Neutral Citation Number: **[2021] EWHC 2714 (Ch)**

Case No: BL-2020-001624

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Business List (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 October 2021

Before :

MASTER PESTER

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Between :

PARAMOUNT POWDERS (U.K.) LIMITED	**Claimant**
- and -	
(1) TARLOCHAN SINGH BADYAL	**Defendants**
(2) SANDEEP BADYAL	
(3) TRIDENT POWDERS LIMITED	

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James Willan QC (instructed by Trowers & Hamlins LLP) for the **Claimant**
Hugh Sims QC and Richard Ascroft (instructed by Vymans Solicitors Ltd) for the **First Defendant**
Timothy J. Walker (instructed by RIAA Barker Gillette (UK) LLP) for the **Third Defendant**

Hearing dates: 29 and 30 July 2021

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APPROVED JUDGMENT

Covid 19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 4pm on 11 October 2021.

MASTER PESTER:

Introduction

1. There are two applications before the Court seeking to strike out these proceedings as an abuse of process. Both are made pursuant to CPR Part 3, r. 3.4(2)(b), the first dated 22 March 2021 brought by the First Defendant, Tarlochan Singh Badyal ("TSB") and the second dated 29 April 2021 brought by the Third Defendant, Trident Powders Limited ("Trident"). The applications have been made before the service of any defence by the Defendants.

2. The proceedings themselves were begun by the Claimant, Paramount Powders (U.K.) Ltd ("PPUK"), by claim form dated 5 October 2020. PPUK claims damages, alternatively, an account of profits and/or equitable compensation against TSB, who was until July 2016 a director of PPUK, on the ground that he was in breach of fiduciary duty to PPUK in setting up Trident as a direct competitor of PPUK. PPUK also claims that the Second Defendant, Sandeep Badyal ("Sandeep"), who is TSB's son, dishonestly assisted in those breaches of duty together with Trident and that all three defendants unlawfully conspired against PPUK.

3. On 27 January 2021, I granted PPUK permission to serve Sandeep out of the jurisdiction in New Delhi, India. Owing to difficulties in effecting service, by order dated 31 March 2021, I granted PPUK permission to serve Sandeep by way of alternative service. Although Sandeep has now been served with the proceedings, he has as yet taken no steps in them, failing for example to have filed any acknowledgment of service.

Background

4. To understand the basis of the strike out application, it is necessary to set out the background in detail.

5. PPUK was incorporated on 19 August 1986 as a private company limited by shares under the Companies Act 1985. The issued share capital is £100 comprising 100 ordinary shares of £1 each. Such shares are currently registered in the names of TSB, and each of his two brothers, Malkiat Singh Badyal ("MSB") and Santokh Singh Badyal ("SSB"), and the three brothers' late father, Sohan Singh Badyal; each of whom has 25 shares each. The shares of Sohan Singh Badyal are now held by his widow's administered estate for TSB, MSB and SSB, and their two siblings.

6. The business of PPUK consists in manufacturing and selling powders, raw material and equipment for use in powder coating processes.

7. The current directors of PPUK are MSB and SSB. TSB was a director of PPUK from its incorporation until 19 July 2016, when his two brothers removed him as director (this is the date shown in the filings at Companies House; the parties refer to the removal as taking place on 12 August 2016). The reason given for the removal of TSB as director was that TSB had set up Trident secretly in order to compete directly with PPUK. Trident was incorporated on 13 February 2015. The first registered director of Trident was Ajay Manro, but Sandeep was appointed director of Trident on 15 April 2015 and was the original 100% shareholder. MSB and SSB claimed that TSB, whilst still a director of PPUK, was involved in, amongst other things, funding, promoting and encouraging

Sandeep to set up Trident, in soliciting key employees of PPUK to join Trident, and in running Trident.

8. The removal of TSB was merely one step in what the late Mr Justice Henry Carr described as "a bitter dispute between three brothers who have built up a very successful business". In March 2016 (that is, even before his removal as director of PPUK), TSB commenced a claim seeking to wind up the partnership(s) between the three brothers, and for the taking of accounts ("the Partnership Claim"). TSB also filed an unfair prejudice petition pursuant to ss. 994 – 996 of the Companies Act 2006 seeking, initially, an order requiring MSB and SSB as the majority shareholders to buy out TSB's interest, alternatively that TSB be granted permission to pursue derivative claims on behalf of PPUK. This was later amended to seek as primary relief the winding up of PPUK ("the Company Claim"). The respondents to the Company Claim were MSB, SSB and PPUK.

9. Central to their defence to the Company Claim was the allegation by MSB and SSB that they had been entirely justified in removing TSB as director, because in breach of fiduciary duty, TSB had wrongfully set up Trident. As is usual in unfair prejudice petitions, PPUK was a purely nominal party to the proceedings, and did not take any active part.

10. The Partnership Claim and the Company Claim was evidently hard fought litigation. As a first step in those proceedings, in April 2016, TSB applied for various injunctions. At the first hearing of the injunction application, the Respondents (that is, MSB and SSB) gave various undertakings, including one not to permit PPUK to make any payments or dispose of any of its assets other than in the ordinary course of business.

11. On 15 August 2016, TSB applied for an order for the appointment of a receiver and manager and to restrain payment of legal fees from the assets of PPUK. The draft order attached to that application sought to prevent PPUK from making any payment in connection with the provision of any legal services, without limitation.

12. It is not necessary for me to set out all the subsequent steps in the Partnership Claim and the Company Claim, save to note that TSB's then solicitors, Gannons, demanded undertakings by letter dated 21 October 2016. In response, MSB and SSB indicated that they were prepared to provide undertakings, but that PPUK should be entitled to obtain legal services in the ordinary course of business. Gannons responded by letter dated 4 November 2016 to MSB's and SSB's solicitors, stating as follows:

"We note your comments concerning the use of legal services in the ordinary course of business and our client would not want to prevent such expenditure. However, it may be that the parties have a different concept of what is and is not in the ordinary course of business. Your clients apparently thought it appropriate to ask you to advise the Company, at the Company's expense, on a claim against our client for an alleged breach of fiduciary or statutory duty, where clearly this is part and parcel of the dispute between our clients. …"

13. The letter from Gannons then went on to set out the form of contractual undertakings which would be acceptable to TSB. The undertakings sought by TSB at the time include an express provision that no payment whatsoever would be made by PPUK to MSB's and SSB's solicitors, Gordon Dadds LLP, and prohibiting any payment for the provision of legal services or disbursements

which is not a "Permitted Payment". A "Permitted Payment" was defined as being a "Prohibited Payment but which is made in the ordinary course of business of [PPUK] or a subsidiary of [PPUK] ….". A payment was not in the ordinary of course of business if it was connected with any claim or potential claim against a number of parties, including TSB, Sandeep and Trident.

14. By letter dated 8 November 2016, MSB and SSB indicated that they were prepared to accept the undertaking suggested, with a few slight variations. That letter goes on to state that "… if [PPUK] has a valid claim against [Sandeep] or [Trident], payment for legal services in relation to that dispute is in the ordinary course of business and on your client's pleaded case does not involve your client. Your client [that is, TSB] should therefore endorse any such proceedings as a shareholder in PPUK. Our clients are content however that the undertakings cover the costs of legal services incurred concerning [Sandeep] and/or [Trident] so far as they are concerned with the provision of legal services relating to [the Partnership Claim or the Company Claim]".

15. In their evidence before me, MSB and SSB explain that at the time they felt they had no choice but to agree to the undertakings, given the threats by TSB to apply for a receiver or administrator over PPUK. Having regard to the contemporary correspondence, it seems clear that the undertakings were proffered by MSB and SSB in order to avoid the need for further contested interim hearings. No doubt TSB would have challenged any attempt on the part of PPUK to pay for legal services in connection with any advice on a potential claim against Sandeep and / or Trident in 2016, and would have revived his application for the appointment of a receiver.

16. The Partnership Claim and the Company Claim were tried before Henry Carr J over 11 days in November 2017. TSB was cross-examined about Trident on the second and third days of the trial, and so were a number of other witnesses, including Sandeep. During the course of trial, MSB suffered a heart attack (leading to a triple bypass) and he was absent during the latter part of the trial.

17. In his judgment ("the Carr Judgment"), Henry Carr J was critical of the evidence given by both TSB and Sandeep (who was a witness on behalf of his father, but not a party to either the Partnership Claim or the Company Claim). The Carr Judgment said this:

"… Furthermore, I do not accept TSB's evidence about Trident. He repeatedly denied any involvement in Trident in his witness statements and in his oral testimony, but he was not telling the truth." (at [10])

And, in relation to Sandeep:

"Sandeep was very defensive during his cross-examination, preferring to respond to questions with a question rather than an answer. Whilst claiming that he had set up, financed and run Trident without any assistance from his father, he did not provide documents to show that this was the case. After he was cross-examined, I was concerned that he had chosen not to reveal evidence which might assist him, in order to avoid disclosing matters about Trident to MSB and SSB. I gave him the opportunity to corroborate his evidence with documents, including bank statements from his personal account and Trident's account, to establish that he had provided the considerable sums required to finance Trident's business. He provided two sets of documents (not including any bank statements) and was twice recalled for cross-examination. He did not

provide a complete or credible account and I did not consider that I could rely upon his evidence about Trident." (at [11])

18. It is fair to say, and I believe this is common ground between the parties before me, that in the Company Claim TSB failed on most of the points he was advancing, and MSB and SSB were overall the successful parties. The Carr Judgment establishes that TSB's exclusion from the management of PPUK was justified. The concluding paragraphs [200] – [201] state as follows:

"Although I have not accepted all of the arguments advanced by MSB and SSB, I am satisfied that TSB has been involved in Trident's business from the outset, has funded it, and has encouraged Dr Manro and Mr Bij to leave PPUK and join Trident. In my judgment, it was not unfair for MSB and SSB to remove TSB as a director of PPUK in these circumstances.

MSB and SSB claim that they have offered to buy TSB's shares at a fair (undiscounted) independent valuation, but TSB denies that the offer was fair. In the light of my conclusion concerning Trident, MSB and SSB were not obliged to buy TSB's shares. In all the circumstances, I do not consider that TSB has been unfairly prejudiced and I shall refuse relief under section 994. I do not consider that it would be just or equitable to wind the company up. There is no justification for doing so, and the effect would be to leave the field clear for Trident, a result which I believe would be unjust and inequitable."

19. About half of the judgment addresses issues relating to the Partnership Claim, which did not relate to the allegations about Trident.

20. TSB appealed the Carr Judgment to the Court of Appeal. The appeal was heard on 11 July 2019 and dismissed by a judgment delivered on 18 October 2019.

21. If it were ever the hope that the Carr Judgment would bring an end to the litigation between the three brothers, this proved not to be the case. The Partnership Claim is ongoing. Numerous accounts and inquiries are outstanding. I have been referred to two judgments, one by Fancourt J (dated 1 March 2019), the other by Zacaroli J (dated 27 June 2019), which are critical of TSB's subsequent conduct with the apparent aim of frustrating the enforcement of various orders made by Henry Carr J. In particular, TSB has delayed providing disclosure in relation to various assets which Henry Carr J had held were partnership assets, and TSB had also caused, as Fancourt J found, various Indian companies to apply, in August 2018, for an injunction in India, preventing both TSB and his brothers from complying with the orders of Henry Carr J. I have also been referred, by MSB and SSB, to an order dated 31 January 2020 of Adrian Beltrami QC (sitting as a deputy High Court judge) in which TSB was granted relief from sanctions in relation to his previous failures of disclosure.

22. Following the Carr Judgment, the solicitors then acting for MSB, SSB and PPUK sent letters before action dated 6 July 2018 to TSB, Sandeep and Trident asserting claims on behalf of PPUK for breach of fiduciary duty against TSB, for dishonest assistance against Sandeep and Trident, and for unlawful means conspiracy against all three. That letter relies on a number of "material findings" made in the Carr Judgment. In response, TSB's then solicitors responded, by

letter dated 8 October 2018[1], asserting that the proposed claim would be "a plain abuse of process", relying on the line of cases flowing from *Henderson v Henderson* (1843) 3 Hare 100. The letter concludes by stating that, were PPUK to advance the claims outlined in the letter before action, it would be met by an immediate application by TSB to strike out for abuse of process.

23. There was then a further exchange of correspondence between the parties' solicitors in 2020, before the present claim was issued on 5 October 2020.

24. By way of further background to the two applications for strike out before me, there have been changes in relation to the management and ownership of Trident since the Carr Judgment. Sandeep has resigned as director on 2 June 2020. The current de jure directors are Sandeep's two sisters, Navdeep Badyal ("Navdeep") and Amandeep Badyal ("Amandeep"). Navdeep has provided a witness statement in support of Trident's strike out application. Navdeep was appointed as director on 10 May 2018 and Amandeep on 22 January 2019. Both sisters were given shares in Trident by their brother in January 2019. Since that time, Sandeep is said to have taken a step back from running the business, and in June 2020 Sandeep gave up his interest in the business, transferring his shares to his sisters and resigning as director.

Legal principles

25. CPR 3.4(2) provides (so far as is relevant):

[1] The letter exhibited in the evidence before me is described in the heading as a "Draft letter in reply to Gordon Dadds' letter of 6 July 2018". There seems no doubt it, or something in very similar form, was sent. Both PPUK and TSB have since changed solicitors.

"The court may strike out a statement of case if it appears to the court –

(a) …

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;

(c) …"

26. A statement of case for these purposes includes a claim form as well as particulars of claim: CPR Part 2, r. 2.3(1).

27. The principle on which both TSB and Trident rely was first formulated by Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 as follows:

"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

28. The classic modern formulation of the principle is found in the speech of Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 30H—31F:

> *"… Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.*
>
> *I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the*

process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not . . . While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

29. Generally speaking, the "broad merits based" assessment to which Lord Bingham referred does not relate to the substantive merits of the proposed claim but to the merits relevant to whether the claim should have been brought as part of earlier proceedings: see *Stuart v Goldberg Linde (a firm)* [2008] 1 WLR 823, at [57], where Lloyd LJ said that "Whether the claim appears to be weak or strong, it is the fact of it being brought as a second claim, where the issue could have been raised as part of or together with the first claim, that may constitute the abuse". The principal caveat which Lloyd LJ introduced was to indicate that, if the case can be shown to be cast-iron, so that judgment could be obtained under CPR Part 24 "… this might perhaps outweigh factors suggesting that the case ought to have been brought as part of earlier proceedings." Absent that category of case, then it would be inappropriate to attempt to weigh the prospects of success in the balance in deciding whether it is an abuse of the process to bring the claim in later proceedings, rather than as part of the earlier proceedings.

30. A useful summary of the decision in *Johnson v Gore-Wood* and other authorities was given by Clarke LJ (as he then was) in *Dexter Ltd (in administrative receivership) v Vlieland-Boddy* [2003] EWCA Civ 14, at [49]:

    i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.

    ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.

    iii) The burden of establishing abuse of process is on B or C or as the case may be.

    iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

    v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.

    vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.

31. Further guidance may be found in the summary proffered by Simon LJ in *Michael Wilson & Partners Ltd v Sinclair* [2017] EWCA Civ 3; [2017] 1 WLR 2646 at [48] on abuse more widely (which has been cited more recently in *Koza Ltd and another v Koza Alten Isletmeleri AS* [2020] EWCA Civ 1018; [2021] 1 WLR 170). In particular, Simon LJ indicated that "It will be a rare case where

the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process …".

32. The exercise upon which the Court is engaged when considering whether or not to strike out a claim as abusive is not the exercise of a discretion; rather, it is a decision involving a large number of factors to which there can only be one correct answer to whether there has been an abuse or not: *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260; [2008] 1 WLR 748 at [16] per Thomas LJ and [38] per Longmore LJ.

33. A further important point to emerge from the decision in *Aldi* is the importance of raising with the court seized of the original proceedings any intention to pursue in the future further claims against the same or different parties. That way the court is able to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation (*ibid* at [30] per Thomas LJ; [36] per Wall LJ and [42] per Longmore LJ). Per Thomas LJ (at [31]):

"[F]or the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seized of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future."

34. The importance of compliance with the so-called '*Aldi* guidelines' has been emphasised in a number of subsequent decisions of the Court of Appeal.

35. In *Stuart v Goldberg Linde (a firm)* (supra) (where the claimants sought to pursue a second claim against the same defendant, albeit raising issues which differed from those raised in the first claim), Sedley LJ said this (at [77]):

"Secondly, as the Aldi Stores Ltd case again makes clear and as Sir Anthony Clarke MR stresses, a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides."

36. Sir Anthony Clarke MR added the following, at [96]:

"For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary they should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the CPR, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated."

And at [101]:

"I only add by way of postscript that litigants and their advisers should heed the points made by this court in the Aldi Stores Ltd case and underlined here that the approach of the CPR is to require cards to be put on the table in cases of this kind or run the risk of a second action being held to be an abuse of the process."

37. See also Briggs LJ in *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466 at [64] and [65]; and Kitchin LJ in *Clutterbuck and anr v Cleghorn* [2017] EWCA Civ 137 (at [76]), who stated:

"It is clear that Thomas LJ was concerned to ensure that, in future, a party to commercial litigation who wishes to pursue a claim at a later date against the same or other parties in relation to the same commercial matter should put his cards on the table in the first claim so as to give the court an opportunity to consider whether and, if so, how, by appropriate case management directions, the resources of the court may be utilised in the most cost effective and efficient way."

38. While compliance with the *Aldi* guidelines has not been translated into a rule of procedure of the CPR or been made a subject of a Practice Direction, it has been stressed by the Court of Appeal that the *Aldi* guidelines are not subject to exceptions or optional: see *Otkritie Capital International Ltd v Threadneedle Asset Management Ltd* [2017] EWCA Civ 274; [2017] 2 Costs L.R. 375 at [48] per Arden LJ. However, in that same judgment, Arden LJ went on to say this:

"As to Mr Malek's submission that, once the judge found that Otkritie had acted in breach of the Aldi guidelines in Action 1, Action 2 was an abuse of process and should be struck out, in my judgment, that approach is clearly not consistent with Johnson v Gore Wood and its adherence to a broad merits-based assessment of whether a second action was an abuse of the process of the court. In my judgment, it is clear that this court in Aldi did not intend to depart from the decision in Johnson v Gore Wood. So there is no hard-edged rule of law that a claim, which a party could have raised in one set of proceedings, will be struck out if that party seeks to bring it in another set of proceedings. The Aldi guidelines are a facet of the principle of a "broad merits-based judgment" as to whether this is the just outcome, which was established in Johnson v Gore Wood." (at [49])

39. The most recent decision to which I was referred was that of the Court of Appeal in *Taylor Goodchild Ltd v (1) Scott Taylor & (2) Scott Taylor Law Limited* [2021] EWCA Civ 1135, where judgment was handed down six days before the start of the hearing before me. It is an obviously important decision, as it involved (like the proceedings before me) an unfair prejudice petition. In that case, Taylor Goodchild Ltd ("the Company") was a solicitors' practice in which Mr Taylor and Mr Goodchild were equal partners. Mr Goodchild brought an unfair prejudice petition in which he complained (amongst other matters) that, in breach of fiduciary duty, Mr Taylor had diverted ongoing business to his own company, Scott Taylor Law Limited ("STL") and had poached staff. Following a five day trial, Barling J concluded that there had been unfairly prejudicial conduct because Mr Taylor had committed clear breaches of fiduciary duty. Mr Goodchild was ordered to buy out Mr Taylor.

40. Subsequently, and after the buy-out had completed, the Company brought a claim against Mr Taylor and STL, seeking to recover transferred WIP together with an account of profits on the diverted business, together with a claim for repayment of a director's loan.

41. At first instance, Snowden J held that the claims which the Company sought to bring for WIP and an account of profits were an abuse of process: see [2020] EWHC 2000 (Ch). The Court of Appeal (Newey LJ, with whom Moylan LJ and Sir Nigel Davis agreed) allowed the appeal: the Company's claim was not abusive. In the key passage of the Court of Appeal's decision, Newey LJ indicated that it is to be remembered that "a party is not lightly to be shut out from bringing before the court a genuine cause of action" and that an action is less likely to be held abusive if the parties to it differ from those in earlier litigation: at [47]. It was stressed that the claims which Snowden J held to be abusive were claims by the Company against Mr Taylor and STL, whereas the unfair prejudice petition had been presented by Mr Goodchild, and did not have STL as a respondent. Part of the reasoning behind Snowden J's conclusion at first instance was that, if the Company were allowed to pursue the WIP and account of profit claims, Mr Goodchild would benefit 100% from those claims (via the Company), rather than 50%, because Mr Taylor had been bought out. Snowden J held that to require Mr Taylor to sell his shares for a price that took neither factor into account and then to subject him to the further risk of having to repay both his director's loan account and the other amounts in full would seem to be "inherently penal" (at [102] of Snowden J's decision). But the Court of Appeal said this could be addressed by the Company accepting on appeal that its claim be limited to 50% of their value.

42. Further, the Court of Appeal held that it was far from obvious that it would have been convenient for the WIP and account of profit claims to be pursued in the unfair prejudice proceedings, as this could have been expected to delay, complicate and increase the cost of the unfair prejudice petition proceedings, and the legitimacy of advancing such company claims was "questionable". Finally, the failure to comply with *Aldi* guidelines was said not have mattered: the likelihood was that Barling J would have left the WIP and account of profit claims for the future.

Submissions of the parties in outline

43. In addition to lengthy and detailed skeleton arguments, I heard oral arguments on behalf of the parties before me over two days. In this section, I summarise only the flavour of key submissions made to me, without setting them out in full.

44. TSB stressed that this was a case where not only could PPUK have brought its current claim in the earlier proceedings, but where it should have done so. It was said that PPUK, acting under the majority control of MSB and SSB, had all the necessary knowledge to have brought the claim which PPUK now seeks to bring. And although PPUK was only a nominal respondent to TSB's unfair prejudice petition, there was no procedural difficulty in PPUK advancing a substantive claim against TSB by way of counterclaim or additional claim (together with a claim against Sandeep and Trident by way of a third party claim).

45. It was also submitted that MSB and SSB had failed to comply with the *Aldi* guidelines. Had PPUK complied with the *Aldi* guidelines, appropriate case

management guidelines could have been made by the Court, which would have enabled PPUK's claim to be heard together with the Partnership Claim and the Company Claim. Pursuit of the current claim against TSB in the earlier proceedings would not have added significantly to either the costs or the length of the trial. TSB relied on a schedule, prepared by his solicitors, to demonstrate the extent of the overlap in the factual issues between what MSB and SSB were asserting in their defence to the Company Claim and what is now alleged in PPUK's Particulars of Claim. On the basis of that schedule, it is fair to say that most of the issues now raised in the Particulars of Claim were issues in dispute in the earlier trial, with certain exceptions, noticeably the question of whether Sandeep (assuming he lacked knowledge of TSB's breaches of fiduciary duty) turned a blind eye to the same, and the question of the extent of PPUK's losses suffered as a result of the legal wrongs done to it. It was submitted to me, moreover, that identifying the precise legal label of PPUK's cause of action (such as whether Sandeep is guilty of dishonest assistance) adds little to the underlying factual investigation which took place in the earlier proceedings.

46. In so far as MSB and SSB suggested that either PPUK, or they themselves personally, lacked the funds to enable PPUK to pursue its claim in the earlier proceedings, TSB submitted to me that the evidence filed by MSB and SSB to substantiate this contention was inadequate. Moreover, to allow PPUK's claim to go forward in the present circumstances would lead to significant additional costs being incurred by TSB in re-litigating issues which were before Henry Carr J. Those costs could have been avoided, had PPUK brought its claim in parallel to the Company Claim. In the present proceedings, neither Sandeep nor Trident is bound by any findings made by Henry Carr J. MSB, in his witness

statement filed in response to the two applications for strike out, made it clear that PPUK would not seek to rely on the prior findings from the trial before Henry Carr J as against any of the defendants, including TSB (a position confirmed in correspondence from PPUK's solicitors). This creates a real risk of inconsistent judgments, which only serves to highlight the abuse involved in permitting PPUK's present claim to go forward.

47. Finally, it was strongly submitted on behalf of TSB that he was entitled to believe that the trial in late 2017 (giving rise to the judgment of Henry Carr J in January 2018) would achieve finality in respect of Trident. TSB is being unjustly harassed by these proceedings. In summary, therefore, both TSB's private interests in not being vexed twice and the public interest in ensuring that disproportionate resources are not taken up in investigating what in substance is the same claim are engaged.

48. The other applicant before me, Trident, whilst it was not a party in the previous proceedings, contended that it was also an abuse of process for PPUK's claim to be brought against it. It was submitted that it was now settled law that *Henderson v Henderson* abuse applied not only to those who were parties to previous actions, but also to those who ought to have been parties, citing *Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482 (CA), per Auld LJ at p. 149H; *Aldi v WSP Group* at [26]. It was said that the doctrine was also applicable to protect witnesses who might otherwise be vexed twice where what was effectively the same suit was being re-litigated: *Lo Kai Shui v HSBC International Trustee Ltd* [2021] HKCFI 1539, at paras. 151-157 (a decision of Hong Kong Court of First Instance). It was said that MSB and SSB had, at the

time of the Company Claim, all the evidence for PPUK to bring a successful claim against Trident. Somewhat surprisingly, perhaps, Counsel for Trident submitted to me just how powerful PPUK's case was. It was said that this was a classic example where PPUK had decided not to bring a claim and therefore a clear breach of the *Aldi* guidelines, given that PPUK had not indicated that it intended to bring this claim against Trident (or TSB or Sandeep). It was said that the costs of joining Trident as a party to the original Company Claim would have been less than the costs of these separate proceedings.

49. Regarding the prejudice which Trident might suffer, in her witness statement, Navdeep, one of the two current directors of Trident, explained that Trident would wish to challenge Henry Carr J's findings and that "Trident would not get a fair trial" because a judge could or might not be able to approach matters with an open mind if the judge was aware of the Carr Judgment. Rather contradicting Ms Badyal's evidence, Trident's Counsel submitted that the court ought in any event to be concerned about the risk of inconsistent judgments.

50. Further, it was submitted to me that if the claim were to be struck out against TSB, but not against Trident, Trident was "likely" to bring a contribution claim against TSB, which would have the effect of exposing TSB to re-litigation of the claim against him. Reliance was placed in this context on the Court of Appeal decision in *Gladman Commercial Properties v Fisher Hargreaves Proctors* [2013] EWCA Civ 1466. However, there is no evidence before this Court as to either the likelihood of Trident's bringing a claim for contribution against TSB, or the intention of its directors to do so, in the witness statement filed by Trident's director, Navdeep.

51. For PPUK, it was conceded that, at least theoretically, PPUK could have crossed-claimed against TSB in the context of the Company Claim, although the permission of the Court would need to have been sought. The central point made was that TSB was not "being vexed twice", as PPUK had not sued TSB in the Company Claim. There was therefore nothing abusive in PPUK seeking to recover the losses it had suffered due to the serious breaches of its former director. Particular reliance was placed in this context on the guidance given in the recent decision of *Taylor Goodchild v Taylor*.

52. It was contended that PPUK had several good reasons for not bringing the claim earlier, including the significant complications in terms of legal complexity and cost in seeking to bring a claim for unlawful means conspiracy in the context of a shareholders dispute, the difficulty of funding such a claim (particularly given the undertaking demanded by, and given to, TSB), and the fact that there was no point in bringing such a claim in circumstances where, were TSB to succeed in his primary relief, PPUK would not have continued as a going concern.

53. As to compliance with the *Aldi* guidelines, it was not accepted that they even applied on the facts of the present case, given that PPUK was a purely nominal respondent in the Company Claim. Even if they did apply, it was said that the guidelines would not take matters very far, given that had the question of PPUK's claim been raised earlier, the likelihood is that no court would have insisted on PPUK bringing its claim in the context of the shareholder dispute in any event. This was particularly so, in circumstances where TSB can realistically be assumed to have vociferously opposed such a move, and PPUK would not have wished to, and had reasonable grounds for adopting that

position. In those circumstances, no court would have insisted on PPUK's claim for damages being heard alongside the Company Claim. As for the risk of inconsistent judgments, it was said that this was not objectionable in itself, if the application was not otherwise abusive.

54. Finally, in relation to Trident, the central point made was that it was very hard to see what prejudice Trident would suffer if PPUK's claim, which was described as a strong one by Trident's Counsel, were allowed to proceed.

Discussion

55. The starting point for the analysis of the two applications before me is that it is accepted that PPUK could, procedurally, have brought its claim in the Company Claim. Sections 994 – 996 of the Companies Act 2006 confer a wide jurisdiction on the Court. Relief can be granted to remedy wrongs done to the company, including seeking an order that the respondent pay damages to the company. In such a situation alleged wrongdoers can be made parties to the proceedings, including non-members of the company.

56. Further, MSB and SSB had the necessary knowledge to formulate the claim which PPUK now wishes to bring. I also accept that there is a heavy overlap between the factual matters which MSB and SSB were raising in their amended defence to TSB's petition in the Company Claim and the issues which would need to be decided on PPUK's claim. However, the overlap is not total. The issue as to what loss PPUK had suffered and the overall impact on PPUK by Trident was not a matter raised in the amended defence.

57. Counsel for PPUK submitted to me that it was at best doubtful whether the *Aldi* guidelines applied at all "… in circumstances where PPUK was merely a nominal party to the previous proceedings". However, I will proceed on the basis that the *Aldi* guidelines did apply, because MSB and SSB were the majority shareholders of PPUK, who could have sought the Court's permission to bring a claim on behalf of PPUK, adding in Sandeep and Trident as additional defendants, at a time when they were plainly aware of PPUK's potential claim against the present defendants. To say that the *Aldi* guidelines do not apply in this position would be to adopt an overly narrow approach. I therefore approach this case on the footing that there was at least a formal failure to comply with the *Aldi* guidelines. I have not been referred to any document in which it is suggested that MSB and SSB raised with the Court the issue as to whether PPUK should be bringing any claim it might wish to advance against TSB and/or Sandeep and Trident.

58. However, although PPUK could have brought its claim in the earlier proceedings, and did not raise the issue as to whether that claim should proceed in the Company Claim, this does not necessarily mean that its current claim is abusive. As has been made clear by the Court of Appeal in both *Otkritie Capital v Threadneedle* and *Taylor Goodchild v Taylor*, it does not follow that a failure to comply with the *Aldi* guidelines leads to the automatic consequence that a subsequent claim is abusive. As Arden LJ said in *Otkritie Capital v Threadneedle*, at [8], "the *Aldi* guidelines do not … mandate striking out", but "the judge had to consider all the circumstances of the case, including the seriousness of the non-compliance with the *Aldi* guidelines".

59. In the course of the oral submissions to me, I expressed the view that the parties did not differ in substance on the general principles of law. Rather, the focus was on their application to the facts of the present case. That is not surprising, given that I am required to make a "broad, merits-based judgment which takes account of the public and private interests involved and also take account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before", as Lord Bingham put it in *Johnson v Gore Wood*.

60. It seems to me that the key factors in this case are as follows.

61. First, there is the importance of the general principle that every person with an arguable claim should be able to pursue it in court. This is enshrined in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It is for that reason that, as both TSB and Trident accept, the burden of showing that the bringing of a claim by PPUK against them in the present circumstances is abusive lies on them. If the court is not satisfied that PPUK's attempt to pursue its claim is abusive in light of its previous failure to bring it, the claim cannot be barred from proceeding however desirable it might have been for PPUK to raise it earlier: see per Lord Neuberger of Abbotsbury MR in *Henley v Bloom* [2010] 1 WLR 1770, at [26].

62. Second, PPUK's claim against TSB, Sandeep and Trident has never been adjudicated. The parties to the Company Claim and the present case are different, and the two sets of proceedings involved what are different claims. The Company Claim was a shareholder dispute, where PPUK was a purely

nominal respondent. The focus of the Company Claim was on whether TSB's exclusion from PPUK was justified, and if it was not, should PPUK be wound up. PPUK's present claim involves a claim for damages for wrongs done to it. Counsel for TSB accepted that PPUK on the one hand, and MSB and SSB on the other hand, are not in the strict sense of the word privies: if they were, then TSB would be bound by the findings made by Henry Carr J in the Company Claim when faced with PPUK's claim. What TSB's Counsel did stress was the fact of control of PPUK by MSB and SSB.

63. It also seems to me important that it was TSB who decided to bring the Company Claim. This makes it harder for TSB to say that he is now being unjustly harassed in circumstances when he chose to bring the earlier proceedings. Once again, I refer to what Lord Neuberger said in *Henley v Bloom*, this time at [33], when he pointed out that "… where an action is brought by a claimant who was simply a defendant in an earlier action involving the same parties, it is more difficult to argue that the latter action is an abuse than where the same person was claimant in both actions."

64. Third, regard must be had to the nature of unfair prejudice petitions. Disputes between shareholders frequently involve allegations of breach of fiduciary duty by one or more of the shareholders involved. In many cases, it is sensible case management to keep those disputes separate from whatever claims one or other group of shareholders allege that the company may have against the other side.

65. The recognition that unfair prejudice petitions raise particular issues with regard to case management is supported by the Court of Appeal's reasoning in *Taylor Goodchild v Taylor*. Counsel for both TSB and Trident sought to distinguish the

facts of that case from the present in various ways. They pointed out that, in *Taylor Goodchild v Taylor*, there was an obvious difficulty in the company bringing a claim, given that the shareholders were in a 50-50 deadlock (although Mr Goodchild could have sought permission to bring a derivative claim). The petition in that case was also heard on an expedited basis. There were also complications arising from the fact the single joint expert had, for one reason or another, not addressed all the valuation issues affecting the company's shares. Further, the trial judge in that case, Barling J, expressly indicated that the trial of the petition could not be expected to resolve all the matters in dispute between the parties.

66. I accept that *Taylor Goodchild v Taylor* has certain factual features which distinguish it from the situation before me. However, it does seem to me that the Court of Appeal intended by its judgment to give general guidance, not necessarily limited to the specific individual facts of the case before it: see Newey LJ's opening remarks, at [1], and Sir Nigel Davis's concurring judgment, at [51] and [52(i)]. Whilst I am alive to the points drawn to my attention by Counsel for both TSB and Trident which demonstrate that *Taylor Goodchild v Taylor* is not on all fours with the case before me, I consider that introducing PPUK's claim against TSB, Sandeep and Trident would inevitably have complicated and increased the costs of the Company Claim. What I can, and do, derive from *Taylor Goodchild v Taylor* is that it is far from obvious that pursuing such wider claims in unfair prejudice petitions would be convenient.

67. Fourth, in *Johnson v Gore Wood*, Lord Bingham indicated, at p. 31, that "… there will rarely be a finding of abuse unless the later proceeding involves what

the court regards as unjust harassment of a party". So it is necessary to consider whether TSB is being unjustly harassed.

68. In his witness statement in support of his strike out application, TSB complains that he is being vexed for a second time in relation to substantially the same allegations, and the earlier proceedings were "extremely costly and stressful to me". As I have mentioned above, TSB suffered a heart attack (leading to a triple bypass) during the course of them. His Counsel emphasised to me the stress and cost of TSB having to give evidence a second time, at a time when "he is not getting younger". These are powerful factors to support the allegation of abuse, which I have well in mind. But there are countervailing factors. The primary remedy which TSB was seeking in the Company Claim was the winding up of PPUK (a buy-out order in his favour being the alternative remedy sought). Had that primary relief been granted, PPUK would have ceased trading. This would inevitably have affected the quantum of any claim by PPUK, as a claim for future loss of profit would have been academic. The principal issue, given the relief being sought by TSB, was whether PPUK would continue in existence. In those circumstances, deferring the resolution of any damages claim by PPUK was sensible.

69. Further, it was TSB's solicitors who had sought an undertaking that PPUK's funds should not be spent in connection with legal services connected with any claim or potential claim against either himself, Sandeep or Trident (among other things). TSB now asserts that MSB and SSB could have sought a direction or order varying or releasing MSB and SSB's from their undertakings, to allow PPUK to bring a claim. However, it is highly doubtful that such a variation or

release would have been permitted, without MSB and SSB being able to show a change of circumstances. I also consider that it is virtually certain that TSB would strenuously have opposed such an application, which serves to undermine the contention that this is something which MSB and SSB could or should have done at the time.

70. In this context, much of the submissions before me centred on the contention of MSB and SSB that PPUK did not in any event have sufficient liquidity in 2016 and 2017 to fund its own claim. Logically, that involves considering two matters: first, what would it have cost PPUK to bring a conspiracy claim against TSB, Sandeep and Trident, and secondly, whether PPUK could have met that expense.

71. As to the first question, TSB's submissions to me were that such a claim would have been a relatively simple "bolt on" to the Company Claim. I disagree. PPUK would have had to obtain the Court's permission to issue a claim and have it heard alongside the Company Claim, something which it is far from obvious would have been granted (this is a matter to which I return below). It is likely that PPUK would have had to arrange separate representation in relation to the additional claim, separate that is from the existing legal team who were representing MSB and SSB in the Partnership Claim and the Company Claim. Sandeep and Trident would have doubtless also arranged separate representation (given that TSB was trying to demonstrate his distance at this time from Sandeep and Trident). No doubt, there would have been disputes about disclosure. This would all have been carried out under the threat by TSB to revive his application for the appointment of a receiver. I accept, as pointed

out by TSB's solicitors in correspondence, that there is no evidence of costs estimates as to what such a claim might reasonably have cost PPUK. However, I reject the submission that such a claim would only have cost PPUK perhaps £17,500 plus VAT, as suggested by Mr Kapoor, TSB's solicitor. That seems to me, given the way in which the wider litigation has been fought, to be wholly unrealistic. As Clarke LJ put it in *Dexter v Vlieland-Boddy*, at [51], "More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in efficiency and economy of litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all."

72. As to the second question, PPUK's ability to fund any litigation in its own right in the context of the Company Claim, Counsel for TSB complained that the evidence put forward was nowhere near sufficient for the Court to resolve matters in PPUK's favour. It was submitted that the quality of the evidence would not be considered adequate, for example, in meeting an application for security for costs. I consider that the criticisms of the evidence made on behalf of TSB are largely misplaced. What the evidence shows is that, based on PPUK's monthly end statements, PPUK was either in overdraft or had a fluctuating albeit usually rather small credit balance. PPUK's finances were plainly stretched in having to meet the three brothers' costs of the litigation. Throughout 2016 and 2017, PPUK declared monthly dividends to all three shareholders (including TSB) in order to enable the three brothers to fund their personal legal fees in dealing with their litigation expenses.

73. Criticism is also directed at the fact that MSB in his evidence does not address "… the scope for PPUK to have funded the conspiracy claim by borrowing from an institutional lender or by approaching a third party funder including a specialist litigation funder …". Even if PPUK had the ability to have obtained funding to pursue the litigation, I do not consider that its failure to adduce evidence on this point means that it is fair to conclude that PPUK's claim should be struck out as being an abuse. Given the straitened financial position in which PPUK found itself, it cannot be said that it was unreasonable for PPUK not to seek to raise money by borrowing or from litigation funders to pursue a conspiracy claim. That is particularly so in circumstances where TSB was seeking to have PPUK wound up.

74. A similar point applies, in my view, to the suggestion that it was open to MSB and SSB to have used their own, personal funds to have PPUK bring its claims against TSB and Sandeep and Trident. The evidence of MSB and SSB on this point is that they lacked the funds to do so. The cost of defending TSB's claims against them in the Company Claim (and the Partnership Claim) were paid for by taking cash dividends from PPUK, and by borrowing from family and friends. Again, the quality of the evidence is criticised by TSB. It is said that MSB and SSB have not identified with any particularity what assets are owned by them personally which they might have realised in order to enable PPUK to bring its claims against TSB, Sandeep and Trident.

75. Ultimately, the question of MSB's and SSB's ability to fund any claim by PPUK from their own funds seems to me to be something of a diversion. It is not

explained what obligation two shareholders have to fund litigation on behalf of a company against a third shareholder.

76. At points in his submission on behalf of TSB, Counsel for TSB seemed to be trying to reverse the burden of proof which applies when dealing with an application to strike out for abuse of process. It was submitted that, if a prima facie case of abuse were made out, and a party then sought to justify the "prima facie abuse" by pointing to a lack of funds, then the burden of showing that the lack of funds prevented the bringing of the claim shifted to that party. That approach is directly contrary to the guidance given by Lord Bingham in *Johnson v Gore Wood*, who said at p. 31F:

"… while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. …"

77. On the question of harassment, both TSB and Trident relied heavily on *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 146. In that case, the claimant ("Gladman") had received in the first claim which it had brought very substantial damages of £2.7million pursuant to a settlement agreement entered into once the trial had already begun. Subsequently, Gladman began the second claim against two individuals who had been

witnesses in the first claim, and which would have involved a further trial estimated to last between 20 and 30 days, in circumstances moreover where allowing the second claim to proceed would have exposed the defendants to the first claim to re-litigation if a claim for contribution were to be made against them (which was considered likely). All those factors make it far more obviously abusive than the present case. Here, PPUK has never received any compensation for the wrongs allegedly done to it, and the judicial time to be allocated to the second claim in *Gladman Commercial v Fisher Hargreaves* was far in excess of what is envisaged here (or what has already been expended in trying the Company Claim). *Gladman Commercial v Fisher Hargreaves* is a case of a party seeking a second bite of the cherry. In the present case, PPUK has not had a first bite.

78. TSB also says that it is unfair for him to have to refight issues in the Company Claim. It is accepted on behalf of PPUK that TSB is not bound by the findings of Henry Carr J. I agree with Counsel for MSB and SSB that TSB is not obliged to refight issues regarding his own conduct in setting up Trident in breach of fiduciary duty. If, however, he chooses to run the defence which Henry Carr J found was dishonest, it becomes very hard for him to say that the risk of inconsistent judgments is a reason to conclude that the bringing of PPUK's present claim is an abuse. The choice of how to conduct his defence is a matter for him. In the words of Lord Bingham in *Johnson v Gore Wood*, at p. 27, TSB could, if he chooses, limit the extent to which issues canvassed in the earlier action are to be re-opened.

79. Fifthly, I should consider the impact of the failure to comply with the *Aldi* guidelines. In approaching that question, I ask myself what hypothetically would have happened, had the issue of PPUK's potential claim against TSB, Sandeep and Trident been raised with the court at a directions hearing before trial. TSB is rather vague as to when exactly this should have been raised with the Court. This is no doubt because the undertakings which he was seeking from April 2016 onwards were aimed precisely at preventing PPUK from being able to advance such a claim.

80. Assuming that MSB and SSB had sought to raise the possibility of PPUK bringing such a claim, and had not been prevented from the undertakings given to TSB in doing so, PPUK would have needed the Court's permission to bring the additional claim and to add additional defendants, which it can be presumed would have been opposed by TSB, not least on the ground that seeking to have PPUK bring another claim against him was yet another instance of unfairly prejudicial conduct on the part of MSB and SSB. On the other hand, PPUK had rational commercial reasons for not wishing to pursue its claim at the time. It would have, for example, wished to see the extent of any loss it had suffered as a result of Trident's competition. In those circumstances, it is by no means obvious that the Court would have granted permission for PPUK to bring its own claim.

81. My overall conclusion here is that had PPUK sought to raise the issue of whether it should bring its own claim against TSB, Sandeep and Trident alongside the Company Claim, TSB would have opposed this, and PPUK would have been reluctant to do so (given the issue of delay and increased complexity and costs

in the proceeding). I therefore consider it very doubtful whether any judge at a directions hearing would have insisted on PPUK bringing its claim to run alongside the Company Claim.

82. For that reason, just as in *Taylor Goodchild v Taylor*, I do not think that any failure to comply with the *Aldi* guidelines in this case mattered. The likelihood is that a judge, faced with the decision whether PPUK should be allowed to bring its claim alongside the Company Claim being brought by TSB, would have decided that the shareholder dispute should be resolved first, before any separate consideration should be given to PPUK's claim.

83. In this context, TSB and Trident referred me to various passages in the transcript of closing submissions at the trial before Henry Carr J. It was submitted to me that those passages can be taken as a reasonable proxy as to what the attitude of the Court would have been to an attempt by PPUK to bring its own claim against TSB and Sandeep and Trident in the context of the Company Claim. Henry Carr J certainly raised the issue as to why Trident was not a party to the proceedings. Reference was made to the undertakings, and there was debate between Counsel for TSB, and Counsel for MSB and SSB (who were separately represented at that stage) as to whether the undertakings did effectively prevent PPUK from bringing a claim against Trident, or not. As I read the transcript, Henry Carr J was primarily concerned about the position as to disclosure. He was concerned that serious allegations had been made against TSB and Sandeep in circumstances where he considered that he might not have all the relevant evidence before him, and one way in which that issue might have been addressed was if Trident had been a party before him. The point made by

Counsel for MSB was that the practical effect of the undertakings was that proceedings could not have been brought by PPUK against Trident. The Judge appears to accept this, saying:

"Mr Justice Carr: As a matter of interest, in the light of undertaking 5, how has your side managed to fund its own costs of this action?

Mr Terry: With difficulty and out of the drawings. I mean, it has been a problem, funding.

Mr Justice Carr: These undertakings were given and for better or worse these undertakings were asked for and given.

Mr Terry: Very definitely for the worse, but trying to reverse them once they had been given without there being a change of circumstances was practically impossible.

Mr Justice Carr: Yes, quite.

Mr Terry: In reality, one has been hamstrung in that regard.

Mr Justice Carr: Yes, I understand. That is that."

84. Taken as a whole, I do not read the references to the transcript to which I was taken as indicating any positive finding by Henry Carr J that it was wrong for PPUK not to have brought any claim which it might have against TSB, Sandeep and / or Trident in the earlier proceedings. Indeed, Henry Carr J's final conclusion in his judgment as part of his reasoning for refusing a winding up order was that it would "leave the field clear" for Trident, something which he concluded would be inequitable and unjust.

85. It does seem to me in this context that there is a strong element of the hindsight principle in the submissions being made to me by TSB. TSB knew all about the claim which PPUK might have against him. Indeed, his conduct in 2016 when he sought and obtained the undertakings, was in effect an attempt by him to ensure that PPUK could not bring such a claim against him, or Sandeep, or Trident. It was open for TSB to himself raise the suggestion with the Court that PPUK, if it wished to bring a claim against him, must do so in the context of the Company Claim. That factor again tends to support the view that PPUK's present claim is not an abuse.

86. Sixthly, and finally, I have considered whether it can truly be said that TSB had a legitimate expectation that the earlier trial would result in finality as between himself and PPUK. I do not see how he can say this. As I have explained, there are ongoing proceedings between the parties in relation to the Partnership Claim. But, and more importantly, I do not see any reason for him to have assumed that PPUK was not going to bring a claim against him, in the event that he failed to obtain an order winding up PPUK.

87. In all the circumstances, therefore, I conclude that TSB is not being unjustly harassed by PPUK's claim.

88. I turn now to deal with the position of Trident. It is much more difficult to see what prejudice would be suffered by Trident, which has never had to face a claim by PPUK and was not a party to the Company Claim. This is not a case of abusive and unjust harassment of Trident by PPUK.

89. In so far as Trident relies on the risk of inconsistent judgments, it does not follow that it is an abuse of process for PPUK to now seek to hold Trident liable for

wrongs done by it. Judges decide cases on the basis of the evidence and arguments presented to them. It may be that the judge hearing PPUK's claim against Trident, on the basis of different evidence, might come to a different conclusion. That does not put Trident in a worse position.

90. In the evidence relied on by Trident's director, Navdeep, there is the suggestion that a judge hearing PPUK's claim against Trident might not have an "open mind" and therefore there is a real risk of injustice to Trident. I reject this argument, which was not pursued very forcefully before me, because judges are perfectly able to put to one side findings made in separate proceedings involving different parties.

91. In so far as Trident relies on the public interest in having proceedings tried efficiently and in one go, if at all possible, this only goes so far. As I have sought to explain above, had Trident been sued in the context of the Company Claim, it is a virtual certainty that it would have been separately represented, with the inevitable result that the action in the Company Claim would have been complicated, made more expensive, and longer. PPUK had rational reasons for not bringing the claim against Trident at the time of the Company Claim. As for Trident, one can legitimately ask whether it would have genuinely insisted that it wanted to be sued in the earlier proceedings, had it been asked that question in 2016 and 2017.

92. There is another point in this context that seems significant in the overall balancing exercise I must carry out. No one suggested to me that in the Company Claim the question of the extent of PPUK's loss would have been tried. Rather, it is assumed that the trial would have focussed only on liability.

So the issue of what loss (if any) has been suffered by PPUK as a result of the defendants' alleged conduct would always have been a matter for another day in any event. That is significant, because it shows that the trial of Company Claim could never have been expected to resolve all the issues in dispute between the parties.

93. In summary, therefore, I do not consider that Trident can establish any real prejudice so as to show that the action which PPUK now seeks to bring against it is an abuse.

Conclusion

94. For all these reasons, I have concluded that PPUK is not misusing or abusing the process of the court. It follows that I should dismiss both TSB's and Trident's applications seeking the strike out of PPUK's claim in these proceedings.

95. I will hear Counsel as to what further consequential orders are needed as a result of my judgment on a future date to be agreed.