Neutral Citation Number: [2017] EWHC 3097 (Comm)

Case No: CL-2016-000446

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2017

Before :

MR ANDREW HENSHAW QC
(sitting as a Judge of the High Court)

- -

Between :

(1) BRONZE MONKEY LLC	**Claimants**
(2) JOHN FRANCIS GREGG	
- and -	
(1) SIMMONS & SIMMONS LLP	**Defendants**
(2) UNITED INVESTMENT TRADING LIMITED	

- -
- -

James Collins QC (instructed by **Dorsey & Whitney (Europe) LLP**) for the **Claimants**
Patricia Robertson QC and Rupert Allen (instructed by **Humphries Kerstetter LLP**) for the **First Defendant**
The Second Defendant did not appear and was not represented

Hearing date: 3 November 2017

- -

Approved Judgment

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

.....

MR ANDREW HENSHAW QC

Mr Andrew Henshaw QC:

(A) Introduction

1. The First Defendant ("**S&S**") applies by notice dated 31 January 2017 for summary judgment and/or to strike out the claim against it.

2. The claim against S&S is for declaratory relief, and arises out of correspondence sent by S&S on 12 July and 14 July 2016, while acting for the Second Defendant ("**UIT**"), in connection with a dispute between UIT and the Second Claimant ("**Mr Gregg**") about the ownership and management of the First Claimant ("**Bronze Monkey**").

3. S&S contends that the claim against it is hopeless, abusive, serves no useful or proper purpose and should never have been brought. S&S argues that it did no more than set out its client's case, on instructions, in respect of matters that were and are in dispute between UIT and Mr Gregg; and that the recipients of the relevant letters correctly understood them in those terms.

4. S&S further argues that there is no justification for any declaratory relief against it, since such relief would risk inhibiting S&S's ability to represent the interests of its client UIT in its ongoing dispute with Mr Gregg. The underlying issues as to the ownership and management of Bronze Monkey should be left to be litigated as between UIT and Mr Gregg in the normal way.

5. The Claimants' position is that S&S in its letters of 12 and 14 July 2016 purported to write on behalf of Bronze Monkey and to demand that a payment due to Bronze Monkey be made into S&S's client account; that S&S had no authority to do so; that both UIT (before proceedings were commenced) and S&S (after proceedings were commenced) refused to provide appropriate undertakings; and that S&S therefore remains a proper defendant to the claim for declaratory relief. The Claimants say they seek such relief in order to prevent further representations being made, and that the question of who is entitled to represent Bronze Monkey may continue to be an issue of real significance (including in the context of a separate claim brought by two third parties against Mr Gregg, UIT and Bronze Monkey in the Chancery Division, in which Dorsey currently represent Bronze Monkey).

(B) The underlying transactions

6. Bronze Monkey is a limited liability company incorporated in Delaware in September 2014. It entered into transactions which, according to the Particulars of Claim were as follows:

> "4. By a loan agreement dated 30 September 2014 (the "Dewarson Loan Agreement") Bronze Monkey agreed to loan Dewarson Limited ("Dewarson") €1,300,000 (the "Dewarson Loan"). The purpose of the Dewarson Loan was to enable Dewarson to fund the exercise, by it, of an option to acquire another loan referred to as the "CDHC Loan".
>
> "5. Pursuant to Clause 7 of the Dewarson Loan Agreement:

> 5.1 the Dewarson Loan was to be repaid by Dewarson using the repayment proceeds of the CDHC Loan (the "CDHC Receipts");
>
> 5.2 the CDHC Receipts were to be used by Dewarson to repay the Dewarson Loan within 3 business days of receipt by Dewarson; and
>
> 5.3 *"all payments due under this Agreement to the Lender shall be made to such account as notified to the Borrower from time to time."*
>
> "6. Dewarson is and was at all material times owned and/or controlled by Clermont Trust (Switzerland) SA, which is represented by *inter alia* Clermont Corporate Services Limited ("Clermont").
>
> "7. By a further agreement dated 30 September 2014 (the "Call Option Agreement") Clermont Trust (Switzerland) SA granted Bronze Monkey an option to purchase 8 ordinary shares in Dewarson, representing 80% of the issued share capital of that company, or US$1 (the "Call Option")."

7. A dispute subsequently arose between Mr Gregg and UIT as to their respective rights and interests in, and authority to act on behalf of, Bronze Monkey. It is common ground between Mr Gregg and UIT that the investors in Bronze Monkey included Mr Gregg and UIT and that they funded Bronze Monkey's loan to Dewarson with the intention of acquiring a stake in Bronze Monkey. However, there is a dispute as to whether UIT had the authority to take certain steps on behalf of Bronze Monkey, namely to exercise the option to acquire Dewarson shares and to give instructions about where the proceeds of the CDHC loan should be remitted.

8. UIT's position is that those steps were necessary to preserve the value of the investment on behalf of the investors, in circumstances where it suspected Mr Gregg of breach of fiduciary duty and of intending to divert the proceeds of the CDHC loan away from Bronze Monkey.

9. Mr Gregg denies this and also denies that UIT had authority to act on behalf of Bronze Monkey; he claims to be the sole manager and member of Bronze Monkey. UIT's position is that, under Delaware law:

   i) in the absence of a written operating agreement, UIT is a managing member of Bronze Monkey with authority, as such, to act (alone) on Bronze Monkey's behalf;

   ii) further or alternatively, the investors with a majority interest in Bronze Monkey are entitled to act (together) on Bronze Monkey's behalf.

10. On or about 19 July 2016 UIT filed proceedings in Delaware ("**the Delaware proceedings**"), on behalf of itself and derivatively on behalf of Bronze Monkey, naming Mr Gregg and Bronze Monkey as defendants, for "*declaratory relief, fraud,*

breach of fiduciary duty, removal of [Mr] Gregg as a manager of Bronze Monkey and for dissolution of the company" (§ 6).

(C) Correspondence up to the issue of the present proceedings

11. The claim against S&S is primarily based on two letters it wrote on 12 July 2016 to Clermont and to Morrison & Foerster (who act for Clermont and Dewarson), and a letter of 14 July 2016 to Dorsey & Whitney (Europe) LLP ("**Dorsey**"), who act for the Claimants in the present proceedings.

12. S&S was instructed by UIT in February 2016, shortly after UIT gave, or purported to give, notice of exercise of the option to acquire Dewarson shares.

13. In July 2016, UIT learned that Morrison & Foerster would soon receive the proceeds of the CDHC loan.

14. On 12 July 2016, S&S wrote to each of Clermont and Morrison & Foerster on UIT's instructions to request that the proceeds of the CDHC loan be paid into a designated client account at S&S. These letters were copied to the other investors in Bronze Monkey including Mr Gregg.

15. S&S's letter of 12 July 2016 to Morrison & Foerster began as follows:

> "We are writing on behalf of Bronze Monkey LLC ("Bronze Monkey") in relation to the First Call Option Agreement and the [Dewarson] Loan Agreement. Our firm represents United Investment Trading Limited ("UIT"), a managing member of Bronze Monkey. The positions set forth herein represent those of the members who own a majority of the interests in Bronze Monkey and therefore are to be regarded as Bronze Monkey's positions."

After alleging a breach by Clermont of the First Call Option Agreement, the letter stated:

> "Our client and Bronze Monkey reserve the right to pursue any claim for the breach and for the avoidance of doubt do not waive any rights under either the First Call Option Agreement or the Loan Agreement."

As regards the Loan Agreement proceeds, the letter included these passages:

> "We understand that Dewarson will shortly be receiving the CDHC Receipts … in the amount of approximately €9,296,073 …
>
> "Pursuant to clause 7.1 of the Loan Agreement, Dewarson must, within three Business Days of the receipts of the CDHC Receipts, repay the €1,300,000 to Bronze Monkey plus accrued unpaid interest in the amount of €345,123. In accordance with clause 7.3, we put Morrison & Foerster (UK) LLP on notice to

> make such payment to Bronze Monkey, on behalf of your client, to the following account:
>
> …
>
> Account name: Simmons & Simmons LLP Client Account
>
> …
>
> As soon as practical after Dewarson's receipt of the CDHC Receipts, and in any event no later than within two weeks of such receipt, the balance of the CDHC Receipts must be made available for pro rata distribution to Bronze Monkey as the majority shareholder (80%) of Dewarson … Accordingly, please remit Bronze Monkey's pro rata share in the amount of €6,120,760 to the account above as soon as practical after receipt of the CDHC Receipts, and in any event no later than within two weeks. …
>
> UIT's interest in the payments and distributions from the CDHC Receipts due from Dewarson to Bronze Monkey is no less than €1,553,117."

16. The letter continued:

> "By seeking to delay the Completion, Clermont Trust would be in breach of its obligations under the First Call Option Agreement and would be wrongly depriving Bronze Monkey of its interests. This would both be a breach of contract and a breach of trust. …
>
> Please therefore confirm that Morrison & Foerster (UK) LLP, acting on behalf of Dewarson and/or Clermont Trust, will not release or distribute any of the CDHC Receipts, either prior to Completion (except to repay the sums referred to above) or following Completion, until further notice is received from our firm.
>
> Furthermore, it has come to the attention of our client that one of Bronze Monkey's members, John Gregg, has been in communication with Clermont Trust and/or Dewarson and may have held himself out to have the authority to manage the affairs of Bronze Monkey. The management of Bronze Monkey is vested in its members in proportion to their respective ownership interests, pursuant to the laws of the State of Delaware, under which it is incorporated. For the avoidance of doubt and for all future matters in relation to Bronze Monkey, Mr. Gregg owns a minority interest in Bronze Monkey of 39.10% and, as such, has no authority to manage its affairs without the consent and approval of either our client or another member, who collectively own more than 50%.

> You are hereby notified that Clermont Trust and/or Dewarson should not accept any instructions from Mr. Gregg on behalf of Bronze Monkey, unless such instructions are signed by members of Bronze Monkey owning 50% or more of its interests.
>
> Further, our client is concerned that Mr. Gregg may also have an undisclosed interest in or a relationship with Clermont Trust and/or Dewarson as he has held himself out to third parties as a representative of Dewarson and also may be acting, either through or in conjunction with Clermont Trust to defraud Bronze Monkey and its other members. …"

17. S&S's letter was marked as being copied to *"The members of Bronze Monkey LLC"* and it is common ground that it was copied to, amongst others, Mr Gregg.

18. S&S's letter of the same date to Clermont, also copied to the members of Bronze Monkey, was to essentially the same effect though it also included this passage:

> "By reason of your failure to attend the Completion, we are concerned that Clermont Trust may be attempting to deprive our client of its rights under the First Call Option Agreement as the owner of the Option Shares. … Bronze Monkey and its members take such issues very seriously and reserve their rights to pursue any person involved in undermining its rights."

19. S&S's evidence is that its instructions from UIT at this stage were that UIT had the support of another member of Bronze Monkey, Mr Christopher Letter, who had a 30.9% interest in Bronze Monkey, giving UIT and Mr Letter a combined interest of 50.9%. As noted below, this situation subsequently altered.

20. Dorsey wrote to S&S the same day, 12 July 2016, copied to Clermont, taking issue with S&S's contentions. Dorsey stated:

> "We refer to your letter dated 12 July in which you purport to represent Bronze Monkey LLC.
>
> You have no authority to act in any capacity on behalf of Bronze Monkey LLC. Your letter fails to produce any evidence to support the entitlement of [UIT] to instruct you to represent Bronze Monkey LLC. Please explain the basis upon which you purport to hold yourselves out in this regard.
>
> … We are instructed by Bronze Monkey LLC and John Gregg, its sole member and manager. …
>
> On 31 January 2016 your client, [UIT] (acting through a Mr. Grizetti) fraudulently held itself out as having authority (1) to represent Bronze Monkey LLC and (2) to sign a notice purporting to exercise Bronze Monkey's rights under the First Call Option agreement to which you now refer.

> …
>
> In the circumstances, we require the following undertakings in writing from your client, [UIT]:
>
> - That it will immediately cease to hold itself out as having any authority to represent Bronze Monkey LLC
>
> - That it will instruct your firm to write to Clermont Corporate Services Limited, its advisers and any other party to whom your letter was copied that:
>
> - It has no authority to hold itself out as representing Bronze Monkey LLC
>
> - Its statement that it is a managing member of Bronze Monkey LLC was and is untrue
>
> - It had no authority to purport to serve any notice or notices on behalf of Bronze Monkey LLC
>
> …
>
> Unless we have an unequivocal undertaking in the above terms by 12 noon tomorrow, 13 July, we are instructed to immediately commence proceedings for an injunction and for an indemnity in respect of the significant losses incurred by our clients. …
>
> In the meantime, our clients' rights against your client and your firm are hereby expressly reserved."

21. Dorsey did not seek any undertakings from S&S at this stage.

22. S&S replied to Dorsey on 14 July 2016, with copies to Clermont and Morrison & Foerster, explaining the basis for UIT's claim to be a managing member of Bronze Monkey in more detail, and setting out UIT's response to Mr Gregg's claim to be solely entitled to act on behalf of Bronze Monkey. The letter included the following passages:

> "We write further to your letters dated 13 July 2016 on behalf of Mr John Gregg, who you contend is the "sole member and manager" of Bronze Monkey LLC ("Bronze Monkey"). Mr Gregg is a minority member of Bronze Monkey. Based on your correspondence and the matters set out below, our client is concerned that Mr Gregg is seeking to defraud the other members of Bronze Monkey.
>
> … the membership and management of Bronze Monkey is governed by Delaware law…

> Our client's US Counsel informs us that pursuant to Delaware law, because Bronze Monkey has no written operating agreement, the management of Bronze Monkey is vested in its members in proportion to their contributions to the company (DLLCA § 18-402, 18-503).
>
> At all times since the formation of Bronze Monkey, our client has acted as one of Bronze Monkey's managing members, and was always recognized as such by your client. …
>
> The above is only a sample of the evidence rebutting your client's claim to be the sole managing member of Bronze Monkey and denying our client's status as a managing member. Most of this evidence is already in your client's possession.
>
> …
>
> It has become increasingly clear to our client that Mr Gregg is seeking to misappropriate funds due to the other Bronze Monkey members by falsely holding himself out as having sole authority to manage its affairs and by attempting to impede the completion of Bronze Monkey's exercise of its option to acquire the majority shares of Dewarson …
>
> Our 12 July 2016 letters to Clermont and its counsel, Morrison & Foerster LLP, were to put them on formal notice of Mr Gregg's attempted fraudulent actions and to ensure that they take no action until the matter is satisfactorily resolved. The positions and instructions set forth in those letters represent the views not only of our client, but also those of the member who owns 30.9% of Bronze Monkey's interests. It is for this reason that our letter stated that it represented the views of the majority of the members' interests in Bronze Monkey."

23. Morrison & Foerster replied to both S&S and Dorsey on 14 July 2016, stating *inter alia* as follows:

> "We are writing to you in our individual capacity as Morrison & Foerster (UK) LLP ("MoFo") and not on behalf of our clients, Clermont Trust Switzerland S.A. ("Clermont Trust") or Dewarson Limited ("Dewarson"). …
>
> **The Dispute**
>
> Since 12 July 2016, Simmons and Dorsey have both asserted claims on behalf of your respective clients, each claiming to represent Bronze Monkey LLC… and to act for persons authorised to act and deliver instructions for Bronze Monkey.
>
> …

> On 12 July 2016, … MoFo received a letter from Simmons written *"on behalf of Bronze Monkey LLC"*. Simmons purported to represent United Investment Trading Limited ("UIT"), a *"managing member"* of Bronze Monkey LLC … and stated therefore "*the positions* [that they were stating in the letter should] *represent those of the members who own a majority of the interests in Bronze Monkey and therefore are to be regarded as Bronze Monkey's positions."*
>
> ...
>
> At approximately 17:00 today, we received a further lengthy letter from Simmons purportedly providing evidence as to its client's authority to act for Bronze Monkey.
>
> …
>
> On 12 July 2016, Dorsey, purporting to represent Bronze Monkey and Mr John Gregg, replied to the first letter of Simmons refuting UIT's authority to instruct Simmons & Simmons to represent Bronze Monkey. …
>
> … it is clear from correspondence that there is a significant dispute between the parties as to who has authority to act and deliver proper payment instructions on behalf of Bronze Monkey.
>
> …
>
> MoFo is in possession of significant money in its client account. The clients of both Dorsey and Simmons assert claims on behalf of Bronze Monkey to the loan monies and the interest to be repaid under clause 7.1 of the Loan Agreement and to the 80% of the balance of the funds on behalf of Bronze Monkey. Bronze Monkey is a Delaware LLC and it is not possible for this firm to form a conclusive view as to which person or entity has authority to act on behalf of Bronze Monkey. …
>
> In light of the position generally and as set out above, in the absence of a resolution regarding the control of Bronze Monkey between your firms' respective clients, it is plain that the only appropriate and sensible way forward to resolve this dispute is for this firm to make an application pursuant to Part 86 of the Civil Procedure Rules. …"

24. As a result, Morrison & Foerster issued proceedings pursuant to CPR Part 86 on 15 July 2016.

25. In the meantime, on 14 July 2016 Dorsey issued the present proceedings against both S&S and UIT, in the name of both Bronze Monkey and Mr Gregg. Counsel for the Claimants informed me, and counsel for S&S was not in a position to contest, that the

proceedings were issued before receipt of Morrison & Foerster's letter of the same date.

(D) Subsequent correspondence

26. Following service of these proceedings, S&S objected in a letter to Dorsey dated 21 July 2016 that Dorsey were *"seeking to bring a claim against us as advisors for advancing our client's position in an existing dispute"*. S&S invited Dorsey's clients to discontinue the claim on the basis of no order as to costs.

27. Similarly, S&S's General Counsel, Mr Watson, wrote to Dorsey's Managing Partner, based in Minneapolis, on 22 July 2016 stating, among other things:

> "In the ordinary course my firm has represented its client's position on certain matters in correspondence. Your firm's client does not agree with that position, meaning there is a dispute between our respective clients – which may need ultimately to be resolved by litigation. In this case your firm's client … has issued proceedings in London seeking to restrain this firm, as first named Defendant, from advancing its client's position …"

28. Dorsey's response dated 27 July 2016 included the point that:

> "… a key issue is whether Simmons & Simmons is, in fact, representing the managing partner of Bronze Monkey, LLC or any client in this matter other than [UIT]. Your firm's representations that it is so representing (a) the managing partner, and (b) other members purporting to comprise a majority of members, are inconsistent with the facts as we understand them. That issue is not one that can be resolved without consideration of your firm's actual relationship to the managing partner and/or other clients it purports to represent …"

29. S&S's reply dated 29 July 2016 is of some significance. It set out the firm's position as follows:

> "Our letter of 12 July 2016, which prompted the action brought by your firm on behalf of John Gregg, stated that *"our firm represents United Investment Trading Limited ("UIT ").* Our client's position, which it instructed us to convey, was (and remains) that it is a managing member (not *"the managing partner"* as you state) of Bronze Monkey LLC. Our client also instructed us that it had the support of another member of the company. If our client's position was correct, both members' interests combined to form a majority position. Consequently, our client's position was that the matters set out in our letter also represented the position of Bronze Monkey. We did not state, and do not state, that Bronze Monkey LLC is this firm's client. It is not.

> …
>
> It has become apparent that since proceedings were issued against this firm, our client no longer has the support it believed it previously had from other members of Bronze Monkey. If correct, that does not alter the basis upon which Simmons & Simmons wrote the letter of 12 July 2016."

30. Dorsey's response dated 4 August 2016 took issue with this, quoting (among other passages) the first and third sentences of S&S's letters of 12 July, and the passage from the letter to Clermont quoted in § 18 above, contending that "*The reference to "our client" would naturally have been taken as a reference to Bronze Monkey, not your identified client UIT*".

31. As a result, S&S on 10 August 2016 (after the Claim Form was issued but before Particulars of Claim were served) wrote to Clermont, copied to Morrison & Foerster and Dorsey, stating:

> "We refer to our letter dated 12 July 2016. In the first paragraph of that letter we state: "Our firm represents United Investment Trading ("UIT"), a managing member of Bronze Monkey.
>
> While whether or not UIT is a managing member of Bronze monkey is a disputed issue, we wish to clarify, for the avoidance of doubt and to the extent not already clear, that our letter of 12 July 2016 sets out UIT's position with respect to Bronze Monkey as at that date. Bronze Monkey is not and has never been this firm's instructing client."

32. Dorsey on 11 August 2016 continued to take issue with S&S's position, saying:

> "… whilst you acknowledge that you do not act for Bronze Monkey, you have not addressed with Clermont or its lawyers (either by way of clarification or retraction) the statement made in your 14 July letter that your instructions represented the views of "*the member who owns 30.9% of Bronze Monkey's interest.*"

33. Dorsey asked S&S to undertake:

> " – That (pending final determination of the Delaware proceedings commenced by UIT or further order) you will not seek to hold yourselves out as representing any interests other than the minority 20% interest alleged by UIT ;
>
> – That (pending final determination of the Delaware proceedings commenced by UIT or further order) you will not seek to give instructions on behalf of Bronze Monkey LLC without the authority of entities or individuals holding interests of more than 50%."

34. S&S declined to provide such undertakings. A witness statement from Mr Turner of S&S, in support of the present applications, explains that S&S was not prepared to provide the undertakings because:

> "(a) the proposed undertakings would preclude [S&S] from representing the interests of others holding a minority interest, in the event that any of them were to decide in the future to support UIT's position and give instructions to [S&S] (or authorise UIT to give such instructions on their behalf); and (b) UIT's position in the Delaware Proceedings is that it is a member of Bronze Monkey and that, as such, as a matter of Delaware law it has authority to act (alone) on behalf of Bronze Monkey (notwithstanding the fact that it does not hold an interest of more than 50%) …"

35. In relation to the support of other members of Bronze Monkey, Mr Turner in his witness statement explains:

> "… (without thereby waiving privilege) that, at the time of writing the letters dated 12 July and 14 July 2016 about which the Claimants' complain, [S&S]'s instructions were that UIT also had the support of Christopher Letter who had a 30.9% interest (and thus, as stated in the letters, the position set out was understood by [S&S] to be the position of members who owned a majority interest). It was only after 14 July 2016 that Mr Letter withdrew his support for UIT's position (again according to our instructions, in respect of which privilege is not waived)."

(E) The Delaware proceedings

36. UIT commenced the Delaware proceedings on 19 July 2016 seeking, along with other relief, declarations that:

> "(i) the membership interests of Bronze Monkey are owned by the following persons in the following percentages: UIT (20%); Gregg (39.10%); Letter (30.90%); and Plunkett (10%),
>
> (ii) UIT is a manager of Bronze Monkey;
>
> (iii) UIT had authority as manager of Bronze Monkey to exercise the First Call Option on behalf of Bronze Monkey on January 31, 2016;
>
> (iv) the portion of the CDHC Receipts that Bronze Monkey is entitled to receive from Dewarson pursuant to the Loan Agreement and the Dewarson Shareholders Deed must be distributed to the members of Bronze Monkey only in proportion to the percentage ownership interests in Bronze Monkey pursuant to Section 18-504 of the [Delaware] LLC Act."

37. UIT's claim in the Delaware proceedings includes the allegation that S&S's letter of 12 July 2016 *"represented the views of both UIT and [Mr] Letter, i.e., the members owning 50.9% of Bronze Monkey's interests"* (§ 69); which the defendants deny.

38. The Claimants have counterclaimed in the Delaware proceedings, seeking among other things an order *"declaring that UIT does not have, and never had, the authority to act on behalf of Bronze Monkey"*. The counterclaim also includes claims against UIT for tortious interference based on UIT having instructed S&S to write its letters of 12 July 2016, which the Counterclaim refers to as *"UIT's assertions in its counsel's July 12 Letter"* and *"UIT's improper and unauthorized actions through its counsel"*.

(F) The parties' statements of case in the present proceedings

39. The Claim Form in this action indicates that the Claimants seek injunctive relief against both S&S and UIT from "any further unlawful interference in the Claimants' contractual, economic or other interests". In the event injunctive relief is sought only against UIT.

40. The Particulars of Claim served on 21 September 2016 seek damages from UIT for procuring a breach of contract and/or unlawful interference with Bronze Monkey's economic interests, injunctions against UIT, and declarations that:

> "UIT is not a member of Bronze Monkey; and/or
>
> UIT is not entitled to represent Bronze Monkey without the express authority of a member or members cumulatively holding at least a 50% interest in Bronze Monkey"

41. The claim against UIT is based on S&S's letters of 12 and 14 July 2016. The Claimants allege that S&S made representations "*on their own behalf and on behalf of UIT*" that S&S were writing on behalf of Bronze Monkey (§ 11.1); that S&S made representations "*on behalf of UIT*" that UIT was a managing member of Bronze Monkey and that the positions set out in the 12 July letters represented those of the majority of Bronze Monkey's members (§§ 11.2 and 11.3); and that S&S *"on behalf of UIT"* demanded payment into S&S's client account (§ 11.5).

42. UIT has issued an application dated 9 January 2017 contesting the jurisdiction of this court, which is yet to be heard. UIT has therefore not served a Defence.

43. According to the Claimants' evidence on the jurisdiction application, Mr Gregg's position is that *"the Delaware proceedings are the appropriate venue in which to determine the question of the ownership and management of Bronze Monkey"*; that that does not, however, address the actions of UIT and S&S in England; but that it is appropriate for there to be a case management stay (not a stay on jurisdiction grounds) of the present proceedings pending the outcome of the Delaware proceedings.

44. As against S&S, the Particulars of Claim seek only declaratory relief and *"[f]urther or other relief"*, though the Claimants reserve the right to seek permission to amend so as to claim further relief (including damages) following disclosure.

45. The claim against S&S is based on (a) the letters dated 12 July 2016 to Morrison & Foerster and Clermont, and (b) the letter dated 14 July 2016 to Dorsey, by which the Claimants allege that S&S expressly or impliedly represented that it "*had authority to write 'on behalf of' Bronze Monkey*". The relief sought against S&S is "*a declaration that [S&S] is not entitled to represent Bronze Monkey and/or give instructions on behalf of Bronze Monkey without the express authority of a member or members cumulatively holding at least a 50% interest in Bronze Monkey*".

46. No claim is made that any such express or implied representation was relied upon or caused loss.

47. S&S's position as set out in its Defence served on 9 November 2016 includes the following:

    i) S&S did not, by the letters of which the Claimants' complain, make any representations as to the correctness of UIT's claim to have authority to give instructions on behalf of Bronze Monkey (§ 3.1).

    ii) The letters were written by S&S on behalf of UIT in S&S's capacity as UIT's solicitors and on UIT's instructions (§ 7).

    iii) A solicitor advancing the position of a client in correspondence, in the way S&S did, does not warrant or represent that the client's position is correct or that the client has the attributes (in this instance, authority to represent Bronze Monkey) that the client claims to have: still less when it is apparent on the face of the correspondence itself that the assertions made on behalf of the client are disputed (§ 14.2).

    iv) Morrison & Foerster correctly interpreted the letters as a statement of UIT's position in a disputed matter, not as a representation by S&S itself that S&S acted or had authority to act for Bronze Monkey or that UIT's position was correct (§ 15.2).

    v) S&S has never acted or held itself out as acting for Bronze Monkey (as opposed to setting out the position of its client UIT) (§ 21.2).

48. UIT has made clear, through a witness statement dated 9 January 2017 of Mr Allen of S&S in UIT's jurisdiction application, that "*[p]ending resolution of the Delaware Complaint, UIT is content to make it clear in any subsequent correspondence that: (i) it maintains that it has an interest in Bronze Monkey; (ii) it maintains that it is/was a managing member of Bronze Monkey; but (iii) both elements are disputed and are currently the subject of court proceedings in Delaware*".

(G) Applicable principles (1): strike-out and summary judgment

49. The test to be applied on an application to strike out or for summary judgment is well established. So far as material to the present application, it is that:

    i) The court may give summary judgment in favour of a defendant where it considers that "*the Claimant has no real prospect of succeeding on the claim*

or issue" and there is no other compelling reason why the case or issue should be disposed of in a trial: CPR 24.2 (a)(i).

ii) A "*real prospect*" means something which is less than probable but more than fanciful and more than merely arguable. [1]

iii) Although the court will not conduct a mini trial, the claimant's case must carry some degree of conviction; the court is not required to accept without question any assertion a claimant makes and may reject it if it is inherently implausible or not credible.[2]

iv) Insofar as a question of law is involved, the court can and should resolve it unless it depends upon disputed facts which must await trial; if a party's case is bad in law, the sooner that it is determined the better.[3]

v) Where a summary judgment application gives rise to a short point of law or construction, the court should decide that point if it has before it all the evidence necessary for a proper determination and it is satisfied that the parties have had an adequate opportunity to address the point in argument.[4]

vi) If the court concludes that, although a claimant has a real prospect of success for the purposes of CPR 24, it is improbable that the claim will succeed it can, and generally will, make a conditional order requiring the claimant to give security for the other party's costs.[5]

vii) The court may strike out a statement of case if it appears to the court that it discloses no reasonable grounds for bringing the claim.[6] The claim (or part of it) should be struck out if the facts alleged, even if true, do not disclose any legally recognisable claim against the defendant.[7]

viii) The Court will strike out a statement of case where it is an abuse of the court's process.[8]

(H) Applicable principles (2): agency and warranty of authority

50. On the question of whether S&S represented by its letters of 12 and 14 July 2016 that it had authority to represent Bronze Monkey, the parties rely on both general

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1 *International Finance Corp v Utexafrica Sprl* [2001] C.L.C 1361 and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472; see also White Book note 24.2.3.

2 *Calor Gas Limited v Easygas UK Limited & Another* [2004] EWHC 3041 (Ch) Etherton J, paragraph 25; *National Westminster Bank Plc v Daniel* [1993] 1 WLR 1453, [1994] 1 All ER 156; White Book note 24.2.5.

3 *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA 725 per Moore Bick LJ at paragraph 12.

4 See 24PD § 1.3 "*An application for summary judgment under rule 24.2 may be based on – (1) a point of law (including a question of construction of a document) …"*, and White Book note 24.2.3

5 *Olatawura v Abiloye* [2002] EWCA Civ 998.

6 CPR 3.4(2)(a).

7 3APD paragraph 1.4(3).

8 CPR 3.4(2)(b).

principles of agency and cases relating to a solicitor's warranty of authority to act for his client.

51. As to the former:

i) The general principle for ostensible authority is summarised thus in *Bowstead & Reynolds on Agency* (20th ed.) § 9-060:

> "Where a person, by words or conduct, represents that he has actual authority to act on behalf of another, and a third party is induced by such representation to act in a manner in which he would not have acted if that representation had not been made, the first-mentioned person is deemed to warrant that the representation is true …"
>
> "Every person who purports to act as an agent is deemed by his conduct to represent that he is in fact duly authorised so to act, except where the purported agent expressly disclaims authority or where the nature and extent of his authority, or the material facts from which its nature and extent may be inferred, are known to the other contracting party."

ii) In *Penn v. Bristol & West Building Society* [1997] 1 W.L.R. 1356, 1363 Waller LJ stated:

> "… to establish a warranty of authority as with any other collateral warranty there must be proved a contract under which a promise is made either expressly or by implication to the promisee, for which promise the promisee provides consideration".

iii) *Zoya Ltd v Ahmed* [2016] EWHC 2249 (Ch), [2016] 4 WLR 174 (a decision of William Trower QC sitting as a Deputy High Court Judge) referred to the earlier decision of Hilary Heilbron QC in *Padhiar v Patel* [2001] Lloyd's Rep. P.N. 328 approving the following passage from the judgment of Sholl J in the Supreme Court of Victoria in *Schlieske v Overseas Construction Co Pty Ltd* [1960] VicRp 33; [1960] VR 195:

> "It is unnecessary … to prove that the plaintiff believed the assertion of authority … But there must be inducement. In the case of solicitors purporting and professing to act for a party to litigation, there is a continuing representation, or series of representations of their authority to do so. Expressed in the language of contract, the position is that solicitors continually say to the opposing solicitors or party, 'if you will deal with us, and otherwise act, on the basis that we are authorized agents of our client, we will in consideration therefore promise you, as a matter of contract, that we have such authority'. Each time the opposite party so deals or acts, because of that promise, and with the intention of accepting it, there is a contract, made upon good consideration. The promise or warranty is enforceable."

> "The inducement of the plaintiff is prima facie to be implied from the making of the representation and the subsequent entry by the plaintiff into the relevant transaction, … There is thus simply a rebuttable presumption or inference of fact. If when all the evidence is in, inducement is not proved on the balance of probabilities, because the force of the presumption is repelled or neutralized by other evidence, the plaintiff should fail. In my opinion, it follows that there may be a failure to prove inducement even in a case where it does not appear that the plaintiff knew the full truth as to the defendant's solicitor's absence of authority."

iv) An agent can avoid any implied (or express) representation by making it clear that it does not have authority from the principal: see, e.g., *Halbot v. Lens* [1901] 1 Ch 344 at 351.

52. As regards solicitors' warranties of authority:

i) Bowstead (supra) § 9-067 states:

> "A specialised application of the warranty of authority is that given by a solicitor or other representative who issues process in litigation. It has been truly said that "this contractual theory presents some conceptual problems in the case of a solicitor conducting litigation". In general, the solicitor only warrants that he has been authorised by a client who exists; it has been held that he does not warrant that the name given by him for that client is correct, and he certainly does not warrant … the validity, or even arguability, of the client's claim." (footnotes omitted)

ii) In *SEB Trygg Liv Holding AB v Manches* [2006] 1 WLR 2276 at [66] the Court of Appeal stated, after reviewing earlier authorities:

> "…it is important to bear in mind that generally a solicitor conducting proceedings does not warrant what he says or does on behalf of his client. Thus he does not warrant that his client, the named party to the proceedings, has title to sue, is solvent, has a good cause of action or defence or has any other attribute asserted on his behalf. The solicitor relies upon his client's instructions for all these things, as he will normally do for naming his client correctly. As he gives no warranty as to the accuracy of his instructions generally, it is difficult to see why the naming of his client should be treated as an exception. Why should this be any different, for example, from the naming of a client who has no title to sue? There is an obvious distinction between such matters and the solicitor's own authority to act because the solicitor will usually know whether he has such authority or not. The imposition of strict liability on a solicitor for breach of warranty of authority is justified because

> otherwise the opposing party will be left without remedy against his supposed client."

iii) In *Knight Frank LLP v Du Haney* [2011] EWCA Civ 404, a case about the misnaming by an agent of his principal, the Court of Appeal referred to the above case as follows:

> "14 In *AMB Generali Holding AG v SEB Trygg Liv Holding Aktiebolag* [2006] 1 Ll Rep 318 this court held that whereas a solicitor who starts, defends or continues litigation or arbitration on behalf of a client warrants that he has authority to do so, he does not additionally and without more represent that he has named his client correctly. The court's reasoning, at paragraphs 56-69 of the judgment of the court, derives in considerable measure from the particular and well-understood features of the position of a solicitor in such circumstances, for example that it is axiomatic that a solicitor gives no warranty as to the accuracy of his instructions. There is an obvious distinction between matters upon which the solicitor must simply rely on his client's instructions without having independent knowledge and matters within his own knowledge, such as his authority to act. ..."

iv) In *P&P Property v. Owen White & Caitlin* [2017] PNLR 3 it was held that a law firm did warrant that it had the authority of its principal, but (at [121]):

> "The basic representation is only that the agent has authority to act for another, a matter which arises between him and his principal and is something which is usually peculiarly within his own knowledge. An agent does not, simply by acting as agent, represent that his principal will perform the contract or is solvent or make any other representation as to the principal's attributes or characteristics. The court should not imply a warranty of authority which has an effect going beyond the basic representation, save where it is clear that the necessary promise is properly to be implied. This is particularly so in relation to professionals, including solicitors, who do not normally undertake an unqualified obligation."

53. S&S also cited two recent cases where authority to represent a company was or became an issue in the litigation itself.

54. First, *In re Sherlock Holmes International Society Ltd* [2016] 4 WLR 173, where a law firm was instructed by a company to appeal from a winding up order, but continued to accept instructions from a director, Mr Riley, after his appointment had expired (on 31 December 2014). The petitioner, a Mr Aidiniantz, wrote to the law firm on 16 October 2015 questioning Mr Riley's status. An application for declaratory relief on that question was issued on 27 October 2015 and a declaration to the effect that his appointment had expired was granted. The court held that the law firm did warrant its authority until 16 October 2015, but did not do so thereafter. The Deputy Judge said:

> "28 The application for a declaration made on 27 October raised a new issue and initiated a new phase in the litigation. Although raised within an appeal to which the Company was a party, and in which Pinder Reaux were on the record as acting for it, in resisting the application Pinder Reaux were advancing Mr Riley's claim to be a director. Pinder Reaux and counsel chose to express their position as acting for the Company because that was consistent with the case which they were instructed to advance, but it was obvious to all that that begged the very question in dispute. It was merely incidental to Mr Riley's position to assert that the Company shared it. Applying ordinary objective principles, a reasonable person in the position of Mr Aidiniantz would not have concluded that in making (and causing counsel to make) submissions to that effect, Pinder Reaux were warranting that Mr Riley was still a director. Legal representatives do not warrant the arguments they make on behalf of their clients. See for example— SEB Trygg Liv Holding AB v Manches at para 66 …: and Nelson v Nelson [1997] 1 WLR 233 per Peter Gibson LJ at p 237 …
>
> 29 Moreover the rationale of inferring a warranty of authority, identified in para 20 above, does not arise where the very issue in the litigation is the authority alleged to have been warranted. It is not the case that Mr Aidiniantz was unable to make his own inquiries about Mr Riley's status as a director. After 16 October he was exactly as well placed as Pinder Reaux to inquire whether or not Mr Riley's appointment had expired. A person equally well placed as the agent to know whether the agent's authority has come to an end does not have the benefit of an implied warranty of authority: Smout v Ilbery 152 ER 357; (1842) 10 M & W 1 as explained in Yonge v Toynbee by Buckley LJ at pp 227–228. And in Babury Ltd v London Industrial plc, Steyn J observed that the general rule (that a warranty is given) "may sometimes have to yield to special circumstances, for example in a case where the opposing party's solicitor is informed that there was a doubt about the solicitor's authority …".
>
> 30 Pinder Reaux did not need to inform Mr Aidiniantz that there was a doubt about their authority. He knew that he could not, in the words of Buckley LJ, safely assume it. In asserting that they did have authority, Pinder Reaux were advancing Mr Riley's case, not warranting it. A solicitor does not warrant his authority where that issue is known to be controversial and the parties are engaged in litigation to find the answer."

55. This approach was followed in *Zoya Ltd v Ahmed* to which I have already referred. The Deputy Judge in *Zoya* held that whilst it was common ground that a warranty of authority was given at the time proceedings were issued, (a) the other party had failed to establish that he had relied on it, because it was his position from the outset that the

solicitors lacked authority (§ 63); and (b) the warranty ceased at the stage at which a preliminary issue was ordered to be tried about the instructing director's authority to act for the company, because at that point the question of authority became the very issue in the proceedings (§§ 56-58).

56. These two authorities indicate that at least once authority becomes the "*very issue*" at stake in the proceedings, any implied warranty of authority ceases, if only because the other party can no longer claim thereby to have be induced. Further, the passage quoted above from *In re Sherlock Holmes International Society Ltd:*

> "Pinder Reaux and counsel chose to express their position as acting for the Company because that was consistent with the case which they were instructed to advance, but it was obvious to all that that begged the very question in dispute. It was merely incidental to Mr Riley's position to assert that the Company shared it. Applying ordinary objective principles, a reasonable person in the position of Mr Aidiniantz would not have concluded that in making (and causing counsel to make) submissions to that effect, Pinder Reaux were warranting that Mr Riley was still a director. Legal representatives do not warrant the arguments they make on behalf of their clients" (my emphasis)

though expressed in terms of warranty, may also have some bearing on the question of what representation the solicitor could reasonably be regarded as making. The passage is directed not so much to the question of actual reliance, but rather to the question of what, applying ordinary objective principles, a reasonable person would understand the solicitor to be saying.

(I) Applicable principles (3): declaratory relief

57. The power to grant declarations is part of the general jurisdiction of the High Court, and is now derived from section 19 of the Senior Courts Act 1981.

58. CPR r 40.20 provides that:

> "The court may make binding declarations whether or not any other remedy is claimed."

59. An example of the court being willing to grant a declaration where the claimant had no cause of action against the defendant, but where there was nevertheless a real issue between them, is *Guaranty Trust Company of New York v Hannay & Company* [1915] 2 K.B. 536, the case cited in the White Book note to CPR 40.20. The defendant there had accepted a bill of exchange and subsequently paid the plaintiff, who had purchased the bill in good faith. The defendant later learned that the accompanying bill of lading was a forgery, and sued the plaintiff in the US where the plaintiff was based. The plaintiff was allowed to pursue a claim in England for a declaration that it did not, by presenting the bill for acceptance with the bill of lading attached, represent that the bill of lading was genuine, and that it was not bound to repay the amount of the bill.

60. In deciding whether to exercise its discretion a court invited to make a declaration must consider whether in all the circumstances it is appropriate, taking into account justice to the claimant and the defendant, whether the declaration would serve a useful purpose, and whether there are any other special reasons why the court should or should not grant the declaration.[9]

61. The applicable principles were summarised by Aikens LJ in *Rolls Royce Plc v Unite* [2009] EWCA Civ 387, [2010] 1 WLR 318 (dissenting in the result) at § 120:

> "(1) The power of the court to grant declaratory relief is discretionary.
>
> (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.
>
> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
>
> (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; (in this respect the cases have undoubtedly "moved on" from *Meadows*).
>
> (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.
>
> (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.
>
> (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."[10]

[9] *Financial Services Authority v Rourke* [2002] CP Rep 14 (Neuberger J).

[10] See also Wall LJ at § 38 citing Lord Bridge of Harwich's statement in *Ainsbury v Millington* [1987] 1 WLR 379, 381 b-c that *"It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."*

62. This statement was followed by the majority of the Court of Appeal in *Milebush Properties Ltd v Tameside Metropolitan Borough Council* [2011] EWCA Civ 270 (§§ 46 and 95) and again applied by the Court of Appeal in *Great Lakes Reinsurance (UK) SE v Western Trading Ltd* [2016] EWCA Civ 1003 § 95 *("A declaration may be made when there is a 'real and present' dispute between the parties and the court is satisfied that the making of a declaration is the most effective way of resolving the issues raised: Rolls-Royce plc v Unite the Union [2010] 1 WLR 318 ").*

63. In *Milebush* a developer had entered into an agreement with a planning authority to grant right of way over a service road behind properties owned by claimant, and the relevant issue was whether the claimant could bring private law proceedings against developer's successor in title for a declaration as to the extent of right of way granted. The majority of the Court of Appeal held not. Moore-Bick LJ, dissenting, suggested that point (2) of Aikens LJ's summary in *Rolls-Royce* was expressed too narrowly because (a) in *Gouriet v Union of Post Office Workers* [1978] AC 435, Lord Diplock recognised that the dispute could relate to rights that might come into existence in the future upon the happening of an event; and in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48 the dispute did not directly concern the existence or scope of any private rights or obligations vested in the parties themselves, but rather the correct interpretation of BT's licence: a document that stood in the realm of public rather than private law but which was central to the negotiations between Mercury and BT. Moore-Bick LJ added:

> "88 In my view the authorities show that the jurisprudence has now developed to the point at which it is recognised that the court may in an appropriate case grant declaratory relief even though the rights or obligations which are the subject of the declaration are not vested in either party to the proceedings. That was certainly the view of the court in *In re S* [1996] Fam 1 and it is also the clear implication of the observations in *Feetum v Levy* [2006] Ch 585 and the *Rolls-Royce* case [2010] 1 WLR 318 that things have moved on since the *Meadows* case. In the *Mercury* case it was not considered relevant that BT had rights under the licence and it was no bar to the proceedings that Mercury did not. To that extent the position is mirrored in this case, in which Tameside has obligations under the agreement but Milebush has no rights. I can see no reason in principle why the nature of the underlying obligation should be critical, although there may well be other reasons why in the particular case a declaration should not be granted. The most important consideration is likely to be whether the parties have a legitimate interest in obtaining the relief sought, whether to grant relief by way of declaration would serve any practical purpose and whether to do so would prejudice the interests of parties who are not before the court."

64. Zamir & Woolf *"The Declaratory Judgment"* (4th ed.) states: *"The general rule is that is desirable that all persons who appear to have a real interest in objecting to the grant of a declaration claimed in legal proceedings should be made defendants",*

citing among other cases *London Passenger Transport Board v Moscrop* [1942] AC 332 where Viscount Maugham stated:

> "The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration, but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made." (p345)

65. The Court should not grant any declaration that would not serve a useful purpose by addressing a real difficulty with which the claimant is faced[11], nor grant relief where it is sought for an abusive or collateral purpose.

(J) Discussion

66. The Claimants submit that S&S's letters of 12 and 14 July 2016 represented that S&S was authorised to give instructions on behalf of Bronze Monkey. The Claimants make the following points:

i) S&S's letters of 12 July began by stating that S&S was *"writing on behalf of Bronze Monkey LLC"*.

ii) That was not merely a statement that S&S was writing on behalf of UIT, together with an assertion that UIT was entitled to give instructions on behalf of Bronze Monkey: it was a statement that S&S was itself writing on behalf of Bronze Monkey.

iii) By stating that it was "*writing on behalf of Bronze Monkey LLC"*, S&S expressly or impliedly represented that it was authorised by Bronze Monkey to do so.

iv) The passage in S&S's letter of 12 July to Clermont, quoted in § 18 above, indicated that S&S was referring to Bronze Monkey as its "*client*", because Bronze Monkey, not UIT, was the party to the First Call Option Agreement and the owner of the Option Shares.

v) S&S's further statement in the 12 July letters that "*The positions set forth herein represent those of the members who own a majority of the interests in Bronze Monkey and therefore are to be regarded as Bronze Monkey's positions"* was an assertion of authority to make statements and issue

[11] See e.g. Zamir & Woolf, The Declaratory Judgment (4th edition) at 4-99, 4-104 ff.

instructions on behalf of Bronze Monkey. The same applies to the similar statement made in S&S's 14 July letter.

vi) S&S's instructions to Morrison & Foerster, in particular to pay funds into S&S's client account, which instructions could only properly have been given by Bronze Monkey, further represented that S&S was authorised to do so. If Bronze Monkey was not S&S's client then payment to S&S would not have constituted payment to Bronze Monkey.

vii) If Morrison & Foerster had thereby been induced to act e.g. by paying the money as instructed, and had suffered loss, then S&S would have been liable to Morrison & Foerster for breach of warranty of authority.

67. On a fair reading of S&S's letters of 12 and 14 July, however, S&S did not in my view represent more than (a) that it was instructed by UIT, and (b) that UIT claimed authority to represent Bronze Monkey and to give instructions on its behalf by reason of (i) UIT being a managing member of Bronze Monkey and (ii) UIT having the support of (an)other member(s) of Bronze Monkey whose interests combined with UIT's represented a majority view.

68. I take this view because:

i) The first paragraph of S&S's letters of 12 July made clear that, whilst it was writing *"on behalf of"* Bronze Monkey, the entity whom S&S as a firm represented was UIT: *"Our firm represents United Investment Trading Limited ("UIT"), a managing member of Bronze Monkey"*.

ii) S&S's letters of 12 July also made clear by necessary implication that Bronze Monkey itself was not S&S's client: each letter on three occasions used the phrase *"[o]ur client and Bronze Monkey"*.

iii) As the authorities referred to in section (H) above indicate, a solicitor's implied warranty of authority is strictly limited to a warranty that he has authority to represent his named client; and the underlying logic is that a third party dealing (e.g. in litigation) with a solicitor who in fact lacks his client's authority would otherwise have no recourse. The narrowness of the implied warranty may not be decisive, since a solicitor could in principle give to a third party an express warranty in wider terms. However, it does provide some context, and suggests that a solicitor's letter ought not in general to be construed as asserting authority to act for anyone other than his client – particularly in a case where there is clearly a dispute about authority – unless the solicitor indicates expressly or by clear implication that he is himself making a representation of authority as opposed to setting out his client's case.

iv) More broadly, a solicitor writing on behalf of his client in the context of a dispute will commonly make assertions of fact without necessarily qualifying them by the use of words such as *"my client claims"* or *"my client's position is"*. Nevertheless, properly construed these are usually assertions made by the client through the solicitor rather than representations by the solicitor himself. Where the dispute concerns or includes issues of authority to act for a particular entity, such assertions may include statements about the client's

authority to represent the company. The natural starting point is that such assertions are being made on the client's behalf rather than by the solicitor personally.

v) S&S's letters of 12 July made express reference to the existence of a dispute about authority to represent Bronze Monkey, stating that Mr Gregg *"may have held himself out to have the authority to manage the affairs of Bronze Monkey"* and setting out reasons why the recipients should not accept that as being the case. It was clear on the face of S&S's letters that there was a dispute as to authority to represent Bronze Monkey. In this context, (a) it is likely that the recipients could not have relied on S&S's letters as containing a warranty of authority to act for Bronze Monkey, and (b) further, a reasonable recipient would be unlikely to understand S&S to be making a representation on its own behalf, as opposed to setting out its client's case, as to the contentious issue of authority.

vi) In all these circumstances, S&S's statements that it was writing on behalf of Bronze Monkey, and that the positions in its letters represented those of the majority of Bronze Monkey members – while making clear that S&S represented UIT and not Bronze Monkey – are properly to be read simply as assertions of UIT's case.

vii) The request for payment to S&S's client account is consistent with S&S writing on behalf of its client UIT, who was concerned (as explained in S&S's letter) to guard again what it apprehended to be a risk of misappropriation by Mr Gregg of funds due to Bronze Monkey and who therefore wished to collect the funds on Bronze Monkey's behalf, whereupon UIT would hold them for Bronze Monkey.

viii) As a matter of strict syntax, the passage in S&S's letter of 12 July to Clermont quoted in § 18 above might be read as referring to Bronze Monkey as S&S's "*client*", because Bronze Monkey, not UIT, was the party to the First Call Option Agreement and the owner of the Option Shares. However, this passage must be read in the context of the letter as a whole, which as already noted explicitly identified UIT as S&S's client and make clear several times that S&S did not regard Bronze Monkey as its client.

ix) S&S's letter of 14 July should be construed in the context of its letters of 12 July, and thus as setting out the position of S&S's client UIT.

69. The position was made clearer still by the ensuing correspondence and, in due course, the Statements of Case.

70. S&S's letter of 22 July 2016 to Dorsey made the point that S&S had *"represented its client's position on certain matters in correspondence"*.

71. S&S's letter of 29 July 2016 was explicit in stating:

i) that it was UIT's position, which S&S had been instructed to convey, that it was a managing member of Bronze Monkey;

ii) that it was UIT's position that it had the support of another member of Bronze Monkey;

iii) that it was accordingly *"our client's position"* that the contents of S&S's letters represented the position of Bronze Monkey; and

iv) that it had become apparent that UIT no longer had the support it believed it had from other members of Bronze Monkey.

72. S&S's 10 August 2016 letter to Clermont similarly made explicit that S&S's letter of 12 July *"sets out UIT's position with respect to Bronze Monkey as at that date"* (my emphasis).

73. In those circumstances it is incorrect, and in any event not decisive for present purposes, to contend (as the Claimants do on this application, and as Dorsey did in its letter of 11 August 2016) that S&S had not addressed with Clermont the statement in S&S's 14 July 2016 letter that the letter represented the views of *"the member who owns 30.9% of Bronze Monkey's interest"*. S&S's letter of 10 August 2016 to Clermont made clear that the contents of its 12 July letters – which referred both to UIT having support from other members and to UIT's claim to be a managing member of Bronze Monkey – represented the position of S&S's *client*. In any event, S&S had already made clear in an open letter of 29 July 2016 to Dorsey that it was UIT's position, as opposed to S&S's position as a firm, that it had support from one or more other Bronze Monkey members.

74. This correspondence made clear, even if (contrary to the conclusion I have reached above) it was not already clear from the letters of 12 and 14 July 2016, that S&S as a firm made no claim in its own right to have authority, on either basis, to represent Bronze Monkey but was simply setting out the position of its client UIT.

75. S&S's Defence to the present proceedings reflects and repeats this position. As detailed in § 47 above, the Defence confirms S&S's position that its statements in the relevant correspondence were simply setting out UIT's case as UIT's solicitors, on UIT's instructions, and not making any representation or warranty as to S&S's own authority to act for Bronze Monkey as opposed to UIT.

76. As a result, there is in reality no issue between the Claimants and S&S as to S&S's entitlement to represent Bronze Monkey. The position of both the Claimants and S&S is that S&S had and have no authority to represent Bronze Monkey unless and to the extent that UIT (or, in future, any other Bronze Monkey members who might choose to instruct S&S) had or have such authority. What authority that might be is an issue between UIT and the Claimants (or Mr Gregg), but S&S as a firm takes no position on that issue.

77. The relief sought in the Particulars of Claim is *"a declaration that [S&S] is not entitled to represent Bronze Monkey and/or give instructions on behalf of Bronze Monkey without the express authority of a member or members cumulatively holding at least a 50% interest in Bronze Monkey"*. However, the question of entitlement to represent or give instructions on behalf of Bronze Monkey is an issue between the Claimants and UIT, not the Claimants and S&S. S&S as a firm takes no position on that issue and has no interest in it such as could justify declaratory relief against S&S.

78. The Claimants contend that *"the principal factual issue in dispute is whether …. [S&S] itself represented that it had authority to write "on behalf of" Bronze Monkey or whether (as [S&S] says at Defence [3.1]) it was simply putting forward … UIT's claim to have authority to give instructions on behalf of Bronze Monkey"*. However:

    i) Any such *"factual issue"* is of at most academic interest. It is abundantly clear at least that S&S makes no such representation now. The Claimants make no claim that anyone relied on the representation S&S is alleged to have made on 12 and 14 July 2016, nor that any loss flowed from it.

    ii) Nor would any such claim have any real prospect of success: it is plain from Morrison & Foerster's letter of 14 July that they understood there to be a dispute about authority, and that that was a dispute between Mr Gregg and UIT. The issue, as they expressed it, concerned *"UIT's authority to instruct [S&S] to represent Bronze Monkey"*. The last two paragraphs quoted from Morrison & Foerster's letter in § 23 above make clear that it was the facts that *"[t]he clients of both Dorsey and Simmons assert claims on behalf of Bronze Monkey to the loan monies …"* and *"the absence of a resolution regarding the control of Bronze Monkey between your firms' respective clients"* that led Morrison & Foerster to commence a stakeholder action under CPR Part 86.

    iii) The alleged representation by S&S is thus of no legal significance. Even if (contrary to my findings) it had been made, it would be comparable to the unaccepted repudiation held in *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417, 421 (cited in Zamir & Woolf § 4-83) to be *"a thing writ in water"*, conferring no legal right, with the result there that *"a declaration that the defendants had repudiated their contract with the [claimant] would be entirely useless to the [claimant] if it appeared at the same time, as it must appear in this case, that it was not accepted"*.

    iv) The relief actually sought in the present proceedings relates not to any historical representation by S&S, but to the question of its entitlement to represent Bronze Monkey. That is, for the reasons I have already given, an issue between Mr Gregg (or Mr Gregg and Bronze Monkey) and UIT, not an issue between either of the former and S&S.

    v) Even if there were a relevant issue of fact as to whether S&S made a representation in its July 2016 correspondence, my conclusion as set out earlier is that it did not.

79. The Claimants argue that there are nonetheless issues specific to the role performed by S&S that can be resolved not only by considering the authority of UIT, but also that of Mr Gregg and the other investors. The claim against S&S, it is contended, is specific to its authority to represent and/or give instructions on behalf of Bronze Monkey. In particular, the Claimants say, if (contrary to the Claimants' case) UIT *is* a member and/or manager and *does* have authority to bind Bronze Monkey, that would still not answer the question of whether S&S can act in circumstances where other members and managers who also have authority to bind Bronze Monkey (and who hold more than a 50% interest):

    i) have instructed a different firm of solicitors;

ii) are telling S&S that it cannot represent Bronze Monkey; and

iii) are giving conflicting instructions on behalf of Bronze Monkey

80. However, the fact remains that that is not a matter on which S&S as a firm has taken or takes any position, and in reality is not an issue relating to S&S at all. In substance it is an issue as to whose authority should prevail – whether the context be instructing solicitors (whoever such solicitors might be), entering a contract or taking any other step – if both UIT and another member of Bronze Monkey are *prima facie* empowered to act for it but the other member has a larger interest in Bronze Monkey than UIT does. That might become an issue as between UIT, Mr Gregg, other members of Bronze Monkey and/or Bronze Monkey itself, but is not an issue or dispute involving S&S itself.

81. In all these circumstances, it is clear that there is no real dispute between the Claimants and S&S, whether as to the existence or extent of a legal right between them or at all. There is, properly analysed, no issue between the Claimants and S&S as such, and in any event none in relation to which there is any real prospect of declaratory relief being appropriate. Equally, and for the same reasons, S&S is not a "*person interested*" in the proceedings within the statement of Viscount Maugham in *London Passenger Transport Board* cited earlier.

82. Even if one were to follow the broader approach to declaratory relief proposed by Moore-Bick LJ's dissenting judgment in *Milebush*, quoted above, there is no real prospect of this being held to be an appropriate case in which to grant declaratory relief against S&S, or of the Claimants being held to have a legitimate interest in obtaining such relief against S&S. There is a dispute between the Claimants and UIT, or between Mr Gregg and UIT, but S&S itself has no interest or involvement in it. It is acting, and claims to act only, as UIT's solicitors.

83. S&S's unwillingness to give the undertakings sought by Dorsey in its letter of 11 August 2016 (several weeks after proceedings were commenced) does not alter the conclusions reached above. S&S are correct to take the view that such undertakings would or might inhibit its ability properly to represent UIT and/or any other minority interests in Bronze Monkey who might in future decide to support UIT, for the reasons given by Mr Turner (§ 34 above). Moreover, in circumstances where there is no issue or dispute vis-à-vis S&S itself, alternatively none with any real prospect of properly being the subject of declaratory relief against S&S, S&S's unwillingness to give the undertakings the Claimants might seek is beside the point. A solicitor's unwillingness itself to give undertakings in respect of a dispute that, properly analysed, lies between a third party and the solicitor's client is not a sufficient basis on which to conclude that there is therefore a dispute with the solicitor which might properly result in declaratory relief.

84. Further, there is in the circumstances I have set out above no practical purpose or utility which could be served by declaratory relief against S&S, as opposed to its client UIT. Conversely, the grant of such relief would for the reasons already given risk improperly inhibiting S&S's ability to represent the interests of its client UIT in its ongoing dispute with Mr Gregg.

(K) Abuse of process

85. S&S makes the further submission that the claim against it is an unwarranted and inappropriate collateral attack on the proper role of a solicitor representing its client, and as such is an abuse of process, citing Zamir & Woolf (*supra*) § 4-120: *"The courts will also refuse to grant any relief when the court considers that the only purpose of the proceedings amounts to an abuse of procedure."*

86. S&S argues that the Claimants have failed to identify any legitimate purpose for bringing the claim against S&S, and the court should infer that they have chosen to issue and maintain these proceedings against S&S for illegitimate tactical reasons such as:

    i) to include S&S as an 'anchor defendant' in the proceedings to bolster the Claimants' argument that the Court should exercise jurisdiction over UIT;

    ii) to interfere with S&S's ability to act in UIT's interests and/or on its instructions in connection with the ongoing dispute between UIT and Mr Gregg; and/or

    iii) to cause costs and inconvenience to S&S.

87. As to the first point, UIT's challenge to the jurisdiction remains pending, as noted earlier, and Mr Gregg has proposed a stay of these proceedings pending determination of the Delaware proceedings. The Claimants make the point that they have no need to rely on S&S as an anchor defendant, because other grounds of jurisdiction over UIT exist: the Claimants allege that UIT committed a tort in England and/or causing loss in England, and seek an injunction ordering UIT to do or refrain from doing acts in England, within 6BPD §§ 3.1(9) and (2) respectively.

88. As to the second and third points, Mr Turner of S&S states in his 2nd witness statement that the undertakings the Claimants seek against S&S had and have the potential adversely to affect UIT's position and S&S's ability to represent UIT's position for the reasons quoted in § 34 above.

89. The absence of any real basis on which to have commenced or continued the claim against S&S lends some support to the inference which S&S invites the court to draw. However, I do not consider that the court is in a position to form a sufficiently clear view on this aspect of the matter, bearing in mind that this is a strike-out/summary judgment application (the tests for which I have summarised earlier), and the court does not have the benefit of full disclosure or witness evidence. In the light of my conclusions on the other matters arising, it does not affect the outcome of the application.

(L) Conclusions

90. The question arises whether in the light of my findings as set out above, the appropriate remedy would be to strike out the Claimants' claim or to grant summary judgment in favour of S&S.

91. Striking out would be justifiable, since even taking the facts and matters set out in the Particulars of Claim alone, for the reasons set out above they disclose no reasonable grounds for bringing the claim. On the other hand, the conclusions I have reached are also supported by fuller consideration of the correspondence and other evidence, which might be regarded as going beyond the grounds "*disclosed*" by the Particulars of Claim within CPR 3.4(2)(a). In these circumstances it seems to me that the appropriate relief is to grant summary judgment in favour of S&S in respect of the Claimants' claims against it.

92. I am grateful for the counsel teams on both sides for their very clear and incisive written and oral submissions.