Neutral Citation Number: [2023] EWHC 218 (Ch)

Royal Courts of Justice,

Rolls Building, Fetter Lane,
London EC4A 1NL
Date 7 February 2023

IN THE HIGH COURT OF JUSTICE **Claim No. BL 2022-000114**
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
CHANCERY DIVISION
BUSINESS LIST

Before

Peter Knox K.C.

(sitting as a Deputy Judge of the High Court)

Between

ZULFIQUR AL-TANVEER HAIDER

Claimant

And

(1) DELMA ENINEERING PROJECTS COMPANY LLC
(2) MABANI DELMA GENERAL CONTRACTING CO LLC
(3) DELMA EMIRATES DIESEL
(4) DELMA EMIRATES GROUP
(5) FALCON ADMINISTRATIVE SERVICES (UK) LIMITED
(6) FALCON GROUP EUROPE LIMITED
(7) FALCON TRADE CORPORATION FZE
(8) FALCON GROUP HOLDINGS (CAYMAN) LIMITED
(9) UMESH MOHANAN GOPALAKRISHNAN
(10) PROTOUCH FZE
(11) AHMED KHALIL KHALED AL MUREIKHY
(12) DIAB AHMED KHALIL KHALED AL MUREIKHY

(13) MARIAM AHMED KHALIL KHALED AL MUREIKHY
(14) AL ANOUD AHMED KHALIL KHALED AL MUREIKHY
(15) SHERIFA AHMED KHALIL KHALED AL MUREIKHY
(16) AL-DHAFRA TRADING ENTERPRISES EST
(17) GLOBAL TRADELINKS LIMITED
(18) COMMODITIES TRADE INTERNATIONAL LIMITED
(19) WEST TRADE INTERNATIONAL LIMITED
(20) ASIA PACIFIC INTERNATIONAL LIMITED

Defendants

MR JOHN MCDONNELL K.C. and MR MARK BALDOCK (instructed by Richard Slade Limited) for the Claimants

The Defendants did not appear and were not represented

Hearing dates: 14 and 16 December 2022 (with further written submissions on 16 December 2022 and 10 January 2023)

Approved Judgment

This judgment was handed down remotely by distribution to the Claimants' representatives by email and by release to the National Archive for publication. The date and time for hand down is deemed to be 10.30 am on 7 February 2023.

Introduction

1. This is an application by the claimant, Mr Zulfiqur Al-Tanveer Haider, for an order that he be permitted to continue a derivative claim in this matter on behalf of the first defendant, Delma Engineering Projects Company LLC, a company incorporated in the United Arab Emirates, against the fifth to twentieth defendants in this matter. I shall refer to Delma Engineering Projects Company LLC as "Delma Engineering". Mr Haider owns 49% of its issued shares. The other 51% are owned by a UAE national, Mr Mohamed Al Mureikhy, who is not himself a party to these proceedings, but is related to those of the same last name who are, that is, the eleventh to fifteenth defendants.

2. The claim form was issued against the twenty defendants on 18 January 2022, and it included a derivative claim for damages for two frauds alleged to have been committed pursuant to a conspiracy to defraud. It sought these damages on behalf both of Delma Engineering, and three other "Delma" companies incorporated in the UAE, who are named as the second to fourth defendants ("Mabani Delma", "Delma Diesel" and "Delma Emirates"). It also claimed damages for Mr Haider in his personal capacity as well. It alleged that the fifth to twentieth defendants were parties

to this conspiracy to defraud, and that they were liable to Mr Haider and the Delma companies (or to one or other of them) in damages in excess of US $350,000,000.

3. After an order granting an extension of time for service of the claim form to 5 August 2022, Mr Haider on that day issued an application seeking permission to continue a derivative claim on behalf of Delma Engineering (but not the other Delma companies), together with (a) an application for a further extension of time in which to serve the claim form and particulars of claim (until after the determination of the application to continue the derivative claim), (b) an application for permission to serve the claim form out of the jurisdiction on all the defendants (save the fifth and sixth, who are based in England), and (c) an application for permission to adduce expert evidence about the law of the UAE.

4. The reason why the derivative claim for the other three Delma companies was dropped was because although it had been agreed, Mr Haider says, that he was to have 50% of the shares in them, he was not registered as the owner of any of them on their "trading licences". Therefore he now accepts that, as a matter of UAE law, he has no right to bring a derivative action on their behalf.

5. On 12 August 2022, Master Clark ordered that "the application" (i.e. all four applications) should be listed for an oral hearing . She also extended the time for serving the claim form until determination of the application to extend, and gave permission to file a draft of the expert evidence on which Mr Haider wished to rely. After further applications, the time for adducing expert evidence about UAE law was extended to 25 November 2022, at which point a completed report was filed, by Professor Chibli Mallat, which I have taken into account in this judgment. According to his report, Professor Mallatt is a practitioner and the principal of Mallatt Law Offices, which operates from Beirut. He is an expert in UAE law, and he is the author of a number of books, including *"Introduction to Middle Eastern Law"* (OUP 2007).

6. The hearing before me took place on 14 December 2022 and the afternoon of 16 December 2022. Pursuant to a note I sent to the Claimant's advisors on 29 December 2022, I received further written submissions on 10 January 2022. At the hearing, Mr John McDonnell K.C., who appeared for Mr Haider together with Mr Mark Baldock, sought not the entire relief claimed in the four applications, but simply, as I have said, an order making Delma Engineering a party to the application for permission to bring a derivative claim on its behalf, with all the other applications to be adjourned to a "second stage" permission hearing.

7. The reason Mr McDonnell sought such a limited order at this hearing, which can be characterised as the "first stage" permission hearing, is that before authorising service of the claim form upon Delma Engineering the court must first consider whether Mr Haider has disclosed a *prima facie* case for giving permission to continue to bring the proposed derivative claim on its behalf. If it appears to the court that there is no such *prima facie* case, then it must dismiss the application: otherwise, it may adjourn the matter and invite the company to give evidence in opposition. Therefore this discrete question, it was said, had to be resolved before any of the other issues raised by the applications ordered by Master Clark to be heard. I accept this, and therefore in this judgment I consider only this question. The balance of the applications will have to be dealt with later.

8. I should add that I am told that pursuant to CPR rule 19.9A(4), Mr Haider's solicitors, Richard Slade & Company, notified Delma Engineering of the claim and the permission application by delivering the claim form, the draft particulars of claim, the application notice and his (Mr Haider's) witness statement in support by hand at the company's registered office in Abu Dhabi on 23 August 2022 (see Mr Richard Slade's third witness statement). The effect of that was to give notice of the application, but it did not make Delma Engineering a party to it, nor did it require it to attend the hearing. Nor did Delma Engineering do so.

9. I set out the facts and the reasoning for my decision in considerably more detail than would be usual on an *ex parte* application, because the claim is complex and gives rise to a number of issues which need to be considered separately. It will also assist, I hope, the defendants to understand what those issues are as they affect them individually.

Summary of Mr Haider's proposed derivative claims

10. The two frauds alleged in the claim form have now been particularised in Mr Haider's draft particulars of claim.

The first alleged fraud

11. The first alleged fraud ("the letter of credit fraud") was one in which Delma Engineering's various banks are said to have been induced, without its authority, to issue letters of credit on its accounts from April 2011 to about March 2015 in sums totalling at least US $58 million, supposedly to pay for the supply of goods to it, which did not exist and were never supplied. Despite this, it is said, the letters of credit were drawn on by the beneficiaries, who were variously the seventeenth to nineteenth defendants ("Global Tradelinks", "Commodities International" and "West Trade"), who in turn paid on sums totalling AED 147,726,489 to the tenth defendant ("Protouch"). This equates to £33,484,324 as at July 2022. Protouch is an entity which was owned and controlled, it is said, by the ninth defendant, Mr Umesh Mohanan Gopalakrishnan ("Mr Mohanan"), who was at all material times Delma Engineering's chief financial officer.

12. The parties responsible for designing and operating the alleged fraud, and in particular for creating the (allegedly) sham documents presented to the banks which caused them to pay out on the letters of credit, are said to have been the fifth to eighth defendants. The fifth and sixth defendants were both incorporated in England, and I shall call them "Falcon Administrative Services" and "Falcon Europe" individually, or "the English Falcon companies" together. The seventh defendant ("Falcon FZE") was incorporated in the UAE, and the eighth ("Falcon Cayman") in the Cayman Islands. These companies, it is said, trade collectively using the style "Falcon Group"; and Falcon Cayman is said to be the ultimate parent of the other three.

13. As a result of the actions of these various parties, Mr Haider says, Delma Engineering's bank accounts were wrongfully debited with the sums paid out under the letters of credit to Global Tradelinks, Commodities International and West Trade

and then paid on to Protouch. It has therefore suffered a loss of at least (a) the £33,484,324 paid to Protouch, plus (b) the fees incurred on the letters of credit in the sterling equivalent as at July 2022 of £3,332,648: in other words, a total of at least £36,816,972 or thereabouts. (See paragraph 94.3 of the draft particulars of claim.)

14. This, Mr Haider adds, was part of a wider alleged letter of credit fraud, under which the total amount wrongfully diverted from Delma Engineering, Mabani Delma and Delma Diesel all in was about £92 million paid to Protouch and £9.8 million in letter of credit fees. But because, as I have said, he cannot bring a derivative claim on behalf of those other Delma companies, that wider claim is not the subject of this application.

The second alleged fraud

15. The second alleged fraud ("the authorised transfer fraud") was one by which a total of AED 12,810,000, or, in sterling, £2,905,372 was transferred to the sixteenth defendant ("ATECO") by three bank transfers made between July 2012 and December 2014, on which Mr Haider's signature, he says, was forged. Although all the fifth to twentieth defendants are said to have been parties to the conspiracy to commit this fraud, the only ones said to have been specifically involved in the transfers are Mr Mohanan; the eleventh defendant ("Ahmed Al Mureikhy"); and the recipient ATECO, which was incorporated in the UAE and which is said to be owned and controlled by the eleventh to fifteenth defendants ("the Al Mureikhy parties").

The issues that arise on the proposed derivative claims

16. By his derivative claim, Mr Haider seeks to restore the sums lost by these alleged frauds to Delma Engineering, because Delma Engineering under those currently controlling it will not do so. In principle, it appears from the decision of Lawrence Collins J in *Konamaneni v. Rolls Royce (India) Ltd* [2002] 1 WLR 1269 at para 44, and from CPR rule 19.9C, that he can bring such a derivative claim in England on its behalf by joining it as a defendant to his claim, and obtaining leave of the court to serve it out of the jurisdiction on the company pursuant to one of the "gateways" set out, pursuant to CPR rule 6.36, in paragraph 3.1 of the Practice Direction 6B.

17. However, as I discuss in more detail below, there are four preconditions to this.
    (1) First, on each alleged fraud, Delma Engineering must have a *prima facie* case in UAE law that there is at least one defendant who is *"related to the Company"* who committed that fraud, that is to say (for the purposes of the present case) a director or an employee of Delma Engineering. If there is no such defendant, there is no basis in UAE law for a derivative claim. Further, it would appear that any other defendant can be sued only if he or she participated in that fraud.
    (2) Second, as a matter of English law, the relevant gateway on which Mr Haider relies is paragraph 3.1(3) of the Practice Direction 6B, i.e. the claim is made against a person on whom the claim form will be served without leave (i.e. one of the English Falcon companies) and *"(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a*

necessary or proper party to that claim". Therefore, on each alleged fraud, he must show that the derivative claim he wishes to make raises a *prima facie* case against one or both of the English Falcon companies that they participated in the director's or employee's wrong. If he doesn't, he will not be able to obtain leave to serve out on Delma Engineering's directors or employees, or on any other foreign defendant, and so the grant of permission to bring such a claim against them, even if justified in the abstract, would be pointless and therefore wrong.

(3) Third, Mr Haider must show that he has *prima facie* satisfied both the relevant English law requirements for bringing a derivative claim, and also the relevant requirements for bringing one under UAE law.

(4) Fourth, he must show that England is the forum conveniens for determination both of the question whether he can bring a derivative claim, and whether the proposed defendants are liable under it (see *Konamaneni* (supra) at paragraph 67, and the 2022 White Book at paras 6HJ.5 to 7).

18. In practice, therefore, the application before me raises the following main issues:

(1) Against which of the defendants if any does Delma Engineering have a *prima facie* case on the alleged letter of credit fraud? In particular, does it have a *prima facie* case against both (a) one or both of the directors or employees it is suing (i.e. Mr Mohanan and Mr Ahmed Al Mureikhy), and (b) one or both of the English Falcon companies, on the basis that they participated in that fraud, so as to satisfy the first two preconditions mentioned above? And if so, has Mr Haider *prima facie* satisfied the third precondition (i.e. the UAE and English law requirements for bringing the claim by way of derivative action)?

(2) Against which of the defendants if any does Delma Engineering have a *prima facie* case on the alleged authorised transfer fraud? In particular, does it have such a case against both (a) Mr Mohanan or Mr Ahmed Al Mureikhy, and (b) one or both of the English Falcon companies, so as to satisfy the first two preconditions mentioned above? And if so, has Mr Haider *prima facie* satisfied the procedural requirements of the third precondition?

(3) In any event, should I nonetheless refuse to grant permission because the fourth precondition is not satisfied, that is to say, on the basis that, as Mr McDonnell accepts, the forum conveniens (a) for deciding whether or not Mr Haider should be allowed to bring a derivative claim and (b) for deciding the substantive merits of Delma Engineering's proposed claim is, on the face of it, the UAE? Or should I allow the application to proceed to a contested hearing, on the basis, as Mr McDonnell contends, that the UAE is not on a proper view the forum conveniens, because there is a real risk that Mr Haider will not have a fair trial in the courts of the UAE on an application for permission to bring a derivative claim there, or, if permission is given, on the substantive trial of such claim against the proposed defendants?

19. Mr McDonnell says that all these questions should be answered in Mr Haider's favour, and that I should allow this application to go to the second stage of the permission process on both claims. In particular, he submits that the threshold I should apply at this first stage is not high, and that as long as there are seriously arguable issues on either claim, they fall to be decided at the second stage of the process.

20. Before I consider these issues, I shall summarise the background and the relevant English and UAE law relating to derivative claims.

The background

21. Mr Haider is a Canadian citizen now residing in the United Kingdom, and is a retired civil engineer. He is the claimant in these proceedings, which were begun by claim form issued on 18 January 2022.

22. According to Mr Haider, he established Delma Engineering in 2002, and its business was to undertake surface and sub-surface level infrastructure projects such as water, drainage, irrigation and sewerage projects. At all material times, as I have said, he owned 49% and Mohamed Al Mureikhy owned the other 51%. Mohamed is the younger son of Mr Khalil Al Mureikhy, and it was Khalil who was Mr Haider's original contact in the Al Mureikhy family. Indeed, it was with Khalil's company, RAPCO, that Delma Engineering had initially operated a joint venture agreement until 2005, after the debts of RAPCO, which had been the largest construction company in the UAE, had been restructured at the instruction of the UAE's ruler.

23. In 2007 to 2009 Mr Haider, along with other members of the Al Mureikhy family, set up the three other "Delma" companies named as the second to fourth defendants in these proceedings, together with another called Delma Emirates General Transport. There were memoranda of understanding agreed in 2008 and 2012, by which he says he agreed with those other members that he was to be a shareholder in various proportions ranging from 20% to 50%, to reflect the understanding that these companies, along with Delma Engineering, were to be a joint venture between him and the Al Mureikhy parties.

24. All these companies collectively were known as the Delma Group. However, although Mr Haider was, he says, the CEO and de facto managing director of all of them, he was not (as he was in the case of Delma Engineering) noted on the necessary trade licences for them as a shareholder. Hence, as I have said, Mr Haider is not able to bring a derivative claim for them under UAE law.

25. In 2008, Mr Haider says, he appointed Mr Mohanan as chief financial officer of the Delma companies, who had been recommended to him for this post by Mr Ahmed Al Mureikhy, Khalil Al Mureikhy's son, who was a director of Delma Engineering. Mr Haider says that Mr Mohanan's father was close to the Al Mureikhy family, and that his role included procuring bank finance for each individual project. Mr Haider's role, by contrast, focussed on winning contracts, but he would be required to sign documents for opening letters of credit.

26. The Delma Group, Mr Haider says, enjoyed great financial success, and they had an order book of well over AED 3 billion, i.e. about £670,000,000.

27. At about the end of 2013 to early 2014, Mr Haider, after hearing rumours on the matter, found that some of Mr Mohanan's staff of chauffeurs were being paid additional amounts in cash over and above those paid to other chauffeurs. He says he reported this to Mr Ahmed Al Mureikhy, who asked for proof that the amounts were

from company funds, and suggested instead that they might be from Mr Mohanan's own money.

28. Around the same time, Mr Haider says he was told by a manager at the Abu Dhabi Commercial Bank that about AED 600 million to AED 700 million had moved in the last year from Delma Group companies to a company called Protouch. In response to his enquiries, the finance departments provided him with documents relating to a bank account opened with Abu Dhabi Commercial Bank in Protouch's name, on which Mr Mohanan was the sole signatory, and with cheques on the account signed by Mr Mohanan. Mr Haider, he says, suspected that Mr Mohanan was working for Mr Ahmed Al Mureikhy.

29. In late 2015, Mr Haider's son led an investigation with three Delma employees, which recovered from the Delma companies' servers a vast number of documents, including emails from Falcon FZE attaching various stock financing agreements and invoices, along with copies of bank statements relating to Protouch's account which, Mr Haider says, showed the operation of the alleged letter of credit fraud. He confronted Mr Ahmed Al Mureikhy, who replied (Mr Haider says) that the Delma venture was his and so he could do what he wanted.

30. At some point, although it is not clear when, Mr Haider also discovered, he says, that his signature had been forged on the three transfers by Delma Engineering to ATECO from July 2012 to December 2014 totalling AED 12,810,000 (the transfers are at pages 307 to 309 of the exhibit to Mr Haider's statement). There was, he says, no commercial purpose to these transfers.

31. Mr Haider sought to negotiate his exit from the Delma companies (which were valued variously between US $300 million to $400 million), and in the course of negotiations, Mr Ahmed Al Mureikhy said he intended to appoint Mr Mohanan as their chief executive officer. In 2016, Mr Ahmed Al Mureikhy made Mr Haider redundant, he says, and terminated the powers of attorney he had had for the Delma companies.

32. After Mr Haider left the business, his signature, he says, was forged on 16 to 18 successive company cheques which were dishonoured, which resulted in his being imprisoned for ten months in a row as each cheque was successively presented and bounced as soon as he obtained bail in relation to the former cheque (issuing dishonoured cheques is a criminal offence in the UAE). But eventually Mr Haider was released, and a police investigation on four of the cheques found that the signature on them was not his (a report is at pages 79 to 85 of the exhibit to his statement). He alleges that it was Mr Ahmed Al Mureikhy who was responsible for forging his signatures, although this appears to be an inference from Mr Ahmed Al Mureikhy's behaviour towards him generally, rather than direct evidence.

33. While he was in prison, Mr Haider's Canadian passport was impounded by the Dubai authorities, and the Canadian embassy equivocated when he asked for a replacement, but eventually he managed to leave Dubai to go to Bangladesh in 2018 using his Bangladeshi passport. After treatment for various disorders resulting, he says, from his imprisonment, he moved to England in 2018 and in February 2020 he was granted UK residency through a tier 1 investment visa.

34. In the meantime, Mr Haider's family instituted criminal proceedings against Mr Ahmed Al Mureikhy (which I discuss below), which are still continuing; and Mr Ahmed Al Mureikhy issued criminal proceedings against Mr Haider alleging that he stole AED 130,000,000 from the Delma companies, but these proceedings have now been dismissed.

35. Mr Haider issued the claim form in this matter on 18 January 2022.

The law on derivative claims

The relevant provisions of English law

The position under the Companies Act 2006 and CPR 19.9A to C

36. The relevant provisions of the Companies Act 2006 which govern the bringing of derivative claims are s. 260 to 265, but they do not in and of themselves apply to companies, such as Delma Engineering, which are incorporated outside England and Wales. However, they are to an extent incorporated for such companies by CPR 19.9C, which provides:

"

(1) This rule sets out the procedure where –

(a) either –

(i) a body corporate to which Chapter I of Part 11 of the Companies Act 2006 does not apply; or

(ii) a trade union,

is alleged to be entitled to a remedy; and

(b) either –

(i) a claim is made by a member for it to be given that remedy; or

(ii) [a member seeks to take over a claim already started].

(2) The member who starts, or seeks to take over, the claim must apply to the court for permission to continue the claim.

(3) [The application must be made by application notice]……

(4) The procedure for applications in relation to companies under section 261, 262 or 264 (as the case requires) of the Companies Act 2006 applies to the permission application as if the body corporate or trade union were a company.

(5) Rules 19.9A (except for paragraph (1)) and 19.9B apply to the permission application as if the body corporate or trade union were a company."

37. In my judgment (as currently advised), it follows from this that although the requirements of s.261, 262 and 264 of the Companies Act, and rules 19.9A (save paragraph (1)) and 19.9B apply to applications in relation to foreign companies, those in s.260 and 263 do not, because they are excluded from the applicable provisions by rule 19.9C(4).

38. Further, s.262 and s.264 have no application, because they apply to taking over claims already brought by the company or a member. Therefore, the relevant provision is s.261, subsection (2) of which provides:

    "If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission (or leave) the court –

    (a) must dismiss the application, and

    (b) make any consequential order it considers appropriate."

39. Further, by s.261(4), if the court does not dismiss the application, then it may give directions for evidence to be provided by the company (i.e. Delma Engineering) and adjourn the proceedings for that purpose; and on hearing the adjourned application (i.e. at the second stage) it may give or refuse permission, or adjourn it further with appropriate directions (s.261(5)). This two stage scheme is spelt out in more detail in CPR 19.9A(9) and (10), which provide that the court considers the application first *ex parte*, either on paper, or (as here) at an oral hearing; and then, if permission is granted, at a further hearing if the company contests the claim.

40. However, apart from that, it seems to me, as currently advised, that in assessing whether there is a *prima facie* case as required by s.261(2), I am not obliged as a matter of English law to take into account the various factors mentioned in s.260 and s.263 of the Companies Act, because, as I have said, those sections are excluded from application by CPR rule 19.9C(4).

41. Further, it seems to me, as currently advised, that this is understandable, because the requirements of foreign law for bringing a derivative action may well be different from those of English law, as they appear to be in the case of UAE law which I discuss below. Indeed, this is a point adverted to in *Konamaneni v. Rolls Royce (India) Ltd* (supra). In that case, a derivative claim was sought to be brought in England on behalf of a company incorporated in India, and Indian law on bringing derivative actions followed English case law. But at paragraph 50 Lawrence Collins J noted that if this had not been the case, then he would have held that the minority shareholders' rights to bring a derivative claim were governed by the law of the place of incorporation, rather than of England.

What does the prima facie test in s.260(2) require the court to do at the first permission stage?

42. Before turning to the requirements of UAE law for bringing a derivative claim, I should say something about the *"prima facie"* test which I have to apply at this first permission stage set out in s.260(2). I do so, because there are a number of different elements to this application, Mr Haider's evidence appears to be stronger on some than on others, and different judges might reasonably take different views on the evidence on which he relies.

43. In *Bhullar v. Bhullar* [2016] B.C.C. 134, at paragraphs 20 to 24, Morgan J discussed what this phrase meant in the context of what the court should do on a contested application for permission to bring a "double derivative" claim (i.e. a claim by a member of a subsidiary to enforce a parent company's rights). He noted that at

common law (which governed that type of claim, as it was not covered by the 2006 Act) the standard that there must be a *"prima facie case"* for allowing a derivative claim to be brought had been established by the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No. 2)* [1982] Ch. 2014 at 221H to 222B.

44. He went on to discuss what this phrase means at paragraphs 20 to 22, in which he noted the criticisms levelled at it by Lord Diplock in *American Cyanamid v. Ethicon Ltd* [1975] AC at p404F, (it may in some contexts *"be an elusive concept"*) and by Lord Reid in *R. v. Governor of Brixton Prison, Ex p. Armah* [1968] A.C. 192 at 299.

    > "That phrase is not self-explanatory: what is it that the case shows prima facie or at first sight? Is it that on the evidence as it stands at the moment the accused would seem to be guilty, or is it that the evidence contains allegations set out in such a way that further investigation is justified? I would hope that a less ambiguous phrase will be used especially in any future legislation."

45. Morgan J also noted the view expressed by David Richards J (as he then was) at paragraph 57 of *Abouraya v. Sigmund* [2014] EWHC 277, again in the context of the a contested application for permission to bring a double derivative claim.

    > "The first requirement is that the claimant must demonstrate a prima facie case that the company Triangle UK is entitled to the relief claimed. A prima face case is a higher test than a seriously arguable case and I take it to mean a case that, in the absence of an answer by the defendant, would entitle the claimant to judgment. In considering, whether the claimant has shown a prima facie case, the court will have regard to the totality of the evidence placed before it on the application."

46. David Richards J went on to consider the merits of Triangle UK's proposed claims, and concluded that *"Looked at exclusively from the point of view of Triangle UK"* (paragraph 53), and *"viewed solely from the point of view of Triangle UK"* (paragraph 54), there was a prima facie case on both of them for relief against the defendant (who was a co-shareholder).

47. Morgan J likewise concluded, at paragraph 25 of *Bhullar*, that on a contested application at which there was conflicting evidence, such as the one before him, it would be open to the court to hold that there was a *prima facie* case for granting permission because it would be wrong to assume that the defendant's evidence would be accepted at trial and indeed it might not be possible to predict with any degree of confidence whether it would be.

48. At this first stage, I do not of course have any evidence from the defendants, but by analogy with the reasoning in *Abouraya* and *Bhullar*, but adapted to the different nature of a first stage permission hearing, I interpret the phrase *"prima facie"* case to require me to consider whether the evidence is such as would entitle Mr Haider to the relief he claims if it were uncontradicted and if it were considered from his point of view, that is to say, taking it at its reasonable highest. I do not interpret it to mean that I should go further, and myself decide, at this first stage, whether or not it should be taken at its highest: that is a matter for the second stage. This applies to both parts of the application, i.e. (a) are the requirements for bringing a derivative claim satisfied, and (b) does such a claim raise a sufficient case against the defendant.

49. I say this for the following reasons:
    (1) It seems unlikely, as a matter of common sense, that the draftsman intended that a court, at the first stage and on an *ex parte* basis, should have to assess anything more than what is required by the test I have suggested. Such applications can involve considerable amounts of material both on whether it is appropriate to allow the shareholder to bring a claim at all, and (as in this case) on the merits of the proposed claims.
    (2) To go further would be undesirable. First, if the application was not dismissed, the company and any defendant at the second stage would understandably have the impression that the judge had already formed a concluded view on the overall strength of the evidence against it; and second, it would likely mean in practice not just that the company had the option of putting in evidence in response (which is what s.261, 262 and 264 provide), but that it would have to do so.

50. In addition, I note that in *Lawrence Ewan McGaughey and Marin Davies v. University Superannuation Scheme Ltd* [2020] EWHC 565, Leech J, at a renewed oral hearing for first stage permission under s.262 of the 2006 Act, said at paragraph 12 that *"the test at the first threshold stage is not a high one"*; and at paragraph 13 that, in considering the requirements of s.263 and 264 (which applied in that case), he had to do so *"bearing in mind that the [company] and the directors will have a full opportunity to re-argue the question at the inter partes hearing"*. Further, he eschewed expressing any view of the merits having found that the applicant was *prima facie* entitled to invoke s.260 to s.264 of the Act (see paragraphs 17 to 19). Although he did not expressly consider the meaning of *"prima facie case"* in these sections, a lower test than that which applies on contested hearings appears to be implicit in his approach.

Practice Direction 6B

51. As I have said, in order for any claim, and therefore any derivative claim, to be brought against any of the defendants, there must be a *"real issue which it is reasonable for the court to try"* against an English defendant under paragraph 3.1.3 of Practice Direction 6B. However, I do not see this as imposing a higher test than the *prima facie* test I have adopted above for the bringing of a derivative claim. Further, to the extent that it imposes a lower test, this is immaterial. If the underlying claim itself does not satisfy the *prima facie* test on the merits which I have adopted, it is difficult to see how there can nonetheless be a *prima facie* case for granting permission to bring it as a derivative claim. I shall therefore consider all the issues below by reference to that *"prima facie"* case test I have described above.

The law of the UAE on derivative claims

52. This is set out in Professor Mallatt's report of 22 November 2022.

53. According to this report, derivative claims are acknowledged in the UAE under Article 167 of the Law on Commercial Companies (the "LCC"). This provides in Article 167(1) that:

"1. A shareholder or a group of shareholders may file a lawsuit before the competent court in their name and on behalf of the Company against any party related to the Company for damages suffered by the Company, and resulting from the related party's violation of his obligations towards the Company according to this Law or any other law, subject to the following conditions:

(a) The existence of damages or violation of an obligation suffered by the Company;
(b) The plaintiff is a shareholder in the Company at the time the acts subject matter of the lawsuit, were committed …
(c) The plaintiff … holds shares representing at least 10% of the Company's capital.
(d) The plaintiff has submitted a written request to the Company's Board of Directors to file the lawsuit and the reasons therefore, and the Board either rejected said request or failed to respond thereto within thirty days.
(e) The case documents include a copy of the request referred to in the preceding paragraph of this article, and details of all other efforts urging the Company to file the complaint itself."

54. Articles 167(2) and (3) require that any settlement against the defendant be approved by the court, and that any compensation be paid to the company.

55. The Professor adds that in addition shareholders (unlike in English law) have a direct personal right to sue parties related to the company for losses caused by wrongs against the company under Article 168.

56. As for the phrase a *"party related to the Company"*, this is defined by Article 1 of ministerial decision 585 of year 2018 (Governance of Private Joint Stock Companies) as:

> "**Related Parties:** chairman and members of the board, members of the senior executive management of the company and its employees, companies in which any of these persons contributes to at least 30% of the capital, as well as the parent, subsidiary, sister or allied companies of the joint stock company."

57. On reviewing the papers for my judgment, I was concerned that this appeared to mean that Mr Haider had no right to bring a derivative claim against anyone other than a related party within this definition, and that therefore he could not join to any such claim as further defendants the English Falcon companies, as they are plainly not related parties. Further, the way Professor Mallatt expressed himself in other passages appeared to lead to the same conclusion (see, for instance, paragraphs 69.1, 75 to 79 and 138.1 of his report).

58. However, in response to my note of 29 December 2022, Mr McDonnell K.C. contended that, as long as there was a related party who could be sued by way of derivative claim, Mr Haider could join to that claim an alleged participant in that party's wrongdoing such as the Falcon defendants, on the basis of Article 291 of the Civil Transactions Law ("CTL"), which provides:

> "**Plurality of persons responsible for the harmful act**
> If there are several persons responsible for a harmful act, each of them is responsible for his share in the harm. The judge may decide their equal shares in liability, or their joint liability or liability in solidum between them."

59. Further:
    (1) In answer to the question whether the defendants who participated in the alleged wrongful acts were liable pursuant to this Article, the Professor said that under the facts as presented to him, *"the obvious parties named in the Claim as authors of the harm are the Fifth to Twentieth Defendants"* (see paragraph 110 of his report). He also approved, in paragraph 137, the way the matter is set out in the draft particulars of claim, which alleges that parties other than related ones can be joined to the proceedings for acts done together with them (see paragraphs 59 to 63). Although paragraph 58 of the draft particulars, on which these paragraphs depend, misstates the wording of Article 167 by missing out the words *"related to the Company"*, it seems to me, as currently advised, that his approval of the conclusion still stands.
    (2) It would, on the face of it, seem odd that a derivative action which can be brought against a related party could not also be bought at the same time against a party who had deliberately assisted or conspired with that related party so as to bring about the same damage to the company, given the broad terms of Article 291.

60. I therefore conclude, for the purposes of this first stage, that, on a reasonable interpretation of UAE law, there is *prima facie* case that non-related parties can be joined to the derivative claim to the extent that they can be said to have participated in the wrongdoing committed by one or more of the "related parties".

The first issue: against which defendants, if any, does Mr Haider have a prima facie claim on the alleged letter of credit fraud? In particular, does his claim prima facie satisfy the first three preconditions?

How did the alleged letter of credit fraud work?

61. To consider this issue properly, it is necessary to say a little more about how the alleged letter of credit fraud operated, which was as follows.

62. **First**, Falcon FZE would send to Mr Mohanan (i.e. Delma Engineering's chief financial officer), an email from an "ftcfze" address which attached a series of documents that it said were required for the letter of credit which was said to have been already issued by the bank, and which was to be drawn upon by one of Global Tradelinks, Commodities International or West Trade.

63. For example, Mr Haider's witness statement exhibits an email from Falcon FZE to Mr Mohanan sent at 11.30 am on 29 October 2014, which attached the following documents, which it said were *"for"* a letter of credit issued by the Abu Dhabi Islamic Bank on 21 October 2014 in the sum of US $4,097,842.50 in favour of Commodities International:
    (1) An unsigned pre-delivery inspection certificate dated 26 October 2014, to be printed up (the email said) on Delma Engineering headed paper, by which Delma Engineering certified (or purported to certify) to Commodities International that it had examined 7,383.50 metric tons of bitumen 60/70 and had found them to be in good condition and ready for shipment to it, and by which it authorised Commodities International to proceed with this as soon as possible;

(2) A stock finance agreement dated 28 October 2014 between Commodities International and Delma Engineering, under which Delma Engineering agreed to sell the bitumen to Commodities International at the sale price of US $3,817,254, and to buy it back on an unspecified date at the repurchase price of US $4,097,842.50, which it would pay by using the funds in the letter of credit;

(3) An invoice from Delma Engineering, as seller, to Commodities International as buyer dated 28 October 2014, by which it invoiced the latter in the sum of US $3,817,254 (i.e. the sale price in the stock finance agreement), saying it had the goods in its possession with good title, but, importantly adding: *"Please make transfer/cheque in the name of: "PROTOUCH FZE"*;

(4) An undated invoice from Commercial International to Delma International, by which it sold (or purported to sell) the same goods back, but now at the repurchase price of US $4,097,842.50, with delivery taking place on 28 October 2014;

(5) A certificate of receipt of the same goods, also dated 28 October 2014, again to be printed (the email said) on Delma Engineering headed paper, by which Delma Engineering certified (or purported to certify) receipt of the same goods in good order at its warehouse in Abu Dhabi from (it was said) the supplier's warehouse in Dubai; and by which it acknowledged that their value was US $4,097,842.50 (i.e. the repurchase price).

64. The email went on to say that the amount of the letter of credit *"utilized"* was the said sum of US $4,097,842.50, less charges at 8.5% for 290 days (US $280,588.38), making a net sum of US $3,817,254.12, or *"Net available in AED @ 3.67 AED 14,009,322.62"*. This net sum, it will be seen, is the same as the sum at which Delma Engineering was to sell the goods to Commodities International in the stock finance agreement and for which it invoiced (or purported to invoice) it. It also asked Mr Mohanan to obtain the required signatures, which, in the case of the pre-delivery inspection certificate and the certificate of receipt of goods was to be Mr Haider's signature. (As I understand it, his case is that in fact he never signed any such documents, or at least if he did, he signed them when he was not aware that they were part of a fraud: see paragraphs 68 to 70 and 96 of his statement).

65. **Second**, Mr Haider says that the parties to the fraud, in the instance above, would have put it into effect as follows:

(1) The relevant documents were, he infers, signed on the parties' behalf (i.e. Delma Engineering and Commodities International) and presented to the bank.

(2) On receipt of the documents, the bank paid Commodities International most or all of the sum payable under the letter of credit.

(3) Commodities International on 9 November 2014 then paid over to Protouch from this sum three sums totalling AED 14,009.322 (made up of AED 4,535,398, AED 4,673,076 and AED 4,050,848), as evidenced by a copy of what is said to be Protouch's bank statement for that date, exhibited to Mr Haider's statement. This sum of AED 14,009,322 corresponds exactly to the sum of US $3,817,254.12 in the AED equivalent given in the 29 October 2014 email, and matches the sale price (or purported sale price) at which Commodities International had agreed to buy the goods from Delma Engineering under the sale and repurchase agreement, and which Delma Engineering had directed it (or purported to direct it), by its said invoice, to pay to Protouch.

(4) Therefore, Delma Engineering's account with the bank was debited with the sum for which the letter of credit had been opened, including all charges, in return for

no benefit to Delma Engineering, but for the eventual benefit of Protouch. There is no direct evidence as to the amount by which, if any, Commodities International is said to have benefited.

66. A number of other examples of similar emails and attachments from Falcon FZE to Mr Mohanan are exhibited to Mr Haider's witness statement, both for letters of credit issued by Delma Engineering, and for letters of credit issued by Mabani Delma and Delma Diesel. A schedule at annex D of the draft particulars identifies a total of 32 such transactions from 16 March 2011 to 20 February 2015 for Delma Engineering alone.

The letter of credit claims against Mr Mohanan and Falcon FZE

67. In my judgment, if these facts are correct – and I emphasise if they are correct - Delma Engineering has a *prima facie* case against Mr Mohanan and Falcon FZE on the basis, as alleged in paragraph 72.2 of the draft particulars of claim, that they presented the sale and repurchase arrangements to it as bona fide transactions when they knew they were not. On this basis, according to paragraph 91 of Professor Mallatt's report, they are both liable in deceit contrary to Article 285 of the LCC, which provides that if a person *"deceives another, he must compensate for the harm resulting from the deception"*.

68. Of course, Mr Mohanan, to whom the emails and attachments were addressed, would have known (on Mr Haider's case) that they were not *bona fide*, but Mr Haider's evidence is that he found these documents amongst Delma Engineering's records, and so it appears to be a reasonable inference, on the face of it, that the paperwork was passed on to others at Delma Engineering who took it at face value, and who were misled by it into believing that the transactions were bona fide, with the result that it paid out on the letters of credit (and continuously paid out on them for a number of years) in return for no consideration.

69. Further, on this basis, there is a *prima facie* case that Mr Mohanan and Falcon FZE are both liable for wrongful participation under Article 291 recited above, as alleged in paragraph 93 of the draft particulars of claim, which says that *"As a result of the Fifth to Twentieth Defendants' participation in the Letter of Credit Fraud as particularised above, each of them is jointly liable for the harmful acts particularised above perpetrated on the Claimant and/or the Delma Companies"*.

70. Finally, on this basis, there is a *prima facie* case that Mr Mohanan acted in breach of his fiduciary obligations under Article 22 of Federal Law no. 2 on Commercial Companies (to manage the company with diligence), and is also liable to it for acts of fraud and misuse of powers, under Article 111 of Federal Law no. 8 of 1984 on Commercial Companies, as set out in paragraphs 87 to 90.3 of the draft particulars, and in paragraphs 104 to 109 of Professor Mallatt's report.

71. The consequence of this conclusion is that the first of the preconditions to bringing a derivative claim is *prima facie* satisfied, that is to say, there is claim against one of

Delma Engineering's directors or employees (i.e. Mr Mohanan), as required by Article 167 of the LCC.

The letter of credit claim against Protouch

72. Further, if the above facts are correct, there is a *prima facie* case against Protouch, on the basis that it is liable in unjust enrichment, as alleged in paragraphs 72.3 and 81 to 86 of the draft particulars of claim, contrary to Article 318 (which forbids a person *"to take the money of another person without a legitimate reason"*, and requires restoration if he does, as does Article 324), as further explained in paragraphs 100 to 102 of Professor Mallatt's report. And as in the case of Mr Mohanan and Falcon FZE, there is a *prima facie* case, if these facts are correct, that Protouch is liable under Article 291 for wrongful participation in all of Mr Mohanan's alleged wrongs (and Falcon FZE's).

73. I note that paragraphs 73 to 80 of the draft particulars of claim plead that the same facts give rise to a claim in unlawful usurpation of Delma Engineering's property, contrary to Articles 304, 306, 308, 311 and 312 of the LCC, but Professor Mallatt expresses doubt on this claim, because Article 304 requires the usurpation to be overt, rather than surreptitious (see paragraphs 93.5 and 94), and it is not clear that Article 312 (which provides that an act which is *"equivalent"* to usurpation) would apply either in the light of the texts on which he relies. That said, he concludes that it is *"arguable"* that there has been *"near usurpation"*. In the circumstances, given that there is a *prima facie* claim based on the same facts in unjust enrichment, I do not think it would be right to prevent Mr Haider from pursuing this alternative way of putting the matter at this first stage on behalf of the company, if the other requirements for the claim are satisfied.

The letter of credit claims against the other Falcon companies

74. Further, as to the other three Falcon companies (i.e. apart from Falcon FZE), my conclusions are as follows.

Falcon Administrative Services

75. First, although I required assistance on this point from Mr McDonnell after the initial hearing, I am satisfied that there is likewise a *prima facie* case against Falcon Administrative Services that it participated in Falcon FZE's alleged deceit and thereby in Mr Mohanan's alleged wrongs, for the following reasons:
    (1) Although all the relevant emails and attachments appear to have been sent by Falcon FZE, each of the stock finance agreements exhibited to Mr Haider's statement provides that the address for all communications to the counterparty (whether Global Tradelinks, Commodities International or West Trade) is *"at the offices of its administrative agent, [Falcon Administrative Services], 17th Floor, 30 St Mary Axe, London, EC3A 8BF Attention: Mr. Neill Way/Mr Will Nagle"* followed by a UK fax number and a ".com" email address for Mr Way. Further, the agreements have an English jurisdiction and choice of law clause; the alleged

purchaser is sometimes given the abbreviation *"Falcon"* in the stock purchase agreements; and Mr Nagle appears to have been a director of Falcon Administrative Services, according to Companies House records, until 30 September 2020.

(2) On the face of it, it appears unlikely that Falcon FZE would have provided for this role for Falcon Administrative Services or Mr Way or Mr Nagle, or have implicitly associated it with the counterparty by calling it "Falcon" in the stock financing agreements, without their agreement or telling them what the overall nature of the arrangements was, and in particular, that the monies raised would be paid to Protouch not Delma Engineering, so as to give it knowledge of the wrongdoing.

(3) Hence, on current evidence, I conclude that there is a *prima facie c*ase, in the sense I have described, that Falcon Administrative Services, participated in Mr Mohanan's and Falcon FZE's alleged wrongs, so as to make it liable under Article 291.

76. I do not, however, find that there is a *prima facie* case that Falcon Administrative Services itself deceived Delma Engineering, contrary to Article 285. On the evidence, the act of deceit, if there was one, was by Falcon FZE sending the relevant emails, and Mr Mohanan passing them on to Delma Engineering in such a way as to suggest the transaction was genuine.

The position of Falcon Cayman

77. Further, although there is no direct evidence that Falcon Cayman played any role in the alleged letter of credit fraud, there is in my judgment a *prima facie* case that as parent of both Falcon FZE and Falcon Administrative Services it knew about the alleged wrongdoing and authorised them to participate in it, given the large sums involved (about US $58 million in relation to Delma Engineering alone), and the length of time over which it is alleged to have taken place (almost four years). Further, Falcon Administrative Services' most recent annual report indicates that the group is a closely knit and privately owned. On the face of it therefore, and I emphasise on the face of it, it would be surprising if two of its subsidiaries participated in the alleged wrongdoing without its permission. Therefore, as with Falcon Administrative Services, I find that there is a *prima facie* case against Falcon Cayman for wrongful participation in Mr Mohanan's and Falcon FZE's alleged wrongs contrary to Article 291, but no more.

The position of Falcon Europe

78. However, I am not satisfied that there is a *prima facie* case of any relevant wrongdoing by Falcon Europe. Mr McDonnell points out that the disclaimer at the end of the Falcon FZE's emails is made on behalf of "Falcon Group"; that the writers of the Falcon FZE emails are identified at the end as writing for *"Operations, Falcon Group, Dubai, UAE"*; and that Falcon Administrative Services' most recent annual report indicates that the group is a closely knit and privately owned.

79. However, in my judgment, these things, whether individually or collectively, are not a sufficient basis to justify the inference that any of Falcon Europe's officers or

employees knew about or had anything to do with the scheme. Nor, given the absence of anything specific (unlike in Falcon Administrative Services' case) does the choice of law or jurisdiction clause assist Mr Haider's argument. No doubt, the allegation against Falcon Europe might justify further investigation, but on the test which I have adopted that is an insufficient basis for holding that there is a *prima facie* case against it.

80. Notwithstanding my conclusion on Falcon Europe, it follows from my conclusion on Falcon Administrative Services that *prima facie* the second of the two preconditions for bringing a derivative claim has been satisfied, i.e. the existence of an English defendant who can be joined as a participant in the wrongdoing alleged against Mr Mohanan.

The letter of credit claim against Global Tradelinks, Commodities International, West Trade and Asia Pacific International Limited

81. The cause of action pleaded on behalf of Delma Engineering against these entities is in paragraph 93 of the draft particulars of claim, i.e. they participated in the wrongdoing alleged against others and are therefore liable under Article 291. The nature of that participation is set out in paragraphs 47 to 49 of the draft particulars of claim and is summarised above, i.e. they received the monies paid under the letters of credit and paid them over to Protouch. Further, on the face of it, it is a reasonable inference, absent evidence to the contrary, that they realised that they were diverting monies to Protouch when there was no basis for doing so, so as to act wrongfully within Article 283 of the CTL referred to at paragraph 113 of Professor Mallatt's report.

82. On this basis, I find that there is a *prima facie* case against Global Tradelinks, Commodities International and West Trade, because on the facts pleaded and on the evidence, they participated in the wrongdoing against Delma Engineering in the way I have described, and because of what Professor Mallatt says at paragraph 110 of his report (i.e. the fifth to twentieth defendants would be liable under Article 291 of the CTL if the facts alleged are correct). I do not, however, find that there is a *prima facie* case against the twentieth defendant, Asia Pacific International Ltd, because there is no specific allegation or evidence that it participated in any fraud against Delma Engineering (see paragraph 47.2 and annex D of the draft particulars of claim, which identifies the entities alleged to have received and passed on the monies in the letter of credit fraud, which do not include this last company).

The letter of credit claim against Mr Ahmed Al Mureikhy

The position of Mr Ahmed Al Mureikhy

83. Paragraph 72 of the draft particulars of claim alleges that in addition to Mr Mohanan and the "Falcon Group", Mr Ahmed Al Mureikhy also deceived Delma Engineering by the letter of credit fraud. Further, paragraphs 87 to 90 allege that like Mr Mohanan he too acted in breach of his fiduciary duty under Article 22 of the 2015 Commercial Companies Law and under Article 111 of the Federal Law no. 8 of 1984 on Commercial Companies, and paragraph 93 alleges that he is also liable under Article

291. However, no particulars are given of any direct involvement in the fraud either in the draft particulars of claim or in Mr Haider's witness statement.

84. However, I am satisfied that there is a *prima facie* case that Mr Ahmed Al Mureikhy did, at least to an extent, participate in the fraud, so as to be liable under these two articles for breach of fiduciary duty, and under Article 291 for assisting in Mr Mohanan's and Falcon FZE's alleged wrongdoing. This is because on the evidence so far, (a) it was he who recommended Mr Mohanan to Mr Haider as the Chief Financial Officer; (b) he appears to have protected Mr Mohanan when Mr Haider first raised the question of the chauffeurs' bonuses; (c) he asserted, when confronted by Mr Haider about his discoveries, that the Delma venture was his and not Mr Haider's; (d) he made Mr Haider redundant after his questions about Mr Mohanan and Protouch; and (e) he then appointed (or said he was going to appoint) Mr Mohanan the chief executive officer of the Delma companies, notwithstanding the allegations against him.

85. Further, Mr Ahmed Al Mureikhy is frequently named in the relevant documents in the alleged letter of credit fraud as a signatory or co-signatory with Mr Haider, or as the contact address for Delma Engineering or Delma Mabani, or, in one case, as the individual whose signature was required to authorise payment to Protouch instead of Delma Mabani who had sold the goods. These matters, unexplained, also tend to support the *prima facie* case to the extent I have indicated. (See, for instance, pages 107, 183, 187, 191, 202, 221, 225 and 226 of the exhibit to Mr Haider's statement.)

The position of ATECO

86. As for ATECO, there is a shipment (or alleged shipment) that is said to have been part of the alleged letter of credit fraud, in relation to which Falcon FZE emailed Mr Mohanan on 8 April 2014 with a replacement sales invoice for Delma Engineering to issue to Commodities International in the sum of US $3,769,664 for 7,380 MT of bitumen 60/70. This invoice required Commodities International to pay the sum of US $3,405,995 to ATECO, and the balance of US $363,669 to Protouch, with the result that just this smaller sum landed up in Protouch's bank account (in the AED equivalent of 1,334,665), as can be seen from pages 131 to 135 of exhibit ZAT 1 to Mr Haider's statement. This suggests that the balance of US $3,405,995 went to ATECO, which in turn gives rise, as I find, to a *prima facie* case that ATECO participated in the alleged letter of credit fraud (and supports the same point against Mr Ahmed Al Mureikhy, as the evidence is that ATECO was owned and controlled by the Al Mureikhy family). This point is not expressly pleaded in the draft particulars of claim or referred to in Mr Haider's statement itself, but as it appears from the documents I am prepared, at least at this stage, to take it into account.

The other members of the Al Mureikhy family

87. However, in my judgment, there is no *prima facie* case on the alleged letter of credit fraud against any of the other members of the Al Mureikhy family (i.e. the twelfth to the fifteenth defendants), either in deceit (as alleged in paragraph 72.2 of the draft particulars of claim), or for alleged participation contrary to Article 291 (as alleged in paragraph 93 of the draft particulars). No specific facts are pleaded against them, and

the mere fact that ATECO appears to have benefited from the alleged letter of credit fraud, and indeed, if the draft particulars of claim are correct, from the alleged authorised transfer fraud, is not a sufficient foundation without more to found a *prima facie* case that they personally participated in either of them.

Limitation

88. A point on which I sought Mr McDonnell's assistance after the initial hearing was the limitation position, given that the alleged letter of credit frauds had been committed some time ago, the last being on 20 February 2015.

89. Mr McDonnell accepts that UAE law would govern Delma Engineering's claims, and therefore the relevant limitation period, under s.1 of the Foreign Limitation Periods Act 1984, is that which would be applied by UAE law. Professor Mallatt's evidence is that under Article 298(1) of the Civil Transactions Law:

    "An action for damages arising from an unlawful act is prescribed after three years from the date upon which the victim knew of the injury and the identity of the person who was responsible."

90. However, the Professor says in paragraph 128 of his report that this provision *"may however be stayed"* under the next paragraph of Article 298(2) which provides:

    "Where a claim arises out of a criminal offense and the hearing of the penal action is still pending after the lapse of the periods above-mentioned in the preceding clause, the action for damages may still be heard".

91. Although the point is not put as clearly as it might be in Mr Haider's statement, it appears from paragraph 113 that criminal proceedings arising out of the letter of credit fraud were instituted by Mr Haider's wife and his son in the UAE in 2017, which complained *"the Delma companies and I had been defrauded in the sum of AED 900,000,000"*, the defendants being Ahmed Al Mureikhy, Mr Mohanan, two others and the finance managers of the Delma companies.

92. This is how I understood Mr McDonnell to put the matter, and given the large sum and the nature of the defendants involved it seems a reasonable inference, on the face of it, that these proceedings do indeed concern or at least include the letter of credit fraud, which involves an alleged loss of about US $100 million if one includes all the Delma parties. If that is right, then there is a *prima facie* case that Mr Haider's claim was issued within time, because, as I have mentioned above, it was not until about 2015 or 2016 that he found out about the letter of credit frauds, so the criminal proceedings will have stopped the running of time before the three year period allowed for by Article 298(1).

Has Mr Haider satisfied the requirements of UAE law and English law for bringing a claim against Falcon FZE and Falcon Administratives Services?

93. I have set out the requirements of UAE law above, and on current evidence, there is a *prima facie* case that they are satisfied, because:

(1) For the reasons above, there is a *prima facie* case that Delma Engineering has suffered a violation of an obligation owed to it and damage, as required by paragraph 1(a) of Article 167 of the Law of Commercial Companies Law;
(2) On Mr Haider's evidence, he was a shareholder in Delma Engineering at the time the alleged letter of credit fraud was committed (i.e. between 2011 and 2015); he still holds more than 10% of its share capital;
(3) On Mr Haider's evidence, his solicitors submitted a request to the Delma Engineering's Board pursuant to Article 167 on 19 July 2022, summarising the nature of the fraud, and asking it to *"take legal action against the Parties to the Fraud"* who were identified as Mr Mohanan, the Falcon companies and *"various other companies"* further details of whom would be provided on request. It is true that Mr Al Mureikhy was not identified in this letter, but as I have said, on 23 August 2022, Mr Haider's solicitors notified Delma Engineering of the claim and permission application by delivering the claim form, draft particulars of claim and evidence at its registered office, and there has been no response. These were served pursuant to CPR rule 19.9A(4), but on the face of it the service of these documents would also seem to satisfy the requirement of Article 167.

94. As for English law, CPR 19.9A(4) required the claim form and the other documents which were eventually sent on 23 August 2022 to be sent *"as soon as reasonably practicable"* after the claim form was issued, which was on 18 January 2022. However, the time for service of the draft particulars of claim was extended until 5 August 2022, and it was only then that the permission application was issued. On the evidence so far, the delay up until that point arose was caused by difficulties in obtaining expert evidence to allow a full particulars of claim to be pleaded, as set out in Mr Slade's first and third statements. Therefore, on current evidence, and without having heard from the defendants, this delay is not a sufficient reason for dismissing the application at this stage. I note that only a draft of the particulars of claim (rather than a copy of *"the particulars of claim"*, as required by a CPR 19.9A(4)(a)) was sent, but as currently advised this is immaterial, because Mr Haider's statement exhibits the draft and verifies it.

95. I note too that Professor Mallatt's report does not appear to have been sent to Delma Engineering, when on the face of it, CPR 19.9A(4)(d), by requiring *"a copy of the evidence filed by the claimant in support of the permission application"* to be sent, requires a copy of all that evidence to be sent, not just most of it. However, as currently advised, this is not a sufficient reason for dismissing the application at this stage, and (on the face of it) it can be treated as an error in procedure under CPR rule 3.10 which does not invalidate the application. As I have said, Delma Engineering has not responded to either of the notices given by Mr Haider's solicitors of his intention to bring this claim on its behalf, and on the face of it it seems unlikely that it would have done so had it received Professor Mallatt's report as well. Further, that evidence for the most part gives expert evidence of the UAE law already relied on in the draft particulars of claim, and of Mr Haider's allegation, in paragraph 116 of his witness statement, that he would not receive a fair trial in the UAE.

96. Finally, I should say that in his skeleton and his oral submissions Mr McDonnell contended that, so far as material, the requirements of s.263(2) and (3) of the 2006 Act were satisfied.

97. As I have said on my current reading of CPR 19.9C, it is unnecessary to show this, but for the avoidance of doubt, if I am wrong on this, I accept that there is a *prima facie* case, given the size of the claim and the current evidence, that (a) a person acting in accordance with the duty in s.172 to promote the success of the company would seek to continue the claim to the extent I have identified, and , (b) the alleged fraud was not authorised or ratified by the company, nor indeed could it have been authorised or ratified (see paragraph 123 of Professor Mallatt's report), and so permission would not be prohibited by s.263(2) of the 2006 Act.

98. Further, and for the same reasons, I am satisfied that there is a *prima facie* case for giving permission, taking into account the considerations in s.263(3)(a) to (d) of the Companies Act, if this is necessary. As to 263(3)(e), it seems likely, as things stand, that Delma Engineering has decided not to pursue the claim (which is therefore a reason in favour of granting permission, if otherwise appropriate). As to s.263(f), although Mr Haider is bringing claims in his own right arising out of the letter of credit fraud, this is not necessarily a conclusive factor (see, for example, *Hughes v Weiss and Iuvus* [2012] EWHC 2363 at paragraphs 61 to 62), especially as, according to Professor Mallatt's report, under UAE law such a claim can be pursued in parallel.

The second issue: the authorised transfer claim

99. On current evidence, I am not satisfied that there is a *prima facie* case for authorising Mr Haider to bring a derivative claim against any of the defendants on the alleged authorised transfer fraud. The fundamental problem is that although there appears to be a *prima facie* case that Mr Ahmed Al Mureikhy issued the relevant transfers, because he was a co-signatory on them and the beneficiary was ATECO (i.e. a company he co-owned and controlled), there is no basis for saying that either of the English Falcon companies was involved in this alleged fraud, and so the second precondition is not satisfied. Mr McDonnell K.C. points out that there is a claim in conspiracy generally against all the defendants in the draft particulars of claim, which is so, but this does not meet the point that there is simply no evidence that either English Falcon company had anything to do with this alleged fraud.

The third issue: forum conveniens

100. As I have said, Mr McDonnell K.C. accepts that on the face of it the *forum conveniens* in relation both to Mr Haider's proposed derivative claim, and to the claim on the merits, is that of the UAE. However, it appears from the Privy Council's decision in *Altimo Holdings and Investment Ltd and others v. Holdings v. Kyrgyz Mobil Tel Limited* [2012] 1 WLR 1804 at paragraphs 89 to 94, that *"where there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption"* then the interests of justice will weigh in favour of a forum in which the claimant can assert his rights (see, in particular, paragraph 94).

101. Here, Mr McDonnell K.C. contends that there is a real risk that Mr Haider will not obtain justice in the courts of the UAE, in reliance on the following matters which appear in Mr Haider's evidence and in Professor Mallatt's report:

(1) Mr Haider's evidence that he was persecuted in the UAE by (he infers) Mr Ahmed Al Mureikhy (or at least someone with access to Delma Engineering's cheque books) issuing successive forged cheques in his name so as to have him imprisoned and then re-imprisoned successively for ten months;
(2) The closeness of the Al Mureikhy family to the ruler of the UAE (as evidenced by his instruction to mitigate RAPCO's insolvency); the powerful influence in the UAE of that family and their associates; Mr Ahmed Al Mureikhy's previous high positions in the Abu Dhabi Criminal Investigation Department and as a colonel in the army; the retention of his Canadian passport to curtail his right to leave the UEA; and the criminal proceedings which Mr Ahmed Al Mureikhy issued against Mr Haider;
(3) The absence of fair trials in the UAE is documented in various human rights organisations' publications; and in 2015 the UN Special Rapporteur issued a report under the reference A/HRC/2926/Add.2, which, at paragraph 33, says that she *"is especially concerned that the judicial system remains under the de facto control of the executive branch of government"*, and at paragraph 37, says that she is concerned at *"reported instances in which judges appear to have lacked impartiality and shown bias, especially with regard to non-nationals of the [UAE]"*;
(4) While Emirati courts tend to be fair to commercial litigants, *"this fairness does not extend to cases where political influence, which often takes the outside legal form of a public prosecution based on some alleged criminal violation, is used by local commercial partners against their foreign partners or employees"*; and
(5) The practice of bringing successive criminal actions, as described by Mr Haider, according to long time practitioners in the UAE, *"is unfortunately not uncommon. The pattern described to me by Mr Haider's solicitors suggests that his chances of receiving a fait trial of the present dispute are slim in the UAE. It includes the risk for Mr Haider to be arrested in the UAE on trumped up criminal charges anytime he visits the country"*.

102. Accordingly, Professor Mallatt concludes: *"Should any of the facts mentioned in the affidavit [sic] of Mr. Haider be true, his prospects of receiving a fair trial in the UAE would be dim"*.

103. In my judgment, and taking into account the need for cogent evidence on the matter which goes beyond the mere anecdotal and general (for which, see paragraphs 101 and 102 of *Altimo* (supra)), I am satisfied that there is a *prima facie* case, in the sense that I have described, that the UAE would not be the appropriate forum for resolution of either (a) whether Mr Haider can bring a derivative claim, or (b) whether the defendants are liable under it. I bear in mind that Mr Ahmed Al Mureikhy's criminal charges were dismissed, but that of itself does not necessarily compel the contrary conclusion. I also note that it might be said that the principal risk of which the Professor talks is that of facing trumped up charges if Mr Haider returns to the UAE, rather than lack of independence in the courts. But his report does speak to lack of independence in the courts as well where non-nationals and political influence are concerned, and anyway, as currently advised, I do not read Lord Collins' opinion in *Altimo* as being necessarily limited to cases where the problem is lack of independence or competence in the courts themselves. In this context, I note that at

paragraph 59 of *Konamaneni* (supra) he puts the point more broadly, where he speaks of another test being that *"the injustice which would be done by restricting the claimant to the foreign court would be so great that the foreign court would not be regarded as an available forum"*.

104. Further, in my judgment, on current evidence, there is a *prima facie* case, in the sense that I have described, that England and Wales is the appropriate forum for this dispute if it is not the UAE, and that it is more appropriate than any of the places in which the non-UEA defendants are based (i.e. the Cayman Islands for Falcon Cayman, Hong Kong for Global Tradelinks, or the BVI for Commodities International and West Trade, or India, of which Mr Mohanan is a national). Mr Haider and Falcon Administrative Services are both based here, and the sale and repurchase agreements, which appear to be a central part of the alleged fraud, are in English, governed by English law, and subject to the jurisdiction of the English courts.

CONCLUSION

105. Accordingly, I shall permit Mr Haider's claim to bring a derivative action on behalf of Delma Engineering to proceed to the second stage and order that Delma Engineering be made a party to that application, so far as it seeks to bring a claim on the alleged letter of credit fraud on its behalf against (1) Falcon Administrative Services, (2) Falcon FZE, (3) Falcon Cayman, (4) Mr Mohanan, (5) Protouch, (6) Mr Ahmed Al Mureikhy, (7) Global Tradelinks, (8) Commodities International, and (9) West Trade, but not against the other defendants. I shall dismiss the application in relation to the alleged authorised transfer claim.

106. In allowing the claim to go forward to this extent to the second stage, I emphasise that this is merely a *prima facie* conclusion, taking Mr Haider's case as presented to me at its reasonable highest but without deciding whether it should be so taken; and without having heard from any of the defendants and seen any evidence from them. Further, as will be obvious from this judgment, there are a large number of issues on which the defendants will no doubt wish to say many things at the second stage.

107. I shall give directions for the service of the claim on Delma Engineering, and for the service of witness evidence by Delma Engineering, and for any further directions for the second stage hearing, which I shall decide on handing down judgment.