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Case No: CR-2019-004628

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

7 The Rolls Building
London EC4A 1NL

Date: 12/12/2019

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS SITTING AS A JUDGE OF THE HIGH COURT

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Between:

(1) CHARLES NATHAN SAATCHI	**Applicant**
- and -	
(1) RAHUL CHANDRAKANT GAJJAR	**Respondent**
(2) TRIPTYCH LOGISTICS LIMITED	

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- -

HUGH NORBURY QC AND MARK WRAITH (instructed by **PETERS & PETERS SOLICITORS LLP**) for the **APPLICANT**
JACK WATSON (instructed by **MISHCON DE REYA LLP**) for the **FIRST RESPONDENT**

Hearing dates: 29 November 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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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS
SITTING AS A DEPUTY HIGH COURT JUDGE OF THE CHANCERY DIVISION

Chief ICC Judge Briggs sitting as a Judge of the High Court:

Introduction

1. There are two applications before the court. The first is for permission to continue a derivative claim pursuant to section 261(1) of the Companies Act 2006 (the "Act") in respect of causes of action vested in the Second Respondent, Triptych Logistics Limited ("the Company"), against the First Respondent, Rahul Gajjar.

2. The second application is made pursuant to CPR r. 25.1(c)(i) and s. 37(1) of the Senior Courts Act 1981 for a proprietary injunction against Mr Gajjar including ancillary disclosure and document preservation orders. An undertaking has been provided pending the handing down of this judgment which concerns the first application only.

The background

3. Mr Saatchi is well-known as one of two brothers who owned and ran a successful advertising agency, and for presiding over the Saatchi Art Gallery in London. The Company was incorporated at a time when Mr Saatchi was concerned with reducing running costs of the Gallery prior to its sale in December 2018.

4. There is no dispute that the majority of Mr Saatchi's art is owned by the Conarco Partnership (the "Partnership") which is a partnership between Mr Saatchi and Conarco Limited ("Conarco"). Mr Saatchi is the sole shareholder of Conarco. The Partnership is branded as The Saatchi Gallery Group. Mr Tickner, a partner at Peters & Peters Solicitors LLP, explains that "Mr Saatchi was the owner, through Marchill LLP (a limited liability partnership made up of Mr Saatchi and Marchill Limited), of the Saatchi Gallery in London until December 2018, when it was sold".

5. There is no dispute that Mr Gajjar began working for the Partnership in or around June 2003 and was initially responsible for overseeing the financial administration and book-keeping of the Saatchi Gallery. Mr Gajjar's role expanded over the years to that of "Finance Director and Chief Operations Officer of The Saatchi Gallery Group" but he worked for a number of other related companies such as Formend Limited ("Formend"), Conarco, and was Company Secretary for Marchill Investments LLP ("Marchill"). Marchill later funded the Gallery.

6. Mr Gajjar directly worked with Mr Munasinghe, Mr Saatchi, Anca Miculas, and Niall Heffernan. Mr Heffernan has produced a witness statement in support of the second application. Mr Munasinghe is said by Mr Tickner to have been the financial controller of the Saatchi Gallery Group. Mr Heffernan was admitted as a Fellow of the Association of Chartered Certified Accountants in 1985 when he became a registered auditor. His evidence is that he has been providing professional services to Mr Saatchi in connection with his finances and investments since the early 1980s. Anca Miculas was the management accountant.

7. The Saatchi Art Gallery required logistical services. At times, part of the art collection had to be stored and transported to various destinations. This was undertaken by specialist third party providers. In early 2010 Mr Gajjar approached Mr Saatchi with a proposal to reduce the cost of these activities. By an e-mail sent on 26 February 2010 Mr Gajjar attached a spreadsheet entitled "Storage & Transport Costs & New Facility Costs". There is a dispute as to whether the spreadsheets sent to Mr Saatchi by Mr Gajjar produced accurate information. It is said by Mr Tickner that Mr Munsasinghe analysed the data in June 2019 and found that the costs of storage and transport by third parties as shown in the spreadsheets were inaccurate and had been inflated by Mr Gajjar. It is suggested that Mr Saatchi was misled about cost savings. This is denied by Mr Gajjar. The proposal led to the incorporation of the Company on 26 May 2010 which, initially at least, was intended to act as a vehicle for reducing the storage and transport overheads. It had a share capital of £10,000 and Mr Gajjar was appointed the sole director. Mr Gajjar and Mr Saatchi equally hold the entire shares in the Company.

8. Much of the remaining evidence is controversial. As an example, soon after incorporation, the Company lent Mr Gajjar £10,000. Mr Gajjar's evidence is that he wanted a loan for a car deposit and that Mr Saatchi had said to him to: "take what I needed" and that "there was no discussion of any timeframe for repayment." Mr Saatchi does not accept he gave Mr Gajjar carte blanche to take what he "needed".

9. It is appropriate to briefly mention the form of the evidence at this point. Mr Tickner has produced 5 witness statements in support of the applications. His statements provide the background to the claims, his opinion on the evidence produced by Mr Gajjar and provide responses to Mr Gajjar's evidence on behalf of Mr Saatchi. An

example relates to the failure of Mr Gajjar to pay for his allotted shares in the Company. Solicitors acting for Mr Gajjar, Mishcon de Reya, wrote stating that the outstanding sum was treated as a loan and accepted that the purported loan of £10,000 remains outstanding. Mr Tickner states that Mishcon de Reya also "assert that it was subsequently orally agreed between Mr Saatchi and Mr Gajjar that it only falls to be repaid on sale of the CSRG warehouse property…. Mr Saatchi rejects this assertion." Other terms are used such as "Mr Saatchi recollects". The background evidence is valuable although Mr Gajjar comments that Mr Tickner has provided a one-sided version that does not provide a full history of their business relationship. The evidence in Mr Tickner's witness statement of what Mr Saatchi has told him is hearsay. His opinion evidence is inadmissible. The importance of witness statements from the main protagonists should not be underestimated. They are required to evaluate whether to decide to grant or refuse permission to continue with a derivative claim. During the hearing the court was informed that Mr Munasinghe and Mr Saatchi, who Mr Tickner relies upon as sources for his knowledge information and belief, would provide a statement, signed with a statement of truth, stating that references in Mr Tickner's statement to their instructions to him are true and accurate. By contrast Mr Gajjar provides a witness statement signed with a statement of truth. I shall lend such weight as is appropriate to the evidence before the court.

The Company 2012-2018

10. According to Mr Tickner, Mr Saatchi recollects that in 2012 Mr Gajjar had suggested that costs could be saved by purchasing a warehouse for storage, rather than leasing. Mr Saatchi was keen to save costs. It is accepted that Mr Gajjar raised the idea that if a warehouse was purchased it could generate an income by renting unused space. Mr Tickner states: "Mr Saatchi had reservations about the proposal as he had no experience of buying commercial property but was content to put his trust in Mr Gajjar's judgment." Such trust is consistent with the evidence of Mr Heffernan. He says: "Mr Saatchi relies on his advisers and senior employees like Mr Gajjar to make clear to him material differences between any legal arrangements and the underlying economics and commercial reality." It is also consistent with the evidence that Mr Saatchi broke with his tradition of using only one of the "big four" accountants to audit and deal with his personal and business finances. Although Mr Tickner's

evidence is that Mr Saatchi does not know the circumstances in which an alternative accountant was engaged, Mr Heffernan's evidence contradicts this position. He says Mr Gajjar's had advised that the appointment of John Savva & Co would save costs. It is not disputed Mr Gajjar produced a lease versus ownership analysis and explained to Mr Saatchi: "that the purchase of a property would be more beneficial". It is not disputed that Mr Savva recommended that a company be incorporated for the purpose of holding any property.

11. In any event CSRG Ltd (the initials of Mr Saatchi and Mr Gajjar) was incorporated on 4 October 2012.

12. Mr Gajjar says he discussed the idea with Mr Heffernan, but Mr Heffernan does not recall the discussions. In an e-mail dated 7 March 2013 timed at 22:21 Mr Gajjar wrote: "I absolutely understand Charles and hence why this is a big decision which I am more than happy for you to drive me nuts with!". This supports Mr Gajjar's contention that Mr Saatchi was fully aware of the arrangements and had some involvement in the decision making. Mr Gajjar explains in the e-mail: "20,000 sqft of space should house everything comfortably and safely with adequate space for manoeuvring. The property in question is 21,434 sqft…….all other costs such as rates, utilities etc would stay the same. So the saving between renting and buying would be between £170k-£260k pa." As regards the Company and use of the proposed purchase he said "As you know Triptych is owned 50% by both you and I. Both put in £10k each 3 years ago and as mentioned above, nothing has been taken out and is being run on a "cost plus small margin" basis. You are the main client and no other clients are being sourced until your stock has all moved, that will be the next step…….My ultimate aim from the outset was two-fold: For you- to have other clients paying for you to have free storage plus income. For me- to have a profitable business to run (from clients not you) in the future and to allow myself to increase my personal credit with my bank for a larger home for my family." This is evidence of ongoing discussions between Mr Saatchi and Mr Gajjar. The e-mail also contains important evidence about intention of ownership, but I need say little more regarding that issue as a claim was issued on 4 November 2019 seeking a declaration that the property purchased in the name of CSRG is held on constructive trust for Mr Saatchi, alternatively Formend and/or Conarco (the "Property Claim").

13. It appears that there was some agreement that the identified 21,434 sq ft property would be purchased on or soon after 7 March 2013. As CSRG was not actively trading at the time it needed to obtain capital for the purchase. This was achieved through several transactions. The documentary evidence demonstrates that on 20 March 2013 the Company received £1,000,000 from Formend and £300,000 from Conarco, and Conarco transferred £260,000 to pay for VAT on the purchase. The VAT sum was repaid. The sum of £1,300,000 was then lent to CSRG by the Company which also lent some additional smaller sums. On 28 March 2013 the identified property, Unit 1, Kelpatrick Road, Slough (the "Warehouse"), was purchased in the name of CSRG. In June 2015 CSRG borrowed £1 million from Coutts plc on a mortgage secured against the Warehouse and transferred £1m to the Company. On the same day the Company transferred £300,000 to Conarco and £700,000 to Formend. In the period June 2015 to July 2019 CSRG paid the sums due under the mortgage using rental income it received from the Company. Since July 2019 the mortgage payments have been met by Conarco.

14. There is no discernible dispute that after the purchase of the Warehouse completed the transfer of artworks stored at third party premises began with the intention to empty those third-party storage facilities. Mr Tickner says that this process was slow and only completed after Mr Gajjar's departure from the business.

15. It is convenient to take the factual background about the purchase of the Warehouse to the point where Mr Gajjar no longer worked for the Saatchi Gallery Group, from the evidence produced by Mr Tickner as it is largely supported by documents and is set out in near neutral terms:

> "On 25 September 2014, in response to an email from Mr Saatchi asking for suggestions on how to cut costs, Mr Gajjar sent Mr Saatchi an email in which he said that he was disappointed that Mr Saatchi had been led to believe that Triptych and the Property were not beneficial. It appears from Mr Saatchi's reply that this was a reference to something Nigel Hurst (managing director of the gallery) had said to Mr Saatchi and Mr Gajjar. Mr Gajjar asserted that Triptych and the [Warehouse] had saved the Partnership £500,000 per year. It appears that Mr Gajjar had still not secured any clients for Triptych other than the Partnership as he explained that he was "currently

> looking" at sub-letting the Warehouse, with the "ultimate aim of getting other clients which would subsidise the Partnership's costs". Mr Saatchi understands that Mr Gajjar has never paid himself a salary from Triptych (other than the unauthorised payments made from March to June 2019 through Triptych's payroll…..albeit that there is an email from Mr Gajjar to Mr Saatchi dated 25 September 2014 in which Mr Gajjar stated: "my take out has been £12,000 per year plus expenses starting from this year"…..From about 2016 onwards Mr Saatchi wanted to introduce measures to make his art business (including the operation of the Saatchi Gallery) financially self-sufficient and not reliant on Mr Saatchi personally for financial support. The measures included costs cutting and control of the Gallery was transferred to a charity chaired by Johan Eliasch towards the end of 2018. I understand from Mr Saatchi that Mr Gajjar was frequently absent from work during 2018 (which Mr Saatchi believes was due to Mr Gajjar's ongoing divorce proceedings) and that Mr Gajjar frequently failed to comply with reasonable work requests. Notwithstanding these difficulties, Mr Saatchi made every effort to support Mr Gajjar. I understand from Mr Heffernan that it was possible for Mr Gajjar to continue at the The Saatchi Gallery Group under its new ownership and control but that he did not pursue this opportunity on the basis that he would need substantially better financial terms if he was to work for a charity and not Mr Saatchi. At the time, the sale of the Gallery meant that Mr Saatchi's other businesses did not require a full-time finance director (still less one who was paid £174,000 and who was frequently absent from work). Mr Saatchi offered Mr Gajjar a part-time role as a consultant and/or a financial settlement. Mr Heffernan tried on several occasions to agree suitable terms with Mr Gajjar but was unable to do so. In the circumstances, Mr Saatchi decided to terminate Mr Gajjar's employment. Mr Gajjar was paid by the Partnership until the end of February 2019. Mr Gajjar contends that he was dismissed by the Partnership unlawfully and notified ACAS of his intention to bring a claim against the Partnership on 26 May 2019."

16. In his witness statement Mr Gajjar states that in 2018, when he was dealing with his divorce, Mr Saatchi had been, at least initially, supportive and encouraged him to take some time off. His position changed around the time of the sale of the Saatchi Art

Gallery. He says that he was dismissed from Conarco as a result of his refusal to follow an instruction from Mr Saatchi. He says he had good reason not to follow his instruction. Again, I shall not venture further into this matter as it is the subject of separate proceedings. After Mr Gajjar left the employ of the Gallery, and during a time when there was active correspondence between solicitors regarding the dismissal claim, he received notification that there were irregularities regarding his conduct in his capacity as a director of the Company. The evidence of Mr Gajjar is:

> "On 29 March, my solicitors responded to Grosvenor Law, setting out a detailed response to their criticisms. In particular it was noted that the agreement between the Applicant and I was that the loans would be repaid after the CSRG property was sold. Thereafter there followed correspondence between the parties…..In particular, the Applicant sought the appointment of Mr Munasinghe as a director of Triptych. While I had no objection in principle to his appointment, I was concerned that the Applicant would use this as an opportunity to remove me as a director (as they have done for the other companies in which I held directorships……or otherwise prejudice my interest. I therefore sought certain undertakings in the letter written by my solicitors on 16 April. While there followed further correspondence between the parties (including a threat of a mandatory injunction seeking Mr Munasinghe's appointment), there was no response from Grosvenor Law to the proposed undertakings. My solicitors chased for a response on 30 April 2019 and again received no response. It was not until 25 June 2019, that my solicitors received any further correspondence on the matter. It was then that the Applicant's new solicitors (Peters and Peters) sent an extensive letter (over nine-pages) to my solicitors making many new allegations of wrongdoing. They also responded to my offer to appoint Mr Munasinghe (subject to undertakings) noting that, as a condition of doing so, I would have to agree to take no action whatsoever in relation to Triptych. Given that I have done nothing wrong and remain a director (subject to fiduciary duties to the company) I plainly could not agree to such terms. My solicitors informed Peters and Peters that they were taking instructions. However, a mere nine days later (with no warning), proceedings were issued".

17. On 29 March 2019 the locks were changed on the Company's premises, locking out Mr Gajjar, its sole director. He says that it is not realistic to return to his role as director.

18. Before turning to the claims to be pursued by the Company if permission is to be given, I shall mention something about the Company's finances.

Profitability of the Company in the period 2012-2018

19. There are no accounts for 2019. In 2012 and 2013 the Company recorded net profits of £51,812 and £61,574 respectively. The assets of the Company are identified as motor vehicles and trade and other debtors. The accounts do not identify who the "other debtors" are, but I understand from submissions that they were companies within the Saatchi Art Gallery Group. These are by far the largest category of debtors and the greatest asset of the Company. That remained the position until 2018. The wages for employees in 2012 was £63,728 plus the usual taxes. There were no motor expenses in the year to 31 May 2014, and no director's loan account. Although the asset base did not change a great deal in year ending 31 May 2015 employee costs doubled to £127,518 plus taxes and the net profits dropped to £34,243. On the face of it, Mr Gajjar was only receiving "…. £12,000 per year plus expenses starting from this year". In the same year a director's loan is entered in the accounts in the sum of £54,681.

20. In the year ending 31 May 2016 the director's loan account (said to be falling due within a year) remained at the same figure but an additional motor vehicle had been added to the fixed assets with a value of £115,895 coupled with a disposal with a figure of £50,545. A finance lease and hire purchase contract is shown costing the Company £5,537. Motor expenses are stated as being £21,414 in the year where wages and salary increased to £133,939. The year ending 2017 saw an increase in the director's loan account to £104,681 but wages reduced by £36,566 and net profits increase by £25,329. The net profits dropped to £31,254 by the year ending 2018. The director's loan account is recorded as not having been repaid but remaining the same as for the year ending 2017.

21. I should mention that the Partnership issued a claim on 2 August 2019 seeking recovery of the director loans from Mr Gajjar.

The Company claims in brief

22. Mr Norbury QC and Mr Wraith, on behalf of Mr Saatchi, describe the claims against Mr Gajjar, generically, as "misappropriating Triptych's assets on a large scale". The claims have developed and include potential losses to the Company where the explanation for payments or expenditure are not readily explicable. The skeleton argument produced for Mr Saatchi indicates that if permission is given, "Mr Saatchi will seek to amend his pleading to add an allegation of negligence" in respect of one of the impugned transactions. During the course of the hearing it became apparent that the Company did not own a particular asset it claimed. Title vested in Black Horse as the provider of a hire purchase agreement. In addition, it was indicated that the Company should never have bought any vehicles, let alone replaced them. This led Mr Watson, on behalf of Mr Gajjar, to point out the "shifting sands" making it difficult to respond properly to the serious allegations. Following this criticism, I understood Mr Norbury's submission to be that this application should stand or fall on the currently drafted particulars of claim. Those particulars set out seven main claims. I shall provide a brief overview as it will assist in understanding the direction of this judgment and provide an opportunity for definitions:

(1) A claim in respect of £190,000 of director's loans ("Loans");

(2) A claim for £65,607.08 in payroll payments including National Insurance Contributions ("Payroll Payments"). Mr Gajjar accepts he received the salary after he was dismissed. He argues that as a director he was entitled to a salary;

(3) A claim in respect of two Tesla cars purchased on behalf of Company ("Teslas"). Mr Gajjar accepts that the cars belong to the Company. He purchased the cars to replace two Land Rovers owned by the Company. The reason was to save money on fuel as the Teslas came with free charging for the life of the car;

(4) A claim in respect of payments of £73,655.86 to Cognition Agency relating to the Stride Tutoring business ("Cognition Agency"). It is said that the evidence supports a prima facie view that the payments were to benefit Mr Gajjar's ex-

wife, who was involved in the Stride business. Mr Gajjar's position is that the payments were aimed at diversifying the Company's business and using the space in the Warehouse profitably;

(5) A small claim of £3,500 in respect of payments to Shenley Cricket Club ("Cricket Club"). Mr Gajjar's evidence is that this was sponsorship which helped raise awareness of the Company;

(6) A claim in respect of £38,000 paid to Mrs Gajjar ("Mrs Gajjar Payment"). Mr Gajjar says that she carried out work for the Company and was entitled to be remunerated;

(7) Claims relating to alleged misuse of the Company credit card ("Credit Card Payments"). Mr Gajjar accepts that some of the money spent on the credit card was for personal use and should be repaid.

Principles applicable to permission applications

23. Due to time restraints at the hearing, the principles applicable to the permission application were dealt with in short form. I shall start with the reasons why permission is required, set out the relevant statutory provisions and then refer to some authorities where the provisions have been considered.

24. A derivative action is an exception to the general rule that a shareholder cannot bring a claim. The Court of Appeal succinctly explained, in *Prudential Assurance Co Ltd v Newman Industries Limited (No.2)* [1982] 1 Ch. 204, 210D–E that:

> "A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the `Rule in Foss v Harbottle' (1843) 2 Hare 461 when applied to corporations but it has a wider scope and is fundamental to any rational system of jurisprudence."

25. A derivative claim can only be brought pursuant to the Act. The starting point is section 260 of the Act which provides that a derivative claim may be brought only in

respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, or breach of trust by a director of the company.

26. There are two stages. First, the shareholder must establish a 'prima facie' case for being given permission to proceed: section 261 of the Act. The company is not required to be involved in the first stage. If the court is satisfied, as it was in this case, that there is a prima facie case, the matter proceeds to the second stage and a full hearing. At the second stage where the court must consider whether to grant permission to the shareholder to proceed with the action by reference to a series of factors set out in s.263 of the Act:

> "(1) The following provisions have effect where a member of a company applies for permission … under section 261 …
>
> (2) Permission … must be refused if the court is satisfied–
>
> (a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or
>
> (b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or
>
> (c) where the cause of action arises from an act or omission that has already occurred, that the act or omission–
>
> (i) was authorised by the company before it occurred, or
>
> (ii) has been ratified by the company since it occurred.
>
> (3) In considering whether to give permission … the court must take into account, in particular–
>
> (a) whether the member is acting in good faith in seeking to continue the claim;
>
> (b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;

> (c) …
>
> (d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;
>
> (e) whether the company has decided not to pursue the claim;
>
> (f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company."

27. The Court is asked by Mr Gajjar to dismiss the application by reason of s.261 of the Act which refers to one of the circumstances described in s.263(2). For present purposes it is said that s.263(2)(a) applies, namely that a director acting in accordance with s.172 of the Act would not seek to continue the claim. Mr Watson relies on s.263(2)(c) to a more limited extent. He says that some of the acts of Mr Gajjar from which the causes of action arise, had been orally authorised by Mr Saatchi and *re Duomatic Ltd* [1969] 2 Ch 365 applies.

28. The test for permission has been considered in a number of authorities. In *Iesini v Westrip Holdings* [2009] EWHC 2526 (Ch), [2010] BCC 420, Lewison J (as he was) refused permission to continue a derivative claim. It was argued that Westrip's board had breached its duty by failing to consider defences which the company might advance to challenge the rescission of an agreement to purchase shares in a company (Rimbal), that it had a claim for restitution in respect of costs incurred in developing the licence, and that Westrip held the licence on trust, so that Rimbal did not have the right to be substituted to the joint venture agreement. Lewison J explained:

> "However, in order for a claim to qualify under Part 11 Chapter 1 as a derivative claim at all (whether the cause of action is against a director, a third party or both) the court must, as it seems to me, be in a position to find that the cause of action relied on in the claim arises from an act or omission involving default or breach of duty (etc) by a director. I do not consider that at the second stage this is simply a matter of establishing a prima facie case (at least in the case of an application under s.260) as was the case under the old

> law, because that forms the first stage of the procedure. At the second stage something more must be needed. In *Fanmailuk.com Ltd v Cooper* [2008] EWHC 2198 (Ch); [2008] B.C.C. 877 Mr Robert Englehart QC said that on an application under s.261 it would be "quite wrong … to embark on anything like a mini-trial of the action". No doubt that is correct; but on the other hand not only is something more than a prima facie case required, but the court will have to form a view on the strength of the claim in order properly to consider the requirements of s.263(2)(a) and 263(3)(b). Of course any view can only be provisional where the action has yet to be tried; but the court must, I think, do the best it can on the material before it."

29. The statutory provisions do not provide a threshold test*: Kleanthous v Paphitis and others* [2011] EWHC 2287 para 40. As Newey J (as he was) said in *Kleanthous* (para 42) "it seems to me that the court can potentially grant permission for a derivative claim to be continued without being satisfied that there is a strong case". What is apparent from *Iesini* and *Kleanthous* is that although there is no threshold test, and the court should not conduct a mini trial, a claimant will need to satisfy the court that there is something more than a prima facie case, but not necessarily a strong case. In order to reach a conclusion as to whether permission should be given, the merits of the claim will be relevant. In this respect the nature of the inquiry is fact sensitive.

30. Lewison J helpfully said (paragraphs 85 and 86):

> "As many judges have pointed out (e.g. Warren J in Airey v Cordell [2007] BCC 785, 800 and Mr William Trower QC in Franbar Holdings Ltd v Patel [2009] 1 BCLC 1, 11) there are many cases in which some directors, acting in accordance with section 172, would think it worthwhile to continue a claim at least for the time being, while others, also acting in accordance with section 172, would reach the opposite conclusion. There are, of course, a number of factors that a director, acting in accordance with s.172, would consider in reaching his decision. They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities

> while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on. The weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case. In my judgment therefore…..section 263(2)(a) will apply only where the court is satisfied that *no* director acting in accordance with section 172 would seek to continue the claim. If some directors would, and others would not, seek to continue the claim the case is one for the application of section 263(3)(b). Many of the same considerations would apply to that paragraph too."

31. Section 172 of the Act provides:

> "A director of a company must act in the way he 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 in doing so have regard (amongst other matters) to-
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company."

32. It is not argued by Mr Watson that *no* director acting in accordance with section 172 would seek to continue the claim (section 263(2)(a)). It is said that many of the claims are "half-baked", the existing claims are "without merit" and in any event there are alternative remedies. It is said that in these circumstances the claims "are not ones that a *reasonable* director would pursue": I shall take this as Mr Gajjar arguing that no

director acting in accordance with the section 172 duty would attach importance to continuing the claim (section 263(3)(b)).

33. In connection with section 263(3)(b) Roth J expressed the view in *Stainer v Lee, Elliot and Eldington Holdings Limited* [2010] EWHC 1539 (paragraph 29), that it is necessary to take account of a range of factors:

> "In particular, under s.263(3)(b), as regards the hypothetical director acting in accordance with the s.172 duty, if the case seems very strong, it may be appropriate to continue it even if the likely level of recovery is not so large, since such a claim stands a good chance of provoking an early settlement or may indeed qualify for summary judgment. On the other hand, it may be in the interests of the company to continue even a less strong case if the amount of potential recovery is very large. The necessary evaluation, conducted on, as Lewison J. observed, a provisional basis and at a very early stage of the proceedings, is therefore not mechanistic."

34. The availability of an alternative remedy is a factor and may be an extremely important factor. In *Mumbray v Lapper* [2005] EWHC 1152, [2005] B.C.C. 990 His Honour Judge Reid Q.C cited *Barrett v Duckett* [1995] B.C.C. 362, at p.367, where Gibson L.J., said this:

> "The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed."

35. HHJ Reid QC said:

> "In my judgment the true position is that, while the availability of an alternative remedy is a factor, and may well be an extremely important factor, it is not an absolute bar and the fact that it is possible to point to some other alternative method of achieving the desired result does not mean that it is inevitably inappropriate for permission for a representative action to be continued….. The bottom line, it seems to me, from those authorities is the

> fact that a company is a two-man company, or a quasi partnership, or some such creature, does not automatically prevent the making of a *Wallersteiner v Moir* to enable one of the shareholders to pursue a representative action on behalf of the company but, on the other hand, it is a factor to be taken into account and it may well be a relevant and important factor."

36. In *Franbar Holdings Ltd v Patel* (supra) Mr William Trower QC (as he was) on unusual facts (an unfair prejudice petition made pursuant to section 994 had been presented prior to the permission hearing) said:

> "The adequacy of the remedy available to the member in his own right is, however, a matter which will go into the balance when assessing the weight of this consideration on the facts of the case."

37. In *Iesini v Westrip Holdings Ltd* Lewison J thought (paragraph 124) it would be desirable to pursue a claim in the form of an unfair prejudice petition as "From the point of view of the company itself a petition under s.994 is far preferable, principally because it will only be a nominal party and will not incur legal costs; whereas in the ordinary way if a derivative action is brought for its benefit it will be liable to indemnify the claimant against his costs, even if the claim is unsuccessful…..". If the court were to give permission it is reaching "the conclusion that the claim ought to proceed for the benefit of the company, [and] it ought normally to order the company to indemnify the claimant against his costs" (paragraph 125).

38. I shall now turn to the factors in section 263 of the Act and undertake an inquiry of the merits to evaluate whether there is something more than a prima facie case in respect of each of the pleaded claims, which need not be strong, while recognising that the exercise is (as Mr William Trower QC said) "not particularly easy". As the pleadings are not in their final form and the evidence is far from perfect, it follows that the court must make the best evaluation it can whilst recognising it may be imperfect. I shall then deal with whether Mr Saatchi has an alternative remedy and reach a final conclusion in light of that analysis.

The merits

i) Loans

39. The particulars of claim at paragraphs 10 onward set out the case against Mr Gajjar as follows:

> "Mr Gajjar caused the Company to make payments totalling £190,000 to his personal bank account with Barclays with account number 00382663 as follows:
>
> (1) £50,000 on 17 November 2014;
>
> (2) £50,000 on 23 January 2017;
>
> (3) £30,000 on 11 September 2018;
>
> (4) £40,000 on 15 November 2018; and
>
> (5) £20,000 on 1 February 2019.
>
> 11. In order to procure the making of the payments in paragraph 10 (1) to (3) Mr Gajjar informed Anca Miculas, the Company's finance assistant, that they were to be held as director's loans. Pending disclosure or service of Mr Gajjar's defence, Mr Saatchi does not know how Mr Gajjar caused the Company to make the payments in paragraphs 10 (4) and 10(5).
>
> 12. Mr Gajjar avoided seeking Mr Saatchi's consent to the drawing of any sums from the Company, whether by way of director's loans or for any other reason. There was no benefit whatsoever to the Company from making the payments in paragraph 10, as Mr Gajjar knew at all material times.
>
> 13. In making each of the payments set out in paragraph 10 above, Mr Gajjar:
>
> (1) Failed to exercise his power to authorise payments from the Company's bank account or other resources for its proper purposes, namely the furtherance of the Company's interests; and/ or
>
> (2) Failed to act in a way which he considered in good faith would be likely to promote the success of the Company for the benefit of its members as a whole; and / or

(3) Created a situation in which his interest (to repay the said sums only when he wished to) conflicted directly with the interests of the Company (to retain its resources for productive use and to repay its creditors, such as Formend, on a timely basis).

14. In the premises, in causing the Company to make the payments set out in paragraph 10 above Mr Gajjar acted in breach of fiduciary and/or the statutory duties set out in sections 171 to 177 of the 2006 Act and held the monies paid to him on constructive trust for the Company.

15. Further, pursuant to section 197 of the 2006 Act, the Company was prohibited from making any loan to Mr Gajjar unless:

(1) A memorandum was made available to the members of the company setting out the nature of the transaction, the amount of the loan and the purpose for which it was required, and the extent of the company's liability under any transaction connected with the loan; and

(2) The loan was approved by a resolution of the members of the company.

16. No memoranda were sent to Mr Saatchi in relation to any of the payments set out in paragraph 10 above and Mr Saatchi was not asked to, and did not, vote in favour of any resolution approving those payments.

17. In the premises, in so far as the payments in paragraph 1 O above are properly to be characterised as loans to Mr Gajjar, he is liable to account to the Company for any gain he has made directly or indirectly as a result of those loans and is liable to indemnify the Company for any loss or damage resulting from the making of the loans pursuant to section 213 of the 2006 Act."

40. Mr Heffernan asked Mr Gajjar for a set of the Company's accounts in 2018 and Mr Gajjar did not respond. Mr Gajjar's evidence is that at the time of the sale of the Saatchi Art Gallery, Mr Saatchi "effectively left Nigel Hurst, the former CEO, and me to run the business. I continued to produce the company accounts, as I had always done, but the Applicant refused to look at them and eventually refused to even meet".

He denies that Mr Heffernan asked for copies of the accounts. Mr Gajjar does not state that Mr Saatchi was given or saw the accounts. Mr Tickner in his fifth witness statement says that Mr Saatchi did not see the accounts. On this basis it cannot be said that Mr Saatchi allowed any loan by reason of being on notice by seeing entries in the accounts.

41. The response from Mr Gajjar is that the Loans "were all made with the knowledge and approval of the Applicant". And "As such, while he has been willing to agree to loans being made, he has generally done so orally, rather than concerning himself with formal documentation." He accepts that the Loans must be repaid. Mr Gajjar recalls that other employees took loans, but they were not on the scale of the Loans.

42. It is accepted that there was a failure to comply with this section 197 of the Act. Mr Watson argues that the saving provisions in section 214 of the Act apply so that the Loans are not avoided under section 213. The saving provision operates where there is ratification within a reasonable time. The evidence on ratification has not been advanced with any great vigour. In any event Mr Watson argues that there was a valid resolution pursuant to the principle in *re Duomatic*. There is a question of law as to whether *re Duomatic* can apply to section 197 of the Act, but I need not decide that on this permission application. It was agreed that I should proceed, for the purpose of this application, on the basis that the principles of informal assent should apply.

43. Mr Norbury directs the court to *EIC Services Limited v Stephen Phipps & ors* [2003] EWHC 1507. Neuberger J was asked to determine whether bonus shares were valid. Master Moncaster ordered the trial of preliminary issues. The judge, in determining those preliminary issues, held that a large number of the bonus shares were allotted to shareholders whose shares were not paid up and that the issue of the bonus shares, including the capitalisation of the share premium account for the issue, was not authorised by an ordinary resolution of the Company, as it should have been, or otherwise effectively authorised by members of the Company. He also held that, despite those defects, apart from s. 35A (1) of the Companies Act 1985 ("the 1985 Act") the bonus shares were validly issued. During the course of a long judgment that covered other issues (which were appealed) he observed:

"This principle, on which the first and second defendants rely, is named after *re Duomatic Ltd* [1969] 2 Ch 365, and it has been expressed in slightly different ways in different cases. In *Duomatic* itself, Buckley J said at p.373:

'[W]here it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.'

In *Parker & Cooper Ltd v Reading* [1926] Ch 975, the principle was expressed in these terms by Astbury J at p.984: 956

'[W]here the transaction is intra vires and honest … it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously.'

More recently Meagher JA in *Herman v Simon* (1990) 8 ACLC 1094 at p.1096 described the principle as:

'a doctrine that formalities may be disregarded if they have been waived by all shareholders acting in concert who want the same substantial result.'

Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable to the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter."

44. Neuberger J was considering the doctrine from a temporal and mechanical perspective. Approval can be given before or after a transaction and may be transmitted orally or by conduct. The informal unanimous assent rule is not without limitations. At paragraph 133 the Judge commented:

> "If a director of a company informs shareholders of an intended action (or a past action) on the part of the directors, in circumstances in which neither the directors nor the shareholders are aware that the consent of the shareholders is required to that action, I do not think it is right, at least without more, to conclude that the shareholders have assented to that action for *Duomatic* purposes. As a matter of both ordinary language and legal concept, it does not seem to me that, in such circumstances, it could be said that the shareholders have 'assent[ed]' to that action. The shareholders have simply been told about the action or intended action, on the basis that it is something which can be, and has been or will be, left to the directors to decide on, and no question of 'assent' arises. The word 'assent' is to be found in the passages I have cited from *Duomatic* and *Parker & Cooper*; the word used in the passage I have quoted from *Herman* is 'waiver': waiver classically requires the person who waives to have knowledge of the legal right which he is waiving: see *Peyman v Lanjani* [1985] Ch 457. Indeed, in *Herman* itself, just before the passage I have quoted, also at (1990) 8 ACLC 1094 at p.1096, Meagher JA described the *Duomatic* principle in these terms:
>
> "where it can be shown that all shareholders having a right to attend and vote at a general meeting of a company assent with full knowledge and consent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

45. Neuberger J concluded that before the informal unanimous assent rule can be satisfied: "the shareholders who are said to have assented or waived must have the appropriate or 'full' knowledge. If a shareholder is not even aware that his 'assent' is being sought to the matter, let alone that the obtaining of his consent is at least a significant factor in relation to the matter, he cannot, in my view, have the necessary 'full knowledge' to enable him to 'assent', quite apart from the fact that I do not think he can be said to 'assent' to the matter if he is merely told of it".

46. The evidence of Mr Gajjar was that informal assent was given because Mr Saatchi was "willing to agree to loans being made"; "on 17 November 2014, I telephoned the Applicant to tell him that I wanted a loan from Triptych. The Applicant agreed. As per usual, he did not want to know anything about the detail and did not want the loan documented". The evidence in respect of the loan for £50,000 on 23 January 2017 is "As with the first loan, the Applicant agreed to the loan, but said that he did not want to hear any more about it or the details…..the Applicant told me that I could pay these loans back whenever convenient, as the money was just sitting in the Triptych account and not being used otherwise"; and "In relation to the £30,000 loan of 11 September 2018, the £40,000 loan of 15 November 2018 and the £20,000 loan of 1 February 2019, it is correct that these were used in order to pay legal fees in relation to my divorce. I cannot remember if I spoke to the Applicant directly about these loans.". In his second witness statement his evidence is that Mr Saatchi "… also agreed to me taking loans generally from Triptych as and when I needed them." He seeks to bolster his evidence in relation to one of the £50,000 loans "Mr Saatchi specifically consented to the loans of £10,000 and £50,000." The £10,000 loan does not form part of this action.

47. In my judgment the evidence of informal assent in respect of the loans made on 17 November 2014, and 23 January 2017 is equivocal at best, even on the improved evidence in the second witness statement. It fails to demonstrate that Mr Saatchi had all the necessary information to make an informed decision. There is no suggestion in the evidence that Mr Gajjar provided proper information including a full set of accounts to demonstrate that a loan was in the best interests of the Company. The evidence fails to demonstrate that Mr Saatchi had 'full knowledge' of these transactions before they took place. In the absence of 'full knowledge' there can be no informal assent.

48. That is not the end of the matter. Mr Gajjar says that the Loans will be repaid on the sale of the Warehouse. The Warehouse is in the name of CSRG and he is a 50% shareholder of that company. As I have mentioned proceedings are on foot in respect of this issue and as a result I tread carefully. I make four observations. First, Mr Gajjar does not say that he contributed to the purchase price. Secondly, there is no written instrument prior to acquisition recording the intention that Mr Gajjar should

own 50% of the Warehouse through his shareholding in CSRG. Mr Heffernan's evidence is that he had no knowledge of the incorporation of CSRG (which was dealt with by the accountant Mr Gajjar had instructed) and saw no advice about how the title to the Warehouse should be held. Thirdly, even if Mr Gajjar is successful at trial there is (i) no evidence as to when the Warehouse will be sold (ii) no evidence that a sale will produce for Mr Gajjar the necessary proceeds to repay the Loans and (iii) the interests of CSRG will have to be taken into account in respect of any sale. The sale of a property owned by a company for the purpose of paying a personal debt of a shareholder may not be in that company's best interests. Lastly on 29 August 2014, after the acquisition, there was an exchange of e-mails between Mr Heffernan and Mr Gajjar:

> "Hello Rahul
>
> Is the warehouse owned by the company or by C? If the Company, what proportion of the share capital of the company is owned by C personally? Have you an idea of its (the warehouse) present market value?
>
> Niall"

49. The response from Mr Gajjar was as follows:

> Hi Niall,
>
> It's through company not personally.
>
> Share Capital is 50/50 he and I, however in reality it is his as Formend is the main lender….."

50. In my assessment there is something more than a prima facie case in respect of the Loans.

51. A director acting in accordance with his duties prescribed by section 172 of the Act would, in my judgment, be justified in taking into account conflicting evidence given by Mr Gajjar, that Mr Saatchi had said that "the money was just sitting in the Triptych account and not being used otherwise". This is because Mr Gajjar's own evidence is that Mr Saatchi was not interested in the accounts. Moreover it would be difficult to

justify a statement that the "money was just sitting" in the Company account on reading of the accounts.

52. As regards the loans made in 2018 and 2019 there is no evidence of informed assent to the transactions.

53. The cumulative level of the Loans is sizeable.

ii) Payroll Payments

54. The particulars of claim on this issue start at paragraph 18:

> "In March 2019, following the termination of his employment with the Partnership, Mr Gajjar added himself (or procured that he be added) to the Company's payroll without any benefit to the Company (alternatively at a vastly inflated rate).
>
> 19. Mr Gajjar caused the Company to make net payments to Mr Gajjar through payroll in March, April, May and June 2019 totalling £33,728.00. By making those payments the Company became subject to a liability to HMRC in respect of Income Tax and National Insurance in the sum of £31,286.00.
>
> 20. For the avoidance of doubt, the payments set out in this section B were made without Mr Saatchi's knowledge or consent. In making each of the payments set out in this section B, Mr Gajjar:
>
> (1) Failed to exercise his power to authorise payments from the Company's bank account or other resources for its proper purposes, namely the furtherance of the Company's interests; and/or
>
> (2) Failed to act in a way which he considered in good faith would be likely to promote the success of the Company for the benefit of its members as a whole; and/ or
>
> (3) Knowingly acted directly in his own interests at the expense of the Company.

> 21. In the premises, in causing the Company to make the payments set out in this section B, Mr Gajjar acted in breach of fiduciary and/or statutory duty and, in relation to the monies paid to him through payroll, held the said monies on constructive trust for the Company."

55. The first and most obvious point raised by Mr Watson is that the Companies (Model Articles) Regulations 2008/3229 expressly provide that a director is entitled to remuneration. Article 19(5) provides: "unless the directors decide otherwise, directors are not accountable to the company for any remuneration which they receive as directors….". There was no shareholder agreement, and no other instrument forbidding remuneration.

56. The fact that Mr Gajjar received remuneration from the Company is not, in my judgment, impeachable by itself. But that is not the case against him. The pleaded case that Mr Gajjar failed to act in a way which he considered in good faith would be likely to promote the success of the Company for the benefit of its members as a whole is a reference to the amount of remuneration. Mr Gajjar remunerated himself at a level that was unsustainable given the Company's financial circumstances. As well as salary it is, as Mr Norbury said in submissions, possible to take account of benefits such as the use of a company car. This claim has the prospect of overlapping with the Teslas issue.

57. There is authority for the proposition that it is irresponsible for defendants to take the "going rate" of remuneration without giving any consideration to the company's financial position or its ability to pay. Mr Gajjar's response to the pleaded case is revealing: "In short, given that I was no longer receiving any salary through Conarco in respect of my work for Triptych, it was entirely appropriate that I be paid through Triptych". He expands on this in his second witness statement: "I was technically employed by the Partnership and solely paid through it. As such, I had informed Mr Saatchi that I would not take a salary from Triptych initially. However, a significant reason for this was the fact that I was receiving a salary from the Partnership. Given the role that I occupy, a salary is plainly appropriate, however, it was not necessary for this to be paid by Triptych at that stage." In his evidence he seeks to justify the reasons why he took a salary "I continued to work for the Saatchi Group" and "given that Triptych has a healthy turnover, I consider that it was appropriate that I be

remunerated." There is an issue with this evidence. First, there is no evidence that the Company had a healthy turnover. The evidence points in the direction of giving no thought to the Company's finances. He simply drew the same sum as he was receiving from Conarco. Secondly, the 2018 accounts would not have been prepared until after the year end (31 May 2019). The accessible accounts at that time show that turnover had fallen between 2016 and 2017. Mr Gajjar does not give evidence that he had management accounts. None are in evidence. When the 2018 accounts were drawn up the turnover had fallen again. Thirdly, Mr Gajjar gives no evidence that he considered the effect on the Company of paying National Insurance Contributions and other taxes. Fourthly, Mr Norbury submitted that if he had continued to draw the salary he had fixed upon, the net profits of the Company would have led to a net loss of £143,000 for the year ending 31 May 2018. The submission was not answered. Fifthly, the main client of the Company was Mr Saatchi. If Mr Saatchi had withdrawn his custom the Company would have suffered greatly. In these circumstances it may have been prudent to have obtained written consent from the main customer and equal shareholder. Sixthly, Mr Gajjar would have been aware that Mr Saatchi had sold the Saatchi Art Gallery at this time and was seeking to cut overheads. No account was taken of this shift in position. Lastly, to have drawn the same salary as a director of the Company he had been awarded while acting for many companies in the Saatchi Art Gallery Group, without more reason, is surprising.

58. It cannot be said that no director would bring the action on the basis of these facts. In my judgment a director acting in accordance with his duties pursuant to section 172 of the Act would attach considerable importance to the factors set out above in pursuing this claim and considerable importance to the Payroll Payments and the Loans taken together.

iii) Teslas

59. I can deal with this claim shortly. Two Tesla cars were purchased in 2017 and 2018. The first was a cash purchase. The second was a hire purchase finance transaction. There is no dispute that Mr Gajjar did not seek consent from Mr Saatchi for either transaction. The particulars of claim plead:

> "23. At all material times since their purchase, the Tesla cars have been in the possession and/or control of Mr Gajjar.
>
> 24. The Tesla cars are unsuitable for transporting artwork and there was no business reason for Mr Gajjar to have a company car as the only business travel which he needed to undertake as director of the Company was between the Company's office in North London and the Property once or twice a week. It is to be inferred that Mr Gajjar did not believe that the purchase of the Tesla cars would promote the success of the Company and further to be inferred that he has used the Tesla cars for his own private benefit."

60. Mr Gajjar's evidence is that the Teslas replaced two Land Rovers which were used to transport smaller pieces of art. They were replaced to save money on fuel. Leaving aside the allegation that the Teslas were purchased as a form of benefit for Mr Gajjar, there is a reasonable argument that he failed to act with reasonable skill, care and diligence in purchasing the vehicles in 2017 and 2018. The accounts, although positive, were not so strong as to readily justify the purchase of replacement assets on this scale. Mr Gajjar states "Eventually, the Land Rovers needed to be replaced." There is no explanation as to why they needed to be replaced. The Land Rovers were purchased just a year prior to the first Tesla purchase (2016). There is no evidence that the land rovers (described as luxury vehicles) were not capable of transporting small pieces of art. The trade in value obtained for each of the Land Rovers was not small. The fuel costs saved, depending upon mileage, compared with capital cost appear, on the material available to this court, disproportionate.

61. The increase of costs to the Company caused by a director, at this point in time, is not readily explicable by a direct application of statutory duties. It is said that Mr Gajjar has possession of the Teslas and uses them as his own. This is the subject of the second application. A director acting in accordance with section 172 of the Act, in my assessment, would take account of (1) the slower rate of depreciation of an older vehicle compared with a newer vehicle; (2) the cost to the Company of using capital to purchase an expensive vehicle; (3) the obligation to pay lease payments for four years which carries with it an obligation to pay a large balloon payment to obtain title; (4) the adequacy of the Land Rovers. The circumstances giving rise to this claim, in

my judgment, lead me to conclude that a person acting in accordance with section 172 of the Act would attach importance to continuing the action.

(iv) Cognition Agency

62. The factual basis for this claim against Mr Gajjar is set out in the particulars of claim:

> "In or around April 2015, payments totalling £73,655.86 to Cognition Agency, a Marketing and PR Agency. The Cognition Payments relate to an education project named Stride Tutoring, a joint venture between Mr Gajjar and Mr Gajjar's then wife ("Mrs Gajjar"), which has nothing to do with the business of the Company."

63. Mr Gajjar does not deny the payments were made. He claims that (i) Mr Saatchi knew of the project and (ii) consented to the money being spent. In his second witness statement he explains that:

> "as a way of diversifying the business….I decided to enter expand into a new venture with my then-wife, which would still be run as a part of Triptych, with Triptych receiving any profits. We called the project "Stride Tutoring"…..intended to provide a tutoring service for school age children……As per usual, Mr Saatchi did not want to know the details. He never, however, raised any objections to the use of the company's funds for this business. As noted above, he left me to run Triptych on a day-to-day basis, and this diversification was part of the business strategy with which he did not want to be involved. Diversification was a positive step for Triptych, and ultimately for Mr Saatchi and myself, because it resulted in additional income streams for the company. In any event, the payments to Cognition were made for the benefit of Triptych because they were used for the marketing and advertising of Stride, which was intended to diversify the Triptych business. Unfortunately, the business idea was not ultimately successful….".

64. Mr Tickner states that in fact Mr Saatchi "had no idea that Mr Gajjar had used Triptych's money to fund an attempt to start a tutoring business." It is argued by Mr Saatchi that the Company could not afford to speculate on a new business that had

little or nothing to do with the core business of the Company at that time or at any time since incorporation. Be that as it may other evidence has come to light that has the potential of painting a very different picture to that drawn by Mr Gajjar. Mr Tickner exhibits documents downloaded from the Stride Tutoring website. The operating address for Stride Tutoring is not the same warehouse as that used by the Company. The business was incorporated as a company in June 2015 under the name "Indalbo Limited". Mr Damania was Indalbo's sole director. At the time of the funding he worked for the Company. The solicitor acting for the Saatchi Art Gallery Group was invited by Mr Gajjar to send invoices for work done on behalf of Indalbo to the Company to pay. There is a further twist. In an article written in the Observer newspaper on 6 August 2015, Mrs Gajjar is described as "Stride's director".

65. The circumstances giving rise to this claim are unusual. A person acting in accordance with section 172 would, in my view, attach importance to continuing this claim.

v) The Cricket Club

66. The sum involved is small in the context of the claim. Of and by itself a director acting in accordance with section 172 of the Act would not seek to prosecute this claim because of its size. On the other-hand Mr Gajjar has not answered the allegation that he had an interest in the club and failed to recognise a conflict of interest giving a sponsorship. His evidence is that the Company "needed additional staff and I thought that sponsorship of the cricket club would be a helpful way to raise awareness of the company."

67. In my view a person acting in accordance with section 172 of the Act would not attach importance to continuing this claim on behalf of the Company. Nevertheless, that view may be reviewed if permission is given to continue the other pleaded claims, as the claim in respect of the Cricket Club must be seen in the context of the other claims and the wider background.

vi) Mrs Gajjar Payment

68. The claim is that "Between July 2014 and July 2017, payments totalling £38,000 to Mrs Gajjar through payroll (excluding any tax and national insurance liability of Triptych). Mr Gajjar was asked for an explanation for these payments by letter dated

25 June 2019. No explanation for these payments has been provided by or on behalf of Mr Gajjar. It is to be inferred that these payments were not made bona fide in the interests of the Company".

69. Mr Gajjar has now provided some evidence:

> "This salary was, however, entirely justified, as the work conducted was for the benefit of Triptych. The company had previously experienced issues between customer services and the logistical operations of the company. My ex-wife therefore worked towards resolving these issues for a more cohesive and functioning of the company. She also assisted with any administrative work required by Triptych. Additionally, my ex-wife started to work for the company to assist with attempts at diversification, for example in setting up Stride and potentially renting out office and car park space."

70. As the present evidence, which has not been challenged, is that Mrs Gajjar was a director of Stride there was a potential conflict of interest. Mr Gajjar produces no employment contract for Mrs Gajjar and there is no record of the work dealing with "issues between customer services and the logistical operations of the company." The fact of the payments is admitted. In these circumstances the payments may amount to a serious breach of statutory duties. A person acting in accordance with section 172 of the Act would attach importance to a claim where there may be a serious breach of duty.

vii) Credit Card Payments.

71. The pleaded claim in relation to the Credit Card Payments is that "Mr Gajjar holds (or held) a Company credit card (the "Company Card") with Coutts. Without the knowledge, approval, or consent of Mr Saatchi, Mr Gajjar (or someone acting with his permission) used the Company Card to make the transactions set out in Schedule A, totalling £72,592.12. The transactions in Schedule A do not appear to relate to the business of the Company and no satisfactory explanation for them has been provided by Mr Gajjar. It is accordingly to be inferred that the transactions in Schedule A were made for Mr Gajjar's personal benefit and not for the purposes of the Company."

72. Mr Gajjar's evidence is that "the £72,592.12 of payments using the company credit card, less the parking fines and personal payments….. were for the benefit of the company, for example in terms of providing technology and furniture for staff, providing staff bonuses and for business development."

73. During the hearing 13 pages of A3 spreadsheet analysis was produced in respect of the payments. These spreadsheets demonstrate that sums were spent on accommodation, travel, entertainment, motor vehicle insurance, shopping (such as Amazon and itunes payments). In addition £13,500 was paid to Banham Group SW18 and Benchmarx to make security improvements to Mr Gajjar's home. He says the security improvements were necessary as artwork was stored there and Company employees would work at his home from time to time.

74. It is accepted by Mr Saatchi that some of the Credit Card Payments may have been for the benefit of the Company. In the absence of books and records and having in mind the fiduciary duties imposed on a director and in particular the core duty of loyalty, Mr Gajjar should explain the payments. He has failed to do so, save in the broadest of terms.

75. According to the spreadsheets the total number of transactions that call for an explanation amount to nearly £63,000. This sum is not small in the context of the Company's finances. In my assessment a person acting in accordance with section 172 of the Act acting for this Company would attach importance to recovering a sum of this size given Mr Gajjar's failure to account.

Alternative remedy

76. In his oral submissions Mr Watson emphasised that Mr Saatchi has alternative remedies. As such and bearing in mind the other ongoing claims, he submitted, a derivative action was the least attractive of Mr Saatchi's options.

77. His primary position is that if one stands back, the dispute is between the only two shareholders of the Company. There is deadlock. One shareholder has been excluded from the premises. These are prime indicators that this matter is best dealt with in the context of a shareholder dispute. He highlights that a petition presented pursuant to

section 994 of the Act would enable one shareholder to buy out the other and avoids the exposing the Company to costs if an indemnity is granted.

78. Mr Watson's secondary position is that it would be appropriate to wind up the Company on just and equitable grounds pursuant to section 122 of the Insolvency Act 1986. Mr Gajjar believes that all trust and confidence has broken down and it will be impossible for Mr Gajjar to continue as director. The parties are deadlocked. If there are claims against him, an independent party holding the office of liquidator will pursue the claims. Further he believes that the Company has claims as against Conarco for unpaid fees. A liquidator will independently assess the likelihood of recovery. In respect of the second matter Mr Saatchi, due to his involvement in Conarco, would not be a competent officer of the Company to bring a claim. Mr Gajjar would not object to the Company being wound up.

79. These are powerful submissions. It is possible to point to these alternative remedies and they both have some merit.

80. An unfair prejudice petition remedy concern acts or omissions that are unfair and prejudicial to the minority and relate to the management of a company. The claims I have set out are of a wrongdoing character. The particulars of claim seek damages from Mr Gajjar, restitution of assets lost to the company, an account and inquiry of assets he dealt with and delivery up of assets he handled. There is no claim that the Company is seeking a resolution to a dispute between shareholders. In my judgment the "whole gist" of the proposed claim lies in the unlawfulness of the acts complained of, breach of statutory duty, fiduciary duty and negligence (yet to be pleaded).

81. Winding up the Company has its attractions but, as Mr Norbury submitted, winding up the Company would not resolve the pleaded issues. It would merely suspend the claims pending a review that may be costly and hand control of the claims to a third party. Taking account of the current position 50% of shareholders are not keen for the Company to be wound up. Regard must be had to both shareholders. Mr Saatchi has already commenced proceedings in which some of the issues relevant to this claim will be ventilated. It would not be proportionate to resolve the issues at different times using different legal teams.

82. Furthermore, a liquidator would have to obtain funding. At present the Company has no assets for a liquidator to draw upon in order to pursue litigation. There is a danger that the claims would not be pursued without third party funding, albeit a liquidator may seek to sell the claim. It is not in the best interests of the Company to be exposed to the risk that no funds will be available to pursue the claims, or the prospect of the claims being assigned to a third party. An assignment to Mr Saatchi (the most likely purchaser) would not only be circular, but waste time and money. Such a course would be disproportionate and undesirable.

83. As Mr Norbury has pointed out, it is not unheard of in a case of a 'two-person' company with insufficient assets to allow the proposed claim to be brought by a liquidator in a winding-up. In *Hughes v Weiss* [2012] EWHC 2363 (Ch), permission was granted for a derivative claim to proceed in such circumstances. HHJ Keyser QC described the suggestion that the liquidator could seek directions to allow the claims to be resolved between the two shareholder-directors as a "convoluted solution". I adopt his description. I note that there is no suggestion that the Company does not continue to trade or is insolvent.

84. In my judgment, and for these reasons, although the availability of alternative remedies can be a powerful factor, on the facts of this case their availability is insufficient to tip the balance.

85. Lastly it is submitted that the Company should not bear the costs of an action. I am satisfied on the facts of this case that the Company will have a measure of protection against costs as Mr Saatchi is to fund the action and will only seek an indemnity if successful against Mr Gajjar.

Conclusions

86. There was no argument advanced in oral submissions that Mr Saatchi is bringing the claims on behalf of the Company in bad faith. In any event, there is insufficient or no evidence to support such a contention.

87. Not all the claims carry the same weight (for example the Cricket claim would not survive this application if it were stand-alone), but the cumulative value of the claims

merit, on my evaluation, an assessment that a person acting in accordance with section 172 of the Act would attach significant importance to the claims.

88. The claims have sufficient substance to reach the conclusion, at this stage, that they are not merely speculative. There is something more to them than a prima facie case.

89. Looked at from the perspective of the Company the cost of the proceedings is an issue. The Company and will not fund the proceedings. It is in the fortunate position of paying only if the action is successfully and there is a recovery. Accordingly, there is no impact on the company if it lost the claim. No argument has been advanced that the company's activities shall be disrupted while the claim is pursued. Mr Saatchi is the main or only client of the Company.

90. It has been argued that the claim should not be consolidated with the Property Claim or employment tribunal matter. In my judgment this case, so far as possible, should be case managed with the other claims issued in the Business and Property Courts as they relate to the same facts and it is likely that the court will hear the same witnesses of fact. Costs will be saved.

91. There is no suggestion that Mr Saatchi could bring any of the claims in his own right. The claims vest in the Company.

92. There are alternative remedies. They are not an absolute bar to continuing the derivative claim. On analysis the claims are properly brought as a derivative action. The "gist" of this claim is an action against a director during a time when he had complete control of the Company. A winding up on just and equitable grounds is likely to lead to a "convoluted solution".

93. I shall grant permission to continue the derivative claim.

94. I will hear counsel on the terms of the order when this judgment is handed down.