The proceedings

11. On 1 October 2019, the claimants in their capacities as trustees of Mr Krause's trust (the Erutuf trust) issued the present proceedings, claiming relief on behalf of the operating companies in respect of alleged misappropriations of assets of those companies. The claims are made against Mr Verhoef and five companies alleged to have assisted in the misappropriations or to have received the assets. It is unnecessary to go into the detail of the claims.

12. Prior to the issue of the proceedings, the claimants applied without notice for personal and proprietary freezing injunctions. They also applied at that stage, again without notice, for permission to continue the claim as a derivative claim. The injunctions were refused, but permission was granted pending a full hearing of the application.

Derivative claims

13. These are so-called double derivative claims or (where there are one or more intermediate holding companies, as is the case with one of the operating companies) multiple derivative claims, whereby members of a holding company bring proceedings to enforce claims, not on behalf of the company of which they are members, but on behalf of subsidiaries of that company.

14. They are not subject to the regime set out in Chapter 1 of Part 11 of the Companies Act 2006 (the statutory regime). This arises from the definition in section 260(1) of a "derivative claim" as proceedings "by a member of a company (a) in respect of a

cause of action vested in the company, and (b) seeking relief on behalf of the company". The definition of a "member" of a company is for these purposes extended from its general definition of a person who has agreed to become a member and whose name is entered in the company's register of members (section 112(2)) but only so as to include a person to whom shares have been transferred or transmitted by operation of law (section 260(5)(c)). The claim must therefore be made by a member of the company on whose behalf the claim is made, or by a person entitled to shares in that company by transfer or transmission.

15. The circumstances in which double and multiple derivative claims may be brought remain governed by the common law rules, known as the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461: *Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] EWHC 348 (Ch), [2013] Ch 551 (*Fort Gilkicker*) and *Abouraya v Sigmund* [2014] EWHC 277 (Ch).

16. There was no requirement until relatively recently for a claimant to apply for permission to continue a derivative claim. The practice was for the defendants to apply to strike out a derivative claim if they considered that it did not fall within the exceptions to the rule in *Foss v Harbottle*. This ceased to be the practice when, with effect from 2 May 2000**,** CPR 19 was amended by the introduction of a new rule 19.9, which required the claimant in a derivative claim on behalf of a company, other incorporated body or trade union to apply to the court for permission to continue the claim after issue of the claim form.

17. CPR 19 was amended with effect from 1 October 2007, when the statutory regime came into force. CPR 19.9A and 19.9B deal with claims to which the statutory regime applies, while CPR 19.9 (re-drafted), 19.9C and 19.9D apply to other derivative claims.

18. It is common ground in the present case that the claimants were required to obtain permission to continue the proceedings after the issue of the claim form. I consider this to be correct but, unlike the judge, I do not think that this requirement arises, strictly speaking, under CPR 19.9.

19. CPR 19.9 applies to "a derivative claim" which is defined in 19.9(1)(a) as being brought "where a company, other body corporate or trade union is alleged to be entitled to claim a remedy, and a claim is made *by a member of it* for it to be given that remedy" (emphasis added). Just as those words in section 260 of the Companies Act 2006 have been construed as limiting the statutory regime to "single" derivative claims (see the authorities cited above) so, as it seems to me, the same result must follow in CPR 19.9. It was submitted to us that 19.9 extends to double and multiple derivative claims by virtue of the words "whether under Chapter 1 of Part 11 of the Companies Act 2006 *or otherwise*" in 19.9(1)(a). It seems clear to me that "or otherwise" encompasses claims on behalf of an "other body corporate or trade union" and does not qualify the requirement that the claim must be made by a member of the company, other body corporate or trade union alleged to be entitled to claim a remedy. Reference was also made to PD19C which uses the expression "derivative claim" but, in my view, this cannot be taken to have a wider meaning than in CPR 19. The purpose of PD19C is not to widen CPR 19 but, as it states, to supplement it. In this respect, I do not agree with the observation made by Briggs J in *Fort Gilkicker* at [53] on the basis, it appears, of common ground. It may be that the Rules Committee

would wish to look at whether the application of CPR 19.9 to double and multiple derivative claims should be clarified.

20. Nonetheless, it is the settled practice of the court to require permission to be obtained for double and multiple derivative claims. In my judgment, the court is entitled and right to impose this requirement, and to apply by analogy the practice in CPR 19.9. As the underlying claims are necessarily vested in the company, a member of its holding company has no right to bring a derivative claim, save as permitted by statute or the common law. In the latter case, just as the courts have laid down the circumstances in which derivative claims may be brought, so they may develop the procedure to which they are subject.

The claimants' standing

21. In preparation for a full hearing of the application for permission, substantial evidence was filed by the parties dealing with all the matters which the claimants needed to show in order to obtain permission. The first of these matters was their standing to bring the claims. The claimants asserted, as they believed to be the case, that they were members of Tellisford.

22. In evidence filed on behalf of the defendants in November 2019, the assertion was made that the claimants were not members and so did not have standing to bring the claims. As I describe below, that proved to be correct.

23. The facts relevant to the claimants' status were as follows.

24. The Erutuf Trust was established in 2000 with Isle of Man Financial Trust Limited (IoMFT) as its original trustee. Tellisford was incorporated on 8 December 2003, on which date a return of allotments showed that the A ordinary shares had been allotted to IoMFT. The annual returns for the years from 2004 to 2014 recorded that the A ordinary shares were held by IoMFT. Notwithstanding those documents, from 2004 the register of members of Tellisford showed 95 A ordinary shares as held by "Erutuf Trust IOM", not by IoMFT. Erutuf Trust IOM was not a legal person capable of being registered as the holder of shares.

25. In April 2013, IoMFT resigned as trustee of the Erutuf Trust and was replaced by Andrew Douglas Ash and Alexander Fleming McNee, who were directors or otherwise involved with IoMFT. They resigned in June 2016 and were replaced by the claimants.

26. Notwithstanding the changes in trustees, no steps were taken to transfer the A ordinary shares registered in the name of Erutuf Trust IOM to either Mr Ash and Mr McNee or to the claimants. In April and May 2020, the claimants sought the agreement of Tellisford and Mr Verhoef to correct the position but, even after the necessary share transfer forms had been executed, they refused to co-operate and the claimants were left to issue their application for rectification of the register on 16 April 2020, very shortly before the hearing of the permission application. It was only after the rectification order was made on 23 July 2020 that they were registered as members of Tellisford.

The first judgment

27. The claimants' application for permission was heard by the judge on 22 and 23 April 2020 and he gave his first judgment on 7 May 2020. He carefully and fully considered all the issues relevant to the grant of permission, including an assessment of the merits of the claims. He was aware of, and referred to, the claimants' rectification application, and that it was opposed by Mr Verhoef. He recorded that he had been told that it would be determined within a few months.

28. The judge identified the question of the claimants' standing as the first of twelve issues arising on the application. He noted that it might have been a candidate for determination as a preliminary issue, as has been done in some other cases, but none of the parties suggested or sought it.

29. At [105]-[122], the judge addressed the issue of standing. There was a sub-issue as to the validity of the appointment of the claimants as trustees, which the judge resolved in their favour. The claimants accepted that they could not show at the time of the hearing that they were the legal owners of shares in Tellisford. He rejected the claimants' submission that they were, for the purposes of standing, beneficial owners of the shares.

30. The judge held that the claimants were not members of Tellisford and that accordingly they did not have standing to bring the claims. Their claim to be registered as members would "fall to be decided in the Rectification Claim by reference to the state of formal transfer instrumentation and supporting evidence pertaining at the relevant time". He continued:

> "121. In light of my conclusion on the threshold question of standing, the remaining issues do not immediately or necessarily arise for determination. That said, they were all fully canvassed at the hearing and, in light of what I say at the end of this judgment about the appropriate form of order to be made on the present application, their determination at this stage may have practical utility.
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> 122. The premise for the remaining analysis, contrary to my conclusion on the standing issue by reference to the current state of affairs, is that Boston are treated as having sufficient interest in the relevant Tellisford shares."

31. The judge proceeded to consider the other issues and decided most of them in favour of the claimants. In conclusion, he said:

> "163. But for the current position on standing, I would have granted permission to Boston to pursue this derivative action in respect of all four heads of claim…
>
> 164. There was some discussion towards the conclusion of the hearing as to whether it might be appropriate to stay or adjourn the disposal of the permission application in the event that I were to conclude, as I have, that Boston currently lack sufficient standing in this matter, i.e. in order to give Boston an opportunity to pursue the Rectification Claim and/or seek

> permission to add another claimant in these proceedings. Boston's counsel suggested as a fall-back that the court could grant permission conditional upon a successful outcome in the Rectification Claim. I can see sense in that as a way forward.
>
> 165. I will hear argument from the parties as to the appropriate form of order to make consequent upon handing down of this judgment, including as to costs"

The second judgment

32. A further hearing to consider the terms of the order and other consequential matters took place on 21 May 2020 and, having circulated a draft judgment the following day, the judge handed down judgment on 26 May 2020.

33. In his second judgment, the judge identified as the relevant issue whether the court had power and, if so, whether it should exercise the power, to grant conditional permission where (a) the court had concluded that the claimants lack standing but that the court would otherwise give unconditional permission and (b) the claimants were actively pursuing a separate legal process to rectify the share register which, if successful, would confer standing. He referred to the claimants having, in these circumstances, "inchoate standing".

34. Having set out the background and referred in some detail to the rectification claim, the judge examined, first, whether the court had jurisdiction to grant conditional permission, by reference to CPR 19.9. He concluded that CPR 19 was to be read with CPR 3.1(3) which provides that:

> "When the court makes an order, it may (a) make it subject to conditions, including a condition to pay a sum of money into court; and (b) specify the consequences of failure to comply with the order or a condition."

35. The judge said at [43] that there was no obvious reason why CPR 3.1(3) should not apply to the grant of permission for a derivative claim and that "[a]s a matter of jurisdiction the court must have power to grant conditional permission to pursue a derivative claim, for example, security for costs or undertakings provided by the claimant as the price for permission".

36. The judge turned to whether he should exercise his discretion to grant permission subject to the condition that the claimants become registered as members of Tellisford. He was satisfied that the claimants had at least a good arguable case for an order for retrospective rectification of the register. He decided that the claimants' election not to seek a stay or adjournment of the permission application, while they pursued the rectification application, did not preclude the court from giving conditional permission.

37. He accordingly made the order under appeal.

38. On this appeal, the claimants sought to contest the judge's finding that they lacked standing. They filed a respondent's notice, seeking to uphold the judge's decision on

different or additional grounds, namely either (i) that the judge, having held that the claimants had an equitable interest in the A ordinary shares, should have held that such interest was sufficient to give them standing, or (ii) that they enjoyed standing by virtue of the stock transfer form relating to 5 B ordinary shares executed by Mr Maughan in favour of "the trustees of the Erutuf Trust".

39. Although we heard submissions on these points, they do not need to be decided, in view of the retrospective effect of the rectification order. Further, I do not consider that they properly formed the subject of a respondent's notice upholding the decision below. The claimants advanced these arguments before the judge. They were arguments which, if correct, would have entitled the claimants to an unconditional grant of permission. It was because the judge rejected them that he made the conditional order. They are not grounds which support the order made by the judge. Permission to cross-appeal on these grounds was not sought or given.

Discussion

40. The judge's approach of asking, first, whether the court had jurisdiction to grant conditional permission and, second, whether he should exercise his discretion to grant conditional permission had the disadvantage of deflecting him from what I consider to be the central question, that is, whether it can ever be right to grant conditional permission in favour of a claimant who lacks standing, save perhaps in the most exceptional circumstances.

41. For my part, I do not consider that the question of jurisdiction takes one very far. While there is nothing in the statutory regime or in CPR 19 that provides any encouragement for a conditional grant of permission, it would be a strong thing to say that the High Court, a court of unlimited jurisdiction, wholly lacked jurisdiction to attach a condition to the grant of permission. However, I am very doubtful that any power to do so derives from CPR 3.1(3) which is concerned only with case management, not with whether a case can be maintained at all. That does not, however, help to determine whether it can be right to grant conditional permission, except perhaps (as I have said) in exceptional circumstances.

42. The claimants' standing to bring the present proceedings is, as the judge correctly said, "the threshold question". As the claimants were not members of Tellisford, and did have not standing on any other basis, they had no basis in law on which to bring the proceedings. It is only if a claimant has standing, that the issues as to whether the court should give permission for the proceedings to continue arise, however strong on those issues the claimant's case may appear to be. Unless a claimant can cross the threshold, there is no warrant for examining and deciding the issues that are contingent upon it. As Henderson LJ observed in argument, by granting permission, albeit conditionally, the judge was accepting that there was a state of facts to justify the grant of permission at that very point, but that was to beg the question of whether there was standing to make the application at all.

43. There is a further substantial reason for deciding the threshold issue before deciding whether permission should be granted. The judge himself remarked in his second judgment at [39] that the starting point must be that the court's power to grant permission is exercisable in the circumstances pertaining at the time that such permission is sought or granted. The grant of permission is a single step, requiring the

determination or assessment of a number of issues. It is therefore not only appropriate but also necessary that permission is not granted until all those issues have been determined. An issue like standing can quite properly be taken as a preliminary issue, leaving the assessment of the other elements to a later time (assuming only no change in standing in the meantime). To determine all the issues, but leave standing undecided, is to invite the problem that the assessment of those issues might be different by the time that standing had been determined.

44. This approach does not have the consequence that the only course open to the judge was to refuse permission and strike out the action. As both parties agreed before us, the judge could have stayed or adjourned the application for permission pending the hearing of the rectification application, much as Briggs J did in *Re Starlight*. In that case, an unfair prejudice petition was presented by a person who was not a member and therefore lacked standing under section 459 of the Companies Act 1985. Briggs J stayed the petition to enable the petitioner to apply for retrospective rectification of the register of members. I am unable to see any material difference between that case and the present. In both cases, the person issuing proceedings lacked the capacity to do so, in the one case under the applicable statutory regime and in the other case under the applicable common law rules. Contrary to the submissions for the claimants, the order for conditional permission made by the judge was not, for the reasons given above, a means of achieving the same result.

45. In my judgment, the grant of conditional permission was not a course which was properly open to the judge and the appropriate course was to adjourn or stay the permission application pending determination of the rectification application within a reasonable time. There are no circumstances in the present case which would have made this an inappropriate order to make.

Conclusion

46. If, in any future case, a similar situation should arise, the court should not make a conditional order for permission but should adjourn or stay the permission application, pending (within a reasonable time) determination of an application for rectification of the register of members or the taking of such other steps as may be necessary to give the claimant standing.

47. I would therefore set aside the judge's order giving conditional permission and, in view of the order for retrospective rectification, substitute an order giving unconditional permission.

Lord Justice Warby:

48. I agree.

Lord Justice Henderson:

49. I also agree.