Neutral Citation Number: [2019] EWHC 3116 (Ch)

Case No: CH-2018-000244

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

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London, EC4A 1NL
Date: 19th November 2019

Before :

MR JUSTICE TROWER

- -

Between :

(1) TRACEY DAVID STANDISH **(2) TRISTAN STANDISH** **(3) VERNA ELLA STANDISH** **(4) SOPHIE CHARLOTTE STANDISH** **(5) TIFFANY DEBRA STANDISH** **(6) TROY STANDISH** **(7) TALITA ESTER ROWLAND** **(8) HENRY JAMES STANDISH-HUNT** **(9) ALEX RICHARD MCQUIN**	**Appellants/ Claimants**
- and -	
(1) THE ROYAL BANK OF SCOTLAND PLC **(2) SIG NUMBER 2 LTD (formerly WEST REGISTER NUMBER 2 LTD)**	**Respondents/ Defendants**

- -

David Reade QC and David McIlroy (instructed by **Lexlaw Solicitors & Advocates**) for the **Appellants/claimants**
Paul Casey (instructed by **Addleshaw Goddard LLP**) for the **Respondents/defendants**

Hearing dates: 29TH OCTOBER 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE TROWER

MR JUSTICE TROWER:

1. This is an appeal against a decision of Chief Master Marsh dated 30 July 2018 by which he refused the claimants permission to amend, struck out the particulars of claim and the claim form and dismissed their claim.

2. In making the orders that he did the Chief Master dealt with the amendment and strike out applications together and assumed that the allegations made by the claimants in the draft amended particulars of claim in the form they were put before him ("the APoC") were true. It was common ground between the parties, both at the hearing before the Chief Master and at the hearing before me, that this was the right approach.

3. The test to be applied on a strike out application was also common ground both before the Chief Master and on this appeal: the court must be certain that the claim as it is set out in the statement of case is bound to fail: *Richards v. Hughes* [2004] PNLR 706, at [22]. It was not therefore suggested that the Chief Master had erred in the test that he applied. The appeal was based on a submission that the Chief Master had gone wrong in applying that test to the case pleaded in the APoC.

4. The proceedings had been brought by nine individuals, eight of whom are members of the Standish family, who were at various times shareholders in a company which ultimately came to be known as Bowlplex Ltd ("the company"). The company operated a bowling business at 16 separate sites in the UK.

5. The first defendant, the Royal Bank of Scotland plc ("RBS"), provided or administered banking facilities for the company. It appears that National Westminster Bank Plc ("NatWest") was also involved in the provision of those facilities, but for present purposes there is no need to distinguish between the two banks, and I shall call them together and separately "the Bank". The second defendant, formerly called West Register Number 2 Ltd ("West Register"), whose role I will describe shortly, was an indirect wholly owned subsidiary of the Bank.

6. It is the claimant's case that the Bank, together with West Register and an employee of West Register (Mr Kamildeep Sondhi), took steps to undermine the company's financial position so as to enable the Bank and/or West Register to acquire 80% of the company's equity at the expense of the claimants. The purpose for which those steps were taken has been called "the unconscionable purpose". They claim that the acquisitions were achieved through two restructurings (called the First Restructure and the Second Restructure). The losses claimed in these proceedings are the amounts which it is said that the claimants' shares would have been worth but for the First and Second Restructures.

7. The way in which the case is put is that there was a conspiracy between the Bank, West Register and the company's non-executive Chairman, Mr Sean Cooper a turnaround consultant who was appointed at the instigation of the Bank, to achieve the unconscionable purpose by unlawful means. Initially the particulars of claim alleged breaches of contract, breaches of an equitable duty and breaches of fiduciary duty by a shadow director as the unlawful means which underpinned the claim.

8. The only unlawful means now relied on is the breach by Mr Sondhi of his fiduciary duties as shadow director of the company. It is also pleaded that West Register became

a shadow director of the company through Mr Sondhi, alternatively that West Register or the Bank is vicariously liable for his actions.

9. I summarise the relevant pleaded facts below. The defendants do not accept all of the pleas made in the APoC, but as I have already mentioned they agree that the appeal should proceed on the basis that they are all true.

10. Throughout the period 2007 to 2009 the company's business suffered as a result of the recession such that in April 2010 it was in breach of one of its banking covenants: viz. keeping its debt to earnings ratio below a certain level. In June 2010, following and in the light of that breach, the company's account was transferred from the Bank's Southampton branch to its global restructuring group ("GRG").

11. It is pleaded that the stated objective of the GRG was to support the turnaround of potentially viable customers. The way in which it did so has become highly controversial. In his judgment the Chief Master described some of the conclusions of a skilled person's investigation, conducted by Promontory Financial Group (UK) Ltd ("Promontory") under section 166 of the Financial Services and Markets Act 2000 into the Bank's treatment of SME customers referred to the GRG. Those conclusions were very critical of the way in which the GRG had been operated.

12. In particular, Promontory concluded that the GRG saw the delivery of its own narrow commercial objectives as paramount, that it focused on the income that the GRG could generate from the charges levied on distressed customers and that it failed to take adequate account of the interests of the customers whose accounts it handled. The Chief Master also drew attention to two particular conclusions reached by Promontory. First that the relationship between the GRG and West Register was inappropriate and gave rise to a series of conflicts of interest that were not adequately addressed. Secondly, that there had been cases of a material loss of ownership rights in a business where an unnecessary upside instrument had been required of it.

13. It is plain that these are serious findings, and that it appears that they may be relevant to the particular situation of the company and the complaints made by the claimants in these proceedings. However, the Chief Master concluded that what mattered was whether or not any unethical conduct by the Bank founds a legal claim. The answer to that question will depend on all the circumstances pleaded in the claimants' statement of case. I consider that he was correct to take that approach.

14. In August 2010, shortly after the company's account was transferred to the GRG, Mr Sondhi started to attend meetings between the Bank and the company. It is said by the claimants that, at a meeting held around this time, Mr Sondhi had indicated that West Register wished to obtain an 80% stake in the company as a price for continuing banking support.

15. There was then a period of time during which the claimants say that they were both implementing a strategy to improve the company's cash position and taking other steps in their attempts to remedy the breach of covenant. This led on 1 July 2011 to what is described in the pleadings as the First Restructure under which West Register acquired 35% of the equity in the company and the Bank and the company agreed to a restructuring of some parts of the company's debt.

16. The First Restructure also provided for West Register to appoint an observer to attend the company's board meetings and to appoint a non-executive chairman of the company. The person whom West Register appointed as observer was Mr Sondhi.

17. Not long thereafter, the company approached the GRG with a recommendation that the company should propose a company voluntary arrangement ("the CVA"), primarily designed to compromise its guarantee liability to a landlord in respect of premises formerly rented by the company and which had now been assigned to (or taken over by) a new tenant. A similar proposal had been made but rejected prior to the implementation of the First Restructure. It is pleaded that KPMG (instructed by both the company and the Bank) advised that RBS would also have to suffer pain in the form of a write-down of part of its debt in order for the CVA to be acceptable to the landlords.

18. During the period in time between this recommendation and the approval of the CVA, West Register exercised its rights under the First Restructure to appoint Mr Cooper to be the non-executive chairman of the company.

19. The CVA was eventually approved in March 2012. The claimants assert that the company and the claimants had no choice but to agree the terms that the Bank extracted as a condition for supporting the CVA. They included the write-off of £4.5 million of outstanding debt in return for a reorganisation of the equity holdings. This meant that West Register ended up with 60%, the claimants ended up with 20% and the final 20% was to be transferred to a management incentive scheme called the Bowlplex Employee Share Trust. The implementation of the terms on which the equity holdings were reorganised and the Bank's debt was written down occurred in April 2012 and was called the Second Restructure.

20. In May 2012, Mr Cooper, acting with the support of RBS, dismissed Mr Tracy Standish as the company's managing director. The consequence of Mr Standish' dismissal is said to be that he was no longer entitled to receive the shares held by the Bowlplex Employee Share Trust. His rights in that respect were given to Mr Cooper.

21. It is alleged by the claimants that during this period Mr Sondhi's role at the meetings he attended went well beyond that of an observer as "*he gave instructions to the directors that the directors felt obliged to follow*" (paragraph 30 of the APoC). The particulars of this allegation are described as Mr Sondhi's actions as a shadow director and were pleaded for the first time in the APoC when the claimants sought permission to amend their particulars of claim in response to the defendants' strike out application. They are set out in the following form:

    (1) Mr Sondhi demanded to see board meeting agendas in advance and added items to the said agendas;

    (2) Mr Sondhi intervened during board meetings to require information and explanation to his satisfaction with regard to each item;

    (3) Mr Sondhi imposed new and onerous contracts of employment on Tracy and Mr Cullaney as part of the First Restructuring;

    (4) in around October 2011, required the instruction of KPMG, in lieu of MCR to advise the company as to the terms of the CVA;

(5) in around November 2011, decided, on behalf of the company, that the company would engage a turnaround consultant;

(6) In around November 2011, decided, on behalf of the company, the terms on which a turnaround consultant would be engaged by the company;

(7) Mr Sondhi insisted, in around December 2011, that the company appoint a turnaround consultant from a shortlist of three candidates identified by RBS;

(8) in around January 2012, Mr Sondhi insisted that the company appoint Mr Cooper, the turnaround consultant who had been selected, as the chairman of the company;

(9) in around May 2012, Mr Sondhi instructed Mr Cooper to dismiss Tracy as managing director of the company.

22. For the purposes of this appeal (and indeed the hearing before the Chief Master) the claimants concentrated on the particulars of shadow directorship given in paragraphs 30(7), 30(8) and 30(9) of the APoC. These three allegations all related to the role of Mr Sondhi in directing the appointment of Mr Cooper and the dismissal of Mr Tracy Standish.

23. In paragraphs 48 and 49 of the APoC, there are further pleas of shadow directorship which track the wording of the statutory definition more precisely:

> "47. *Mr Sondhi attended the Company's board meetings on behalf of West Register and gave directions and/or instructions to the board that the directors were accustomed to follow*".
>
> "48. *Accordingly, West Register (acting through Mr Sondhi) became a shadow director of the Company. Alternatively, Mr Sondhi became a shadow director and West Register (alternatively RBS) is vicariously liable for his actions.*"

24. All parties proceeded on the basis that paragraph 30 of the APoC contained the particulars of the allegations made in paragraphs 48 and 49. I did not understand it to be suggested that there were any other allegations in the APoC which gave further details of how either Mr Sondhi or West Register is said to have become a shadow director of the company. For the purposes of the applications before the Chief Master and this appeal the defendants accept that the particulars in paragraph 30 are sufficient to establish that Mr Sondhi was thereby constituted a shadow director of the company.

25. Returning to the chronology, in about March 2015, a sale of the company's entire share capital to the Original Bowling Company Ltd was agreed. The enterprise value on the sale was agreed to be £30 million, a net return to members of c.£22.6m, some £4.4 million of which went to the claimants and some £13.6 million of which went to West Register in accordance with the equity holdings I have described above. It is said that Mr Cooper, as a beneficiary under the Bowlplex Employee Share Trust to which 20% of the equity had been transferred received c.£2.3 million.

26. It is said by the claimants that this meant that the Bank and/or West Register thereby achieved the unconscionable purpose and did so through an unlawful means conspiracy between the Bank, West Register and Mr Cooper. The damages claimed by the

claimants in these proceedings are c.£17.7 million, being the amounts that they say they would not have lost but for the conspiracy.

27. In the proceedings as originally formulated the claimants relied on several different ways of putting their case on what constituted the unlawful means said to be at the root of the combination. As the Chief Master explained, they fell into three categories:

    i) a breach by the Bank of its duty of good faith based on an implied term in both the overall customer agreement and the individual facility agreements between the Bank and the company;

    ii) a breach of certain equitable duties said to be owed by the Bank and derived from the principles set out in *Medforth v. Blake* [1999] EWCA Civ 1482; and

    iii) a breach by West Register and/or Mr Sondhi of their fiduciary duties as a shadow director of the company.

28. None of these breaches was relied on as giving rise to a freestanding claim for breach of duty against the Bank or West Register. This is understandable, because any relevant duty will have been owed to the company (not to the claimants) and, in the absence of derivative proceedings in the name of the company, any claim by shareholders for a diminution in the value of their shares would be vulnerable to challenge as a claim for reflective loss.

29. The Chief Master decided that none of these ways of putting the case had any real prospect of success, even if the claimants were permitted to amend their claim in the respects pleaded in the APoC. He therefore struck out the proceedings.

30. The claimants sought permission to appeal. Falk J refused permission on the papers, but by an order made on 20 February 2019, Fancourt J gave limited permission. He refused to grant permission to appeal on grounds relating to two of the ways in which the claimants put their case, namely:

    i) that the unlawful means was a breach by the Bank of an implied term by which it was said to owe a duty of good faith under the individual facility agreements; and

    ii) that the unlawful means was a breach by the Bank of an equitable duty in relation to the exercise of its rights as mortgagee - he concluded that the claimants had no real prospect of establishing that there should be the necessary development of the principles in *Medforth v. Blake* to make such a case arguable.

31. Fancourt J did however conclude that permission ought to be granted on two of the grounds of appeal. The first (see paragraph 8 of his judgment at [2019] EWHC 1125 (Ch)) was that it was arguable that there was an underlying banking relationship in relation to which a term of good faith and fair dealing is to be implied. He was very sceptical but thought that there was just enough in that argument to go to trial. Since then, however, the claimants have decided not to pursue that part of their case.

32. The second ground of appeal on which Fancourt J granted permission was the principal argument that has been argued before me on this appeal. He concluded that the claimants had a real prospect of establishing that the unlawful means was a breach of

fiduciary duty by West Register and/or Mr Sondhi acting as a shadow director of the company in a number of respects related to the Second Restructure, and that when doing so they were improperly influenced by the unconscionable purpose. It was therefore arguable that this amounted to unlawful means sufficient to ground a claim in conspiracy.

33. Although he granted permission, Fancourt J was hesitant about whether or not the claim could stand up as a matter of law and made clear that he considered that it was not adequately pleaded in any event. Those inadequacies related to the link that was required between the directions given by Mr Sondhi and the steps taken by Mr Cooper to pursue the Second Restructure. The claimants continue to pursue this ground of appeal.

34. The claimants also rely on a further argument, which is not a separate ground in respect of which unlawful means is said to be established, but which is said to be an additional basis on which the claim ought to be allowed to go to trial. They contend that this is a developing area of the law, that there is a great public interest in the actions of the GRG and that a trial should be held on this ground alone.

35. I should say straightaway that the significance of this further argument is that the court should approach a strike out with some circumspection either where the law is developing, or where the facts alleged indicate that a defendant may have been guilty of unconscionable conduct. It does not in itself justify the court in permitting a case to go to trial where it is satisfied to the requisite degree of assurance that the claimants have no prospect of success. As I understood it, Mr Reade QC for the claimants did not disagree that this was the correct way to approach this ground of appeal.

36. Turning to the second ground on which permission to appeal was granted, the claimants expressed the point in Ground 1(e) of their grounds of appeal as follows: *"He [the Chief Master] wrongly found that the Claimants had no reasonable grounds for alleging that the actions of the Second Defendant [i.e. West Register] or its employee Mr Sondhi as a shadow director of the Company were capable of amounting to a breach of fiduciary duty"*. I shall approach the issues which arise on this appeal on the basis that the claimants' case is as pleaded in the APoC.

37. The reasons for the Chief Master's conclusions were set out in paragraphs 50 to 60 of his judgment and can be summarised as follows. He accepted, as had been conceded by the defendants, that the pleaded particulars of shadow directorship were in themselves enough to justify a plea that Mr Sondhi was a shadow director of the company and that they had a real prospect of establishing that at trial.

38. The Chief Master then referred to the relevant fiduciary duties pleaded in paragraph 50 of the APoC as being a duty to act in a way that he / it considers in good faith would be most likely to promote the success of the company for the benefit of its members as a whole and a duty to avoid a situation in which he / it had an actual or possible conflict with the interests of the company. He held, referring to *Vivendi SA v. Richards* [2013] BCC 77 at [142] and *McKillen v. Misland (Cyprus) Investment Ltd* [2012] EWHC 521 (Ch) at [75], that it has become settled law that shadow directors may owe fiduciary duties to the relevant company and, as I read his judgment, that they may be subject to duties having the character of those pleaded. He also concluded, however, that those duties will normally be limited to the subject matter of the instructions given to the

Board, and by which the person concerned is constituted a shadow director in the first place.

39. The Chief Master then identified the breaches relied on in paragraph 51 of the APoC. It is convenient for me to set them out in full bearing in mind that the breaches pleaded in paragraph 51(3) of the APoC were only alleged for the first time when permission to amend the particulars of claim was sought:

> *(1) In breach of the duty to promote the success of the company, West Register (acting together with RBS):*
>
> *a. refused reasonable proposals made by the company which would have allowed it to trade through its difficulties while adequately protecting West Register and RBS's position;*
>
> *b. imposed unnecessarily high rates of interest and additional charges on the company, which led to a further deterioration in its financial position;*
>
> *c. made excessive demands on management time, which distracted management from taking additional steps to improve the company's position.*
>
> *(2) In breach of the no conflict duty, West Register (alternatively Mr Sondhi) allowed itself to assume a position where the board were accustomed to acting in accordance with its instructions, in circumstances where West Register (and Mr Sondhi) was improperly influence by the Unconscionable Purpose.*
>
> *(3) In breach of both the duty to promote the success of the company and of the no conflict duty, Mr Sondhi, acting as the employee of West Register and/or as the agent of RBS, who are therefore vicariously liable for his actions:*
>
> *a. promoted the Second Restructure;*
>
> *b. refused to agree to alternatives to the Second Restructure.*

40. The Chief Master then identified the main difficulties for the claimants in paragraphs 57 and 60 of his judgment which I can summarise as follows. First, he said that the directions or instructions relied on by the claimants as making West Register and Mr Sondhi a shadow director are unrelated to the breaches of duty that have been pleaded. Secondly, at paragraph 60 of his judgment, the Chief Master said this:

> "*the overall difficulty for the claimants is that they agreed to, and the company entered into through its board of de jure directors, the First and Second Restructures of their own free will. Neither the claimants, nor the company, were directed or instructed by Mr Sondhi or West Register to do so.*"

41. Three weeks before this appeal came on for hearing, the claimants served a new draft of the APoC which reflected their abandonment of the claim based on breaches of an implied term of the customer agreement. To that extent no point is taken by the defendants.

42. However, the new draft of the APoC also sought to introduce further particulars of what were said to be acts by Mr Sondhi as a shadow director of the company and a further breach of duty designed to link more closely the shadow directorship to the acts or omissions which were said to amount to breaches of the duties to which he was thereby subject. This draft also included a number of other miscellaneous amendments which were directed at the same point.

43. One obvious issue for the claimants in seeking to rely on a new draft of the APoC was that this appeal is a review of the decision of the Chief Master, it is not a rehearing. In particular, this appeal is against the decision of the Chief Master to strike out the proceedings in the form they took when before him. To the extent that the claimants wished to rely on new allegations made in a new draft of the APoC, it would have been necessary for them to apply for permission to amend and no such application had been made.

44. The defendants also objected on substantive grounds to the claimants being permitted to advance a new case based on the new draft APoC. They pointed out inconsistencies between the new draft and the way in which the case had been put to date and relied on the fact that there was no proper explanation for why the new points were only now being advanced several months after the Chief Master had struck out the claim. They contended that, if an application for permission to amend were to be made, it would face formidable difficulties and referred to the decision of the Court of Appeal in *Stewart v. Engel* [2000] 1 WLR 2268.

45. In the event I did not have to rule on any application for permission to amend, because Mr Reade confirmed during the course of the hearing that no such application was being or would be made. He accepted that this appeal had to be argued and determined by reference to the form of the APoC which was before the Chief Master. This was consistent with his primary position that the new draft was no more than clarificatory and that his clients could succeed in any event on the allegations made in the APoC in their original form.

46. Initially, it was not clear from Mr Reade's skeleton argument whether or not the claimants challenged the Chief Master's conclusion that as matter of principle they were required to plead and prove a relationship between the directions or instructions that are relied on as making Mr Sondhi and/or West Register a shadow director and the breaches of duty that have been pleaded. The focus of the argument was on why the Chief Master had been wrong to conclude that there was no relationship or causal link between the two, and Mr Casey for the defendants prepared his skeleton argument (see paragraph 28(2)) on the basis that an appeal against his conclusion on the point of principle was not being made.

47. However, a challenge on the point of principle had been advanced before the Chief Master (see paragraph 59 of his judgment) and, by the end of his submissions, Mr Reade had made plain that it was his case that a shadow director in the position of Mr Sondhi could act in breach of duty to the company even where there was no relationship between the directions or instructions said to give rise to the duty and the breach said (in the present case) to constitute the unlawful means. This means that I think it is necessary for me to express my views on this point of principle.

48. The claimants plead that West Register and/or Mr Sondhi as its shadow directors owed their fiduciary duties to the company pursuant to section 170(5) of Companies Act 2006 (the "2006 Act") or alternatively in equity. There was no debate at the hearing as to whether the reference to section 170(5) of the 2006 Act is a reference to the section as originally enacted: *"(5) The general duties apply to shadow directors where, and to the extent that, the corresponding common law rules or equitable principles so apply"* or to the section as amended by section 89 of Small Business, Enterprise and Employment Act 2015 which replaced the words "*where, and to the extent that, the corresponding common law rules or equitable principles so apply"* with "*where and to the extent that they are capable of applying"*.

49. In the event, I do not consider that it matters on the facts alleged in the present case, but for what it is worth I think that the original version of section 170(5) of the 2006 Act applies because nothing of relevance is said to have happened after the amendment came into force. It is also right to note that the authorities which I have considered, and on which submissions were made, were decided either before the amendment came into force or (in the case of *Instant Access Properties Ltd v Rosser* [2018] EWHC 756 (Ch)) in relation to breaches which were alleged to have occurred before that time.

50. The reference to *the general duties* in section 170(5) is a reference to the duties owed to a company by its directors as set out in sections 171 to 175 of the 2006 Act. The duties relied on and pleaded in paragraph 50 of the APoC are formulated by reference to section 172(1) (duty to promote the success of the company) and section 175(1) (no conflict duty).

51. In order to qualify as a shadow director within the meaning of section 170(5) of the 2006 Act, a person must be someone in accordance with whose directions or instructions the directors of that company are accustomed to act (section 251 of the 2006 Act). As I have already mentioned, the defendants accept that for the purposes of their strike out application and this appeal, it is to be assumed that both Mr Sondhi and West Register were shadow directors of the company.

52. If a person qualifies as a shadow director the effect of giving the requisite instructions, when taken with the directors' response by acting in accordance with those instructions, is to impose on him a legal status from which certain consequences flow. If the company concerned becomes formally insolvent, those consequences include potential liability for wrongful trading and disqualification as a director. Irrespective of insolvency, those consequences also include the potential for liability for breach of such of the general duties as may apply, having regard to the impact of section 170.

53. In *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 521 (Ch) at [19], David Richards J explained that the way in which section 170 of the 2006 Act was then drafted makes plain that duties owed by shadow directors are limited in extent. It reflects a real difference between the positions and corporate governance responsibilities of shadow directors on the one hand and *de jure* or *de facto* directors on the other. This was further illustrated by the fact that the status of shadow directorship can be acquired or imposed where the relevant instructions do not extend over all (or even most) of the company's activities or affairs: *McKillen v Misland* (supra) at [76] "*a person can be a shadow director and, arguably, owe duties to the company as such, not generally but in respect of those matters where he gives instructions.*"

54. This approach to shadow directorship was well-established in the context of insolvency prior to the enactment of the 2006 Act, as is apparent (e.g.) from the passage in Morritt LJ's judgment in *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 which was cited by Newey J in *Vivendi SA v Richards* [2013] BCC 771 at [125]. In that context, Morritt LJ concluded that it is not necessary for the shadow director's influence *"to be exercised over the whole field of its corporate activities".*

55. It is therefore quite clear that section 170 of the 2006 Act cannot be read as imposing the full range of fiduciary duties owed by a *de jure* director on somebody merely because they have acquired the status of a shadow director. Put another way, because the status of shadow directorship can be acquired through the giving of instructions that are limited to only some part of a company's activities or affairs, there can be commensurable limitations on the nature and extent of the duties that they will thereby owe.

56. It also follows that the extent of any fiduciary duty owed by a person who is in the position of being a shadow director will reflect the extent and nature of the instructions that he gives. Those acts of instruction are the basis of the relationship between him and the company (and its *de jure* directors). Fiduciary duties flow from relationships and it necessarily follows that when shadow directorship (and nothing else) is relied on as the source of the fiduciary duty, it is only those acts of instruction which can form the foundation for any fiduciary duties that he may owe.

57. Thus, where any instructions are pervasive and all-encompassing, extending over the full range of the directors' decision-making, it is possible that the shadow director may owe fiduciary duties across the entire range of the company's activities. In other instances, the extent and nature of the instructions may be more restricted, being limited to particular aspects of the company's business or affairs. It seems to me that it follows that, where there is no relationship between the instruction and the act or omission of which complaint is made, it would be wrong in principle for any fiduciary duty to be owed. There is no principled basis on which a person whose shadow directorship arises out of unrelated matters ought thereby to be treated as having committed a breach of duty.

58. This conclusion is also supported by two other cases in which the nature of the fiduciary duties owed by a person to the company of which he is a shadow director has been considered: *Vivendi SA v Richards* [2013] BCC 771 (Newey J) and *Instant Access Properties Ltd v Rosser* [2018] EWHC 756 (Ch) (Morgan J). There may be others, but these, together with *McKillen v. Misland,* were the cases on which submissions were made.

59. The decision in *Vivendi* [2013] BCC 771 contains an extensive discussion of the correct approach. Newey J explained how fiduciary duties will be imposed on a shadow director, because of the relationship he has to the company by reason of the acts which put him into the position of being a shadow director in the first place. He is at least to be treated as having assumed fiduciary responsibilities to the company by giving the instructions that he gives (per Newey J in *Vivendi SA v Richards* [2013] BCC 771 at [142(ii)]).

60. Furthermore, as the source of the fiduciary duty is the step or steps which the shadow director has taken (i.e. the giving of the instructions in accordance with which the

directors are accustomed to act), the taking of those steps will both underpin the existence of the duty in the first place and define its limits. This point is also articulated by Newey in *Vivendi SA v Richards* [2013] BCC 771 at [143], in the following passage referred to by the Chief Master:

> "*It seems to me that a shadow director will typically owe such duties in relation at least to the directions or instructions that he gives to the de jure directors. More particularly, I consider that a shadow director will normally owe the duty of good faith (or loyalty) discussed below ... when giving such directions or instructions. A shadow director can, I think, reasonably be expected to act in the company's interests rather than his own separate interests when giving such directions and instructions.*":

61. In my view, it is clear from the analysis of Newey J that the assumption of responsibility which the law imposes on a shadow director by dint of the instructions that he gives reflects a direct link between those instructions and the nature and extent of the duty to which the shadow director can be said to be subject. It follows that, in the absence of a relationship or causal link between an instruction which founds the status of shadow directorship and the event in respect of which a fiduciary duty is said to be owed and breached, a shadow director, merely by reason of his status as such, will not be liable.

62. *Instant Access Properties Ltd v Rosser* [2018] EWHC 756 (Ch) also supports this conclusion. Morgan J explained (at [272] to [274]) how the imposition of fiduciary duties is often fact sensitive and how, in the context of section 170(5) of the 2006 Act, their application and breach will be determined by the nature of the directorship and, in the case of a shadow director, the extent to which he may have been involved.

63. Morgan J also considers the extent to which *Vivendi* can be regarded as settled law and cites the decision of the Court of Appeal in *Sukhoruchkin v. Van Bekestein* [2014] EWCA Civ 399 at [41] which suggest that it is not. However, the fact that the law is not clearly established does not in my view assist Mr Reade on this strike out application. The debate revolves around the question of whether Newey J might have gone too far, not whether he went far enough.

64. No other case has been cited to me in which it has been established (or even suggested) that a person who has given directions or instructions in accordance with which the directors of a company were accustomed to act owes fiduciary duties in respect of aspects of the company's affairs which are unrelated to those directions or instructions. In my view a conclusion to that effect would be inconsistent with the nature and status of shadow directorship as described above and would fail to give proper recognition to the fact that Parliament has not chosen to treat shadow directors as if they were directors for all purposes.

65. I should add that there is room for some debate around the nature of the relationship required to exist between the direction or instruction on the one hand and the duty or breach on the other. This may be one of the areas in which there is still some uncertainty and, if it were to be arguable in the present case, would be a ground for concluding that the matter should be allowed to go to trial. I now turn to explaining my conclusions on that aspect of the case.

66. I have already explained that the Chief Master concluded that the main difficulty for the claimants in this part of their claim is that the instructions relied on are unrelated to the breaches of fiduciary duty that have been pleaded. He said (at paragraph 59 of his judgment) that the claimants "*have not made out a case that there is a connection between the shadow directorship and the actions about which they complain that is capable of amounting to a breach of fiduciary duty*." He reached this conclusion because the pleas of breach made in paragraph 51 of the APoC did not allege that any of the directions or instructions pleaded in paragraph 30 of the APoC were themselves breaches of duty.

67. Mr Reade did not contend that the APoC in the form before the Chief Master made any specific allegation that Mr Sondhi (whether himself or through Mr Cooper) gave a specific instruction to the board to enter into the Second Restructure, nor (self-evidently) that he acted in breach of duty in doing so. Nor did Mr Reade contend that the APoC pleaded that any of the directions or instructions particularised in paragraph 30 were themselves breaches of duty.

68. Mr Reade submitted that this did not matter. He said that there was a sufficient relationship between the actions of Mr Sondhi in giving the directions and instructions which caused him to become a shadow director and the breaches of duty pleaded. He submitted that this was because the Second Restructure was caused by Mr Sondhi's actions in insisting on the appointment of Mr Cooper as chairman (as alleged in paragraph 30(8) of the APoC) and in instructing Mr Cooper to dismiss Mr Tracy Standish as the Company's managing director (as alleged in paragraph 30(9) of the APoC).

69. He supported this submission by taking me through the chronology set out in paragraph 9 of the Chief Master's judgment and said that it had always been the claimants' case that the purpose of the steps taken by the Bank was to remove Mr Tracy Standish and implement the Second Restructure. He then submitted that the defendants could never have been in any doubt that the claimants contended that the Second Restructure was obtained as a result of Mr Sondhi's breach of duty and demonstrate that by reference to the transcript of the hearing before the Chief Master.

70. I do not accept these submissions. In my view, it cannot be said that there is a sufficiently pleaded connection or relationship between either of these two directions and the breaches of duty relied on. There is no pleading which asserts that an act or omission said to constitute a breach of duty has either been instructed by, or at least been caused by an instruction given by, Mr Sondhi and/or West Register. Concentrating on the particular instructions and breaches which he addressed in his submissions, Mr Reade was unable to point to anything in the APoC which alleged how the instruction to the board to appoint Mr Cooper and the instruction to Mr Cooper to dismiss Mr Tracy Standish is said to have caused the company to enter into the Second Restructure.

71. In particular, although it is pleaded that Mr Sondhi promoted the Second Restructure and refused to agree to alternatives to it, it is not pleaded that either of these events was caused by the instruction given to appoint Mr Cooper or the removal of Mr Tracy Standish. Indeed, they could not have been, in the light of the fact that there is no plea that Mr Cooper was given any instructions by Mr Sondhi, nor that Mr Cooper gave any instructions to the board (whether in relation to the Second Restructure or otherwise).

72. It is also the case that, so far as concerns that part of Mr Reade's submissions which relies on the instruction given by Mr Sondhi to dismiss Mr Tracy Standish, it does not stand up on the chronology. The reason for this is that it is not alleged that an instruction to remove Mr Tracy Standish was given by Mr Sondhi until after the Second Restructure had been completed. The APoC does not explain (nor on the face of it could it explain) how a subsequent direction could have caused an earlier event that is said to constitute the relevant breach. I also agree with Mr Casey's submission that any pleading that Mr Sondhi instructed the board to enter into the Second Restructure (whether directly or indirectly, or whether through Mr Cooper or otherwise) would be very difficult to reconcile with at least two other aspects of the company's case.

73. The first relates to the precise role said to have been carried out by Mr Cooper. Although it had always been the claimants' case that Mr Cooper was a party to the conspiracy, at the hearing before the Chief Master, Mr Reade confirmed that it was no part of their pleaded case that Mr Cooper acted in a way that facilitated the Bank's actions. Acceptance by the claimants that Mr Cooper did not facilitate is irreconcilable with any assertion that there is a sufficient relationship between the original direction that he be appointed (paragraph 30(8) of the APoC) and the breaches of duty alleged in relation to the Second Restructure.

74. The second relates to that part of the claimants' case which alleges that "*In the circumstances, the company and its shareholders had no choice but to agree to this proposal*" (paragraph 35 of the APoC). The circumstances referred to were the Bank's proposed terms for agreeing to the CVA, which then led to the Second Restructure.

75. In my judgment, this is irreconcilable with an allegation that the reason the company agreed to the terms which lead to the Second Restructure (and the consequential losses claimed by the claimants in these proceedings) was that the board was instructed to do so by Mr Sondhi and/or West Register, whether or not through the instrumentality of Mr Cooper. By maintaining this plea, it continues to be the claimants' case that agreement to these terms was given through commercial necessity in response to the commercial pressure being applied by the Bank. That cannot stand with an allegation that agreement was reached because the board was directed to do so.

76. In these circumstances, it is clear to me that there is no sufficiently pleaded relationship between the acts of direction or instruction which caused Mr Sondhi to be a shadow director of the company and the breaches of which complaint is made. For these reasons the Chief Master was entitled to reach the conclusion that he did. The appeal must be dismissed.