Neutral Citation Number: [2026] EWHC 2004 (Ch)

Case No: BL-2025-000783

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMPANIES COURT (ChD)

IN THE MATTER OF CONTINENTAL CLOTHING COMPANY LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 July 2026

Before :

Andrew de Mestre K.C. sitting as a Deputy Judge of the High Court

- -

Between :

PHILIP GAMETT	**Claimant/ Applicant**
- and –	
(1) PAUL HUGHES **(2) CONTINENTAL CLOTHING COMPANY LIMITED**	**Defendants/ Respondents**

- -

Maria Mulla and **Oliver Clement** (instructed by **Laceys Solicitors**) for the Claimant/Applicant
Jeremy Richmond KC and **Sam Mitchell** (instructed by **Trowers & Hamlins LLP**) for the First Defendant/Respondent

Hearing dates: 29 and 30 April 2026
Draft judgment: 21 July 2026

- -

Andrew de Mestre K.C. :

A INTRODUCTION

1. On 29 and 30 April 2026, I heard an application under the Companies Act 2006, s.261 by the Claimant ("**Mr Gamett**") for permission to continue a derivative action against the First Defendant ("**Mr Hughes**"). The proposed claim concerns Continental Clothing Company Limited ("**the Company**"), the Second Defendant to the claim. Mr Justice Adam Johnson had given stage 1 permission for the action on the papers in November 2025.

2. By his application Mr Gamett had also sought an indemnity from the Company in respect of the costs of pursuing the claim. However, that application was not pursued before me and so I am concerned only with whether Mr Gamett should be given permission to continue his derivative action.

3. I note also that the derivative action by Mr Gamett against Mr Hughes is only one part of a wider ongoing dispute between those two parties. Shortly before the hearing, Mr Hughes had issued a claim against the Company seeking payment of unpaid dividends and had sent a letter before action to Mr Gamett in relation to a proposed unfair prejudice petition under the Companies Act 2006, s.994. Moreover, several weeks after the hearing and while I was preparing this judgment, I received letters from the solicitors for Mr Gamett (dated 3 June 2026) and for Mr Hughes (dated 9 June 2026) addressing the potential impact of the dividend claim and, in particular, the case management considerations which might arise. However, in the light of the conclusions I have reached and set out below, I do not need to deal further with disputes in that correspondence.

4. Mr Gamett was represented at the hearing by Ms Mulla and Mr Clement and Mr Hughes by Mr Richmond KC and Mr Mitchell. I am grateful to them for their written and oral submissions.

B THE LEGAL FRAMEWORK

5. Derivative actions in England and Wales are subject to the provisions of the Companies Act 2006, Chapter 11, Part 1 (s.260 to s.264).

6. S.260 provides in sub-paragraph (2) that a derivative claim may only be brought under the provisions I have referred to and in sub-paragraph (3) that:

> "*A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.*"

7. Derivative actions are also subject to the permission of the Court and applications for permission are dealt with in two stages. At the first stage, the Court will consider on the papers and looking only at the materials provided by the claimant/applicant whether the application and evidence disclose a *prima facie* case for giving permission (s.261(2)). If the application for permission passes this threshold, the Court will give directions leading to a second stage hearing at which the Court will decide whether to give permission, refuse permission, or adjourn the proceedings with further directions (s.261(4)).

8. The approach which the Court should adopt in considering whether to give permission is set out in s.263 which provides in its material parts that:

"*(2) Permission (or leave) must be refused if the court is satisfied—*

(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or

(b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or

(c) where the cause of action arises from an act or omission that has already occurred, that the act or omission—

(i) was authorised by the company before it occurred, or

(ii) has been ratified by the company since it occurred.

(3) In considering whether to give permission (or leave) the court must take into account, in particular—

(a) whether the member is acting in good faith in seeking to continue the claim;

(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;

(c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—

(i) authorised by the company before it occurs, or

(ii) ratified by the company after it occurs;

(d) *where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;*

(e) *whether the company has decided not to pursue the claim;*

(f) *whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.*

(4) *In considering whether to give permission (or leave) the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.*"

9. The parties referred me to a number of authorities in which these requirements have been considered and, in particular, the approach to be taken at the second stage of a permission hearing. These authorities included Franbar Holdings Ltd v Patel [2008] BCC 885, Iesini v Westrip Holdings [2011] 1 BCLC 498, Abouraya v Sigmund [2015] BCC 503, Boston Trust Co Ltd v Szerelmey Ltd [2020] EWHC 1136, Re Nexbell Ltd [2021] BCC 904, Gandesha v Gandesha & Ors [2024] Costs L.R. 171, and Chimbganda v Kundodyiwa [2025] EWHC 1543 (Ch).

10. In the present case, the following points appear to me to be of particular importance:

10.1. The second permission stage is not a mini-trial but "*something more*" than a *prima facie* case is required at this stage when compared to the first permission stage (Iesini at [79]).

10.2. The authorities also recognise that the factors identified in s.263 require consideration of the merits of the case. In Nexbell (at [25(1) and (2)]) in the context of considering the position of the nominal director acting in accordance with s.172, the "*strength of the proposed claim*" was described as "*important*" but not "*determinative*". In seeking to describe the exercise to be carried out, it has been said that it is necessary to "*look under the bonnet of each claim*" but not to "*strip down the engine*" (Boston Trust at [73]).

10.3. The test under s.263(2)(a) is whether no director acting in accordance with s.172 would seek to continue the claim (Iesini at [81]). In a case where some directors would not continue the claim but others (or even one other) would, then the case falls outside of s.263(2)(a). However, many of the same factors which a director would consider will be relevant to the exercise by the Court of its discretion not least as s.263(3)(b) refers to the importance which a director would attach to the continuation of the claim.

10.4. The availability of an alternative remedy is not an absolute bar to a derivative claim but is one of the factors which will be of relevance to the Court's exercise of discretion.

10.5. As regards the motivation of the claimant and whether they are acting in good faith in bringing the claim, the action need not be brought solely for the benefit of the company. That must however, be the dominant purpose (Iesini at [119]-[121]).

11. Mr Gamett also placed material reliance on the fact that Mr Justice Adam Johnson had concluded at the first stage that the claim should be permitted to continue. However, at the second stage, the position in which the court finds itself is different from the earlier stage. Not only is "*something more*" required but the Court has the benefit both of evidence from the other party and detailed submissions from both sides. The fact that permission was given on paper and with evidence from one side only is part of the background but does not seem to me to be a factor of particular significance to the decision I have to make. I must consider the application in the light of all of the circumstances as I now find them.

C THE FACTUAL BACKGROUND IN OUTLINE

12. For reasons which I will come to, there was a substantial focus at the hearing on factual events from more than twenty years ago which play an important role in relation to the claims and, as a result, I will have to consider the evidence relied on by each of the parties as to those events. In order to give some context to that evidence, the background can be summarised as follows:

12.1. Mr Hughes and Mr Gamett have known each other since childhood.

12.2. In about 1994 they started a business together in the wholesale t-shirt market. This business, known as Hardwear Inc, did not take an incorporated form.

12.3. The Company (initially under the name P.T. and M. Developments Ltd) was incorporated on 9 July 1998 as a successor to the Hardwear Inc business. Initially neither Mr Hughes nor Mr Gamett was a director or shareholder in the Company as they wanted to insulate it from the threat of litigation by a former supplier of Hardwear Inc. Instead, the shareholders and officers were Mr Gamett's sister and her husband.

12.4. In due course, in 2001, Mr Gamett and Mr Hughes were appointed as directors of the Company, and the Company's shares were transferred to them equally. Since then, they have each been a 50% shareholder in and director of the Company.

12.5. On 19 March 2003, Continental Clothing Company GmbH ("**CCC Germany**") was incorporated in Germany. It is the basis on which this company was incorporated and then operated by Mr Hughes which is the subject of the derivative action I have to consider.

12.6. Although the allegations are set out below in more detail, Mr Gamett says in essence that, in the course of 2002, he made an oral agreement with Mr Hughes which contained the detailed terms on which it was agreed that CCC Germany would be incorporated as a subsidiary of the Company and run by Mr Hughes.

12.7. In August 2005, Continental Clothing Company USA LLC ("**CCC US**") was incorporated. As I understand the position, at all material times, Mr Gamett was the sole shareholder of CCC US (albeit that he says that it occupied a similar role to that of CCC Germany but for the expansion of the business into the US). That company ceased trading in April 2011.

12.8. Between the incorporation of CCC Germany and the commencement of these proceedings, there were several occasions on which the parties came into dispute about the relationship between them, the Company, and CCC Germany. In particular, in 2005 there was a meeting between the parties at the offices of Lawrence Graham in London, and in 2011 Mr Gamett instructed Rosenblatt Solicitors to write to Mr Hughes about the relationship between the Company and CCC Germany. I will return below to the detail of these disputes.

12.9. In 2009, Mr Gamett moved to Dubai. In addition, Mr Mark Zeegan was appointed as a director of the Company on 1 October 2009, a position he held until he resigned on 29 June 2023.

12.10. Over the course of 2011-2019, there were various transfers made to Mr Gamett either from CCC Germany's bank account or Mr Hughes's personal account as follows: (i) £1.171m in July 2011; (ii) £300,000 in May 2013; (iii) £158,000 in December 2014; (iv) £380,000 in July 2016; (v) £170,000 in December 2017; and (vi) £300,000 in January 2019.

12.11. In March or April 2022, Mr Hughes and Mr Gamett met in Berlin. At that meeting Mr Hughes informed Mr Gamett of some health issues which he was facing and of his desire to sell the Company and CCC Germany.

12.12. In May 2023, according to Mr Hughes, Mr Gamett returned to active management of the Company.

12.13. In October 2023, Mr Gamett sent Mr Hughes a draft letter before action setting out various claims which it was said that the Company had against Mr Hughes.

12.14. In December 2023, Laceys Solicitors sent a letter of claim to Mr Hughes and CCC Germany. Trowers responded on behalf of Mr Hughes on 5 March 2024.

12.15. In February 2024, Mr Gamett sent a "cease and desist" letter to CCC Germany in relation to the use of the Company's trademarks. In March 2024, Mr Gamett instructed a separate firm of solicitors, Carter Lemon Camerons LLP, to write to Mr Hughes on behalf of the Company alleging trademark infringement by CCC Germany and Mr Hughes. This letter also required use of the Company's intellectual property to stop.

12.16. In or about October 2024, CCC Germany ceased its operations having announced its intention to take this course in July 2024.

D THE PROPOSED CLAIM

13. There was also a considerable amount of focus at the hearing on the nature of the claim as set out in the Claim Form and the Particulars of Claim.

14. Starting with the Claim Form, it described the claim as follows:

> "*The claim is for breach of an oral agreement to transfer shares and profits from a German subsidiary to the Company, and for a derivative claim brought against Mr Hughes in his capacity as a director of Continental Clothing Limed* [sic] *(the Second Defendant) for alleged breaches of his duties as a director, and also for breach of an oral agreement between the Claimant and Mr Hughes.*"

15. Turning to the Particulars of Claim, they plead that:

15.1. They are the particulars of a derivative claim brought under Part 11 of the Companies Act 2006 (¶1).

15.2. In order to govern the relationship between the Company and CCC Germany, and to define their respective responsibilities, Mr Gamett and Mr Hughes entered into an oral contract (¶34) following a series of discussions which culminated in October 2002 (¶35).

15.3. The key terms of that oral contract were that:

(1) Mr Hughes would be responsible for establishing and managing CCC Germany in the best interests of the Company (¶39).

(2) Mr Gamett would support Mr Hughes from the UK to facilitate the success of CCC Germany for the benefit of the Company (¶40).

(3) The Company would support the establishment of CCC Germany, provide stock on loan at arm's length prices, and would allow use of its intellectual property (¶41).

(4) The profits of CCC Germany would be distributed to the Company and then ultimately to Mr Hughes and Mr Gamett as shareholders of the Company (¶42). This term was repeated at ¶45.

(5) CCC Germany would be a subsidiary of the Company and, accordingly, CCC Germany would be jointly owned by Mr Hughes and Mr Gamett as a result of their equal shareholding in the Company (¶43).

(6) CCC Germany would account to the Company for its profits "*with the agreement and understanding that all profits ultimately belonged to the Company*" (¶44).

(7) CCC Germany would provide the Company with full financial reporting to ensure that the Company had transparency over CCC Germany's performance (¶46).

(8) CCC Germany would order stock from the Company on an arm's length basis at a transfer price set at 13% above landed cost (¶47).

(9) CCC Germany would not undercut the Company's prices (¶48).

15.4. The oral contract also included a range of other terms which covered: (a) the Company's obligations to CCC Germany (¶49-54); (b) Mr Gamett's obligations (¶55-56); and (c) Mr Hughes's obligations (¶57-62).

15.5. The Company and CCC Germany acted as parent and subsidiary and were perceived as one unified business.

15.6. Mr Hughes owed duties to the Company under the Companies Act 2006 and at common law.

15.7. In Section I, under the heading "*The breaches of duty of the First Defendant*", Mr Hughes is alleged to have committed the following wrongdoing:

(1) Failing to transfer the shares in CCC Germany to the Company "*in breach of the Oral Contract…*" (¶94). This is also said to amount to a breach of Mr Hughes's fiduciary and statutory duties (¶101).

(2) Failing to provide the Company with any financial information relating to CCC Germany "*in breach of the Oral Contract…*" (¶102-103). This is also said to amount to a breach of Mr Hughes's fiduciary and statutory duties (¶106).

(3) Failing to ensure the proper distribution by CCC Germany of its profits to the Company in "*direct breach*" of the oral contract (¶108-109). This is also said to amount to a breach of Mr Hughes's fiduciary and statutory duties (¶112). Pausing there, in the written argument for Mr Gamett, it was said that the failure by Mr Hughes to account for the profits of CCC Germany was not a breach of his director's duties but "*of his general duty as a trustee of those shares*" which was a fiduciary duty he owed as a trustee but which did not "*stem from* [Mr Hughes's] *position as a director*".

(4) Breaching the term of the oral contract relating to the purchase of stock by CCC Germany from the Company (¶113-114). This is said to amount to a breach both of the oral contract and of Mr Hughes's fiduciary and statutory duties (¶116).

(5) Causing financial loss to the Company (¶117). The allegations in this paragraph appear to include some repetition of earlier allegations (such as in relation to the purchase of stock in ¶117a) but also some additional allegations (such as the misappropriation of an order placed with the Company in ¶117f). These allegations are said to amount to a breach of Mr Hughes's fiduciary and statutory duties (¶120).

(6) Closing CCC Germany without warning and causing reputational damage to the Company (¶121-129). This is said to amount to a breach of Mr Hughes's fiduciary and statutory duties (¶127).

(7) Exploiting the Company in favour of CCC Germany (¶130-140). This is said to amount to a breach of Mr Hughes's fiduciary and statutory duties (¶140).

15.8. The breaches of fiduciary and statutory duty alleged against Mr Hughes are summarised in Section J and particularly in ¶142a-v. These sub-paragraphs appear to repeat the complaints made in ¶117 (for example, ¶142a-c relate to the shares in and profits of CCC Germany) but also add a miscellany of other complaints of a more general nature including that Mr Hughes did not promote the success of the Company for the benefit of its members, allowed CCC Germany to exploit the intellectual property of the Company after 2023, promoted the success of CCC Germany over the Company, and failed to ensure that CCC Germany complied with the terms of the oral agreement. It is not entirely clear to me how the sub-paragraphs are intended to relate to the more detailed pleading of breaches in Section I but the way the pleading is structured paragraph 142 is a summary of (rather than an expansion of) the earlier allegations summarised in paragraph 15.7 above.

15.9. The relief claimed against Mr Hughes is:

(1) A declaration that the Company is the beneficial owner of 100% of the shares in CCC Germany (those shares currently being held on trust by Mr Hughes for the Company) (¶144b).

(2) An order for the immediate transfer of the shares in CCC Germany to the Company (¶144c).

(3) An account of the profits received by CCC Germany and Mr Hughes, including profits from goods which should have been purchased from the Company but were not (in breach of the oral contract) (¶144d).

(4) Payment of those profits to the Company (¶144e).

(5) Further or alternatively payment to the Company of damages and/or equitable compensation (¶144f).

E THE ARGUMENT AND MY ANALYSIS

16. Mr Richmond submitted on behalf of Mr Hughes that the application failed at every stage. He said that:

16.1. No director acting in accordance with the Companies Act, s.172 would seek to continue the Claim as it was not supported by the evidence, there was no real prospect of the Company obtaining any material benefit and the motivation was to exert improper pressure on Mr Hughes. Mr Richmond also referred to the absence of a fortified undertaking to protect the Company in the event of an adverse costs order. This argument would, if I accept it, dispose of the application under the mandatory ground in s.263(2)(a)

16.2. The Company had authorised or ratified the conduct complained of. This argument would, if I accept it, dispose of the application under the mandatory ground in s.263(2)(c).

16.3. If I was not persuaded by either of the mandatory grounds identified above, then the discretionary factors identified in s.263(3) pointed clearly to the dismissal of the application. Many of the matters relied on under this heading were the same as those deployed under the mandatory grounds.

16.4. There had been material non-disclosure at the stage one permission application. Mr Richmond described the failings in disclosure as "*substantial and probably deliberate*". The result of this, he said, was that I should refuse permission at stage two.

17. I will consider these points in turn.

(i) <u>S.263(2)(a): a director acting in accordance with s.172</u>

18. The starting point for Mr Richmond's submissions on s.263(2)(a) was to identify the benefits to the Company which were sought in the claim and to seek to demonstrate that these were illusory.

19. I have described the essential elements of the claim above. There are three particular heads of relief identified: (i) the claim to the shares in CCC Germany; (ii) the claim to an account of the profits made by CCC Germany during its operation; and (iii) various additional financial losses which were said to have been suffered by the Company as a result of Mr Hughes's alleged breaches of duty.

20. It is convenient to start with items (i) and (ii) as they both flow from the claim by Mr Gamett that it was agreed between him and Mr Hughes that CCC Germany would be established as a subsidiary of the Company. It would follow from this agreement that the Company (rather than Mr Hughes or Mr Gamett) would be entitled to any distributions of the profits made by CCC Germany.

21. Mr Richmond pointed to a number of documents and other matters which, he said, were fundamentally inconsistent with the case which Mr Gamett was now advancing and consistent with Mr Hughes's case that, in fact, the agreement reached in 2002 was that (a) Mr Hughes would be entitled to any profits generated by CCC Germany from sales in Germany and (b) Mr Hughes and Mr Gamett would divide equally any profits generated by CCC Germany from sales outside Germany.

22. These documents and other matters included, in Mr Richmond's submissions:

22.1. The payments made by CCC Germany and/or Mr Hughes to Mr Gamett identified in paragraph 12.10 above. If the Company had been entitled to the profits of CCC Germany, there would have been no basis for the payments to Mr Gamett. Further, although these payments and their basis were included in Mr Hughes's evidence and were said to follow the meeting at Heathrow referred to below, no substantive alternative explanation was put forward by Mr Gamett.

22.2. Documents prepared in August 2008 for the potential sale of the Company, CCC Germany, and CCC US. Under "*Ownership*", the "*Executive Summary*" referred to Mr Hughes having a 100% shareholding in CCC Germany and Mr Gamett having a 100% shareholding in CCC US. Further, the financial results of each of the three companies were presented separately.

22.3. A draft business plan for 2010-2015 said that "*CCC exists today as two independent legal entities, managed separately (one founder to each entity) and geographically separate*".

22.4. A series of exchanges in 2011 which appear to have taken place against the background of a potential sale of the business of the Company and CCC

Germany but which did not happen. After that potential sale had fallen through, Mr Gamett sent Mr Hughes a number of emails which shed light on or referred to the position in relation to CCC Germany:

(1) An email sent by Mr Gamett to Mr Hughes in March 2011 which stated that "*our agreement was that while sales within Germany were yours, sales outside of Germany were both of ours…*"

(2) An email sent by Mr Gamett to Mr Hughes on 16 March 2011 in which Mr Gamett asked, in effect, for consideration to be given to whether he was entitled to a share of the past sales of CCC Germany.

(3) An email sent by Mr Gamett to Mr Hughes on 30 April 2011 referring to a previous "*agreement regarding Europe*" and saying "*…I need you to guarantee that I will received fifty percent of the profit from all your sales outside of Germany going forward today, and to make a payment before 10am German time on Tuesday morning for all past sale up to today.*" This letter treated CCC Germany as belonging to Mr Hughes.

22.5. The dispute in 2011 also involved Mr Gamett instructing Rosenblatt Solicitors to write to Mr Hughes in relation to the Company and CCC Germany. That letter dated 17 May 2011 set out, in some detail, the terms which it was alleged that Mr Gamett and Mr Hughes had agreed for the establishment of CCC Germany which was described as a "*satellite company*". These terms included that Mr Hughes would "*personally procure payment to Mr Gamett of 50% of all net profits generated by CCC Germany from all sales*". It was also said to be a "*common understanding*" that Mr Hughes was holding 50% of the shares in CCC Germany on trust for Mr Gamett. However, the letter went on to say that, in 2005 and in anticipation of Mr Gamett setting up a US branch the profits of which he would be entitled to keep as to 100%, the profit-sharing arrangement for CCC Germany was varied so that Mr Hughes would be entitled to keep 100% of the profits generated in Germany with profits outside Germany being split 50/50 as before. The letter demanded that Mr Hughes account to Mr Gamett for his alleged share of CCC Germany's profits. It also alleged that Mr Hughes was in breach of duty to the Company.

22.6. Mr Gamett and Mr Hughes met at a hotel near Heathrow on 4 July 2011. The agenda for this meeting, prepared by Mr Gamett, referred under the heading "*Sales by CCC GmbH outside of the country of Germany*" to Mr Hughes agreeing to "*personally account for 50% of the after-tax profit of CCC GmbH from it's sales outside of the country of Germany to* [Mr Gamett]*, and will do so annually.*" It also referred to Mr Gamett and Mr Hughes reaching agreement about past sales by CCC Germany and Mr Hughes making a payment for such shares.

22.7. The terms in which Mr Gamett wrote to the Company's solicitors in October 2023 when he said that Mr Hughes "*owns 100% of CCC GmbH, and he will get the full value of CCC GmbH when (and if) we sell both companies…*"

22.8. The annual accounts for the Company which, between 2006 and 2022, recorded that Mr Hughes was the owner of CCC Germany. They also described CCC Germany as a "*sister company*" and stated that its results were not consolidated into the accounts of the Company. Prior to that, in 2004 and 2005, the accounts referred to CCC Germany as a company which the directors (i.e. Mr Hughes and Mr Gamett) jointly owned. They never referred to CCC Germany as a subsidiary of the Company.

22.9. The establishment and operation of CCC US by Mr Gamett between 2005 and around 2010. CCC US was entirely owned by Mr Gamett and it was not suggested by either party that Mr Gamett had accounted to the Company for any profits which it generated.

23. Ms Mulla's response was that the existence and nature of the agreement between Mr Gamett and Mr Hughes were matters which could only properly be determined at trial. This was all the more so given that this was a complex case in its early stages and the Company was suffering from a lack of information from CCC Germany on which to base its case. In the circumstances, and given the things which remained unknown, it was submitted that the claim should be allowed to continue at least until disclosure.

24. As regards the nature of the relationship between the Company and CCC Germany, Ms Mulla relied on a number of matters to show that the Company and CCC Germany were very closely connected and that the former acted as if it was a parent company to the latter. These included:

24.1. The desire to establish a base in Europe as acknowledged in the 2006 and 2007 financial statements.

24.2. The connection between the websites of the two companies, with the Company's website directing new German customers to CCC Germany.

24.3. The Company referring to CCC Germany as "*our German branch*".

24.4. The development by the Company of German-language versions of its marketing and promotional materials for use by CCC Germany.

24.5. The Company providing information to CCC Germany which was described by Ms Mulla as "*confidential, commercial and proprietary*".

24.6. The Company allowing CCC Germany to trade on licences held by the Company.

24.7. The registration by CCC Germany of clients using their UK customer ID number.

25. Turning to item (iii), Mr Richmond criticised each of the heads of claim which was said to make up the significant financial harm suffered by the Company (and set out in 117(a)-(g) of the Particulars of Claim).

26. Sub-paragraph (a) alleges that losses arose from the alleged failure by CCC Germany to purchase stock from the Company. These losses would be the profits which the Company would have made from such sales (see also PoC, ¶142f). The answer on behalf of Mr Hughes was that:

26.1. There was no agreement that CCC Germany would only purchase stock from the Company.

26.2. Mr Gamett knew for a significant period that CCC Germany was ordering products directly from suppliers.

26.3. Mr Hughes would have a defence of authorisation and/or ratification. Within this argument, Mr Hughes also referred to a waiver by the Company of any right to a remedy against Mr Hughes and to the Company being estopped from asserting that Mr Hughes had breached his duty as a director.

26.4. No attempt had been made to quantify these profits. While the Particulars of Claim did refer to falls in revenue at the Company from sales to CCC Germany, this only covered the period from 2005-2011.

27. Sub-paragraph (b) alleges that losses arose from the increasing volume of sales by CCC Germany which meant that the Company had insufficient stock to fill orders or grow its own sales and that this limited its "*potential revenue generation and profitability*". Mr Richmond pointed out that no actual loss of sales was pleaded and potential revenue generation was not a recoverable loss.

28. Sub-paragraph (c) alleges that losses arose from CCC Germany taking over the Company's sales to European customers after Brexit. The complaint is that CCC Germany did not account to the Company for these additional sales and/or the profits made from them. It is not clear to me that this claim adds anything to the claim I have already referred to under which the Company claims that it is entitled to an account of the profits of CCC Germany.

29. Sub-paragraph (d) identifies two occasions in 2023 on which CCC Germany is alleged to have retained profits due to the Company from sales it made to Penta Worldwide GmbH. Mr Hughes complained that the quantum of these profits was not identified and that, in any event, even on Mr Gamett's case, sales to Penta – a German company – ought to have been made by CCC Germany.

30. Sub-paragraph (e) alleges that losses were caused to the Company by CCC Germany supplying the Company's products at prices which undercut those of the Company, a strategy which "*could encourage*" non-UK customers to purchase stock from CCC

Germany rather than from the Company. Mr Hughes complained that this was an allegation of a potential loss rather than an actual loss and, as such, was not a recoverable head of loss.

31. Sub-paragraph (f) alleges that losses were caused to the Company by Mr Hughes misappropriating "*a customer order placed with the UK warehouse to the German subsidiary*". Although some additional detail of this claim is given in (f), it is unclear whether the relevant order – from a Swedish customer which was shared by the Company and CCC Germany – was even placed with the Company as opposed to that order being made with CCC Germany but satisfied by stock moved from the UK warehouse to the Berlin warehouse at an arm's length price. In any event, the losses said to have been suffered are not quantified by Mr Gamett but Mr Hughes (while denying the allegation of wrongdoing) estimates they cover profits of €400.

32. Sub-paragraph (g) alleges that losses were caused to the Company through interest being charged by CCC Germany on invoices which it rendered to the Company. Mr Hughes says that no interest has actually been paid by the Company to CCC Germany and that, in any event, there could be no reason for the Company to complain about any such interest given that there is no allegation of an agreement about not charging interest and Mr Gamett's own case is that the two entities dealt with each other on arm's length terms.

33. Mr Richmond also took aim at the claim in respect of the closure of CCC Germany (Particulars of Claim, ¶121-129). He said that the "*reputational damage*" alleged was not quantified and, in any event, was a head of loss which was available as a non-pecuniary loss. He also said that the evidence relied on by Mr Gamett – principally an impact statement from a customer (Mr Drake) – did not establish any loss to the Company and that Mr Drake had, in fact, received notice of the closure of CCC Germany on 11 June 2024.

34. As regards the motivations of Mr Gamett, Mr Richmond relied on a number of points, some of which overlapped with the arguments I have already summarised above. He said that the fact that Mr Gamett was not acting in good faith in pursuing the claim could be seen from the fact that Mr Gamett had:

34.1. Demanded in August-September 2023 that Mr Hughes transfer part of his shareholding in the Company to him. These demands were accompanied by various threats made by Mr Gamett.

34.2. Sought to prevent CCC Germany from using any of the Company's intellectual property, including through "cease and desist" letters sent to CCC Germany and to its customers.

34.3. Caused the Company not to pay dividends to Mr Hughes.

34.4. Caused the Company to pay dividends to himself (but not Mr Hughes) in 2024 (and possibly in 2023 as well).

34.5. Excluded Mr Hughes from management or access to the documentation of the Company.

34.6. Adopted, in the name of the Company, a position which is inconsistent with those which he has previously advanced in relation to the profit sharing for CCC Germany.

34.7. Established a new Irish company, Gaia Licensed Apparel Ltd ("**Gaia**"), which uses the Company's intellectual property and sells the same products. Mr Gamett's explanation was that Gaia was a company which operated as a licensee/distributor pursuant to a trademark licence and so was in a completely different position to CCC Germany.

34.8. Made non-disclosures at the first permission stage.

34.9. Taken the actions described above shortly after Mr Hughes informed him of some health problems.

35. How then would a director acting in accordance with s.172 approach the proposed claim? That section requires a director to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In <u>Iesini</u> at [85] the following factors were identified as amongst those which a director would consider:

"*the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on.*"

36. Having considered carefully the submissions made to me both by Ms Mulla and by Mr Richmond, and recognising that the test in s.263(2)(a) sets a high bar, I have concluded nonetheless that no director acting in accordance with s.172 would choose to continue the claim for the following reasons.

37. First, the merits of the proposed claims are weak at best. As I have explained, the majority of the claims derive from the terms of the oral contract said to have been agreed between Mr Hughes and Mr Gamett in 2002. Leaving aside the issue of how these terms are said to translate into claims by the Company (which I will come to in the second point below), it seems to me inevitable that a director considering a claim based on such an agreement would consider the following points as presenting material difficulties for the claim:

37.1. The inconsistency between the way in which the claim is now put by Mr Gamett and the way in which he (or solicitors instructed by him) have previously put it. This is not just a minor forensic issue for Mr Gamett. As the key events took place over 20 years ago, in 2002, when the alleged oral contract was entered in to, the contemporaneous documents will be of particular importance in assessing the merits of any claim as they are likely to provide the best indication of what, if anything, was agreed. As to this, the documents generated by Mr Gamett (or on his behalf) which I have referred to above, both support Mr Hughes's evidence as to the nature of the agreement which was reached <u>and</u> substantially undermine the case as now advanced by Mr Gamett.

37.2. The absence of a coherent explanation as to how the inconsistent cases came to be advanced. In the written argument on behalf of Mr Hughes, it was acknowledged, for example, that the letter from Rosenblatts in May 2011 contained errors when it said that:

(1) 50% of the shares in CCC Germany were held on trust for Mr Gamett. The "*proper position*" was that all of the shares were held on trust for the Company but it was submitted that "*The net result is the same.*" I do not agree. There is a material difference between 50% of the shares being held for Mr Gamett personally and 100% of the shares being held for the Company.

(2) 50% of the non-German profits were due to Mr Gamett. This was said simply to be a "*misstatement*" but without any indication of how or why such a specific but erroneous case was advanced.

37.3. The fact that Mr Gamett's case as to the ownership of CCC Germany is also undermined by the Company's accounts which were, on occasion, signed by Mr Gamett and, from 2006 onwards, referred to Mr Hughes's ownership of the shares in CCC Germany. If those shares were being held in trust by Mr Hughes for the Company and it was the Company which was entitled to the profits of CCC Germany, its accounts would have referred to this. The accounts are of particular relevance as they are an important, public-facing recognition of the ownership of CCC Germany. I acknowledge that, for 2004 and 2005, the accounts did refer to CCC Germany as owned by the two directors but even this is inconsistent with the case that the shares were held for the Company.

37.4. The acceptance by Mr Gamett of the substantial sums of money referred to in paragraph 12.10 above which Mr Hughes says are on account of the profit-sharing agreement for CCC Germany. Mr Gamett's evidence for the application does not provide any substantive challenge to this nor does it explain why he would have been entitled to these sums if, as he now says, it was the Company which was entitled to the profits of CCC Germany. Thus, although Ms Mulla sought to suggest that the payment supported Mr Gamett's case, I do not agree.

37.5. The absence in the period between 2002 and 2023 of a claim by the Company or Mr Gamett that the Company was entitled to ownership of the shares in CCC Germany or to an account of its profits. On Mr Gamett's case, Mr Hughes was in serious and persistent breach of his directors' duties to the Company from

2002 onwards but the Company (whether through Mr Hughes or its other director) said nothing.

37.6. The apparent consistency between the way in which CCC Germany was dealt with and the way in which CCC US was dealt with – each was owned by one of the founders of the Company. Further, the letter from Rosenblatts in 2011 referred to Mr Gamett own CCC US and being entitled to its profits, and the accounts consistently referred to CCC US as a company owned by Mr Gamett.

38. I have considered carefully whether the points relied on by Mr Gamett and set out by Ms Mulla in her written and oral arguments which demonstrate a close operational connection between the Company and CCC Germany provide a sufficient counterbalance on the merits. I do not consider that they do. While it is right that the two companies were very closely connected and were presented as part of the same overall business, whether or not they were parent and subsidiary as opposed to under common or related ownership is a separate question. Moreover, the factors connecting the two companies were present when Mr Gamett explained the nature of the relationship in 2011 and again in 2023, and when the accounts were prepared from 2006 onwards.

39. While I have reminded myself of the need to avoid a "mini-trial", it is necessary to make at least a preliminary assessment of the merits on the basis of the materials before me. Adopting this approach, it is difficult to see how Mr Gamett will be able to establish the fundamental building blocks of the case he now wants to bring, namely that it was agreed that CCC Germany would be a subsidiary of the Company and would account to it for the profits it made.

40. I have also considered whether the overall claim can be divided up into its three main parts identified in paragraph 19 above, such that the merits of each can be assessed separately. On such an approach it would be said that the documents on which Mr Hughes relies are more directly relevant to the claims to (a) the shares in CCC Germany and (b) the profits of CCC Germany, but not to the other claims for financial losses which depend on other aspects of the alleged oral contract (such as, for example, the agreement that CCC Germany would purchase its stock from the Company at arm's

length prices). As to this latter point relating to stock purchases, Ms Mulla pointed to the fact that there was consistency between the terms alleged now and those set out, for example, in the letter from Rosenblatts in May 2011.

41. While I accept that the documents deal principally with the ownership and profits of CCC Germany, it does not seem to me that the heads of claim can be entirely severed from each other given that they largely arise from the same alleged oral agreement and the foundations on which that oral agreement is built are substantially undermined by the documentary evidence. Furthermore, even the claims to financial loss other than the profits of CCC Germany suffer from the difficulty that they were not advanced for more than 20 years after the agreement was said to have been made.

42. In these circumstances, and in my view, a notional director would start from the position that the claim should be considered as a whole.

43. Second, the nature of the claim as pleaded gives rise to a significant legal difficulty even without the documentary evidence I have referred to. As I observed in the course of the argument, the way in which the claim is put is somewhat unusual. Although the various claims I have summarised in paragraphs 15.7(1) to (7) above, each end with a plea that Mr Hughes acted in breach of his statutory and fiduciary duties, they are derived from the initial plea of an oral contract between the two individuals, Mr Gamett and Mr Hughes, to which the Company is not said to be a party. Moreover, the various things which Mr Hughes is said to have done are pleaded not just as breaches of duty but also, in most cases, as breaches of that contract.

44. This gives rise to an obvious issue for Mr Gamett, namely that a claim for breach of an agreement to which the Company was not a party would not be a derivative action but, rather, a personal claim by Mr Gamett against Mr Hughes. It is not immediately obvious how the existence of the alleged oral contract feed into or leads on to a claim for breach of the duties owed by Mr Hughes to the Company.

45. Ms Mulla's written argument said that the oral contract was "*an agreement, between the only two directors of the Company, as to how to run the* Company" and that "*it was not a personal contract entered into between the directors, but rather an agreement as to Company management and obligations that were owed to the Company*". This

suggests that the oral agreement is more in the nature of a resolution of the Company acting by its two directors. However, both the Claim Form and the Particulars of Claim described it in terms of a contract entered into between the two individuals.

46. Ms Mulla's answer to this in argument was that the oral agreement between the two individuals informs and provides the scope of the duties to which Mr Hughes and Mr Gamett were subject as directors of the Company. Thus, where it was alleged that, for example, Mr Gamett and Mr Hughes agreed that CCC Germany would purchase its stock from the Company at arm's length prices or would not undercut the Company's prices, then if CCC Germany acted contrary to the agreement, then Mr Hughes would be in breach of his duties as a director of the Company. This seems to me to be a convoluted way of translating the alleged oral contract into a claim for breach of director's duty by Mr Hughes so as to seek to bring the complaints within the umbrella of a derivative claim.

47. The difficulties in using the alleged oral contract as a springboard into duties owed by Mr Hughes to the Company as a director of it are also illustrated by inconsistency in the ways in which the claims to the shares in CCC Germany and to an account of its profits are put. As I have noted above, the Claim Form puts these in terms of an agreement and the Particulars of Claim characterise them both in terms of contractual claims and breaches of director's duty. However, the written argument for Mr Hughes described these claims as based on breaches of a separate fiduciary duty owed by Mr Hughes to the Company independently from his position as a director (but still, I assume, derived from the oral agreement as it is the source of the trust over the shares in CCC Germany). It is not obvious that a claim put in this third way would fall within the requirements for a derivative action set out in s.260(3) as the claim would not arise from any breach by a director in that capacity. However, and more generally, the fact that there are significant issues with articulating the way in which the claims come to be those of the Company would be a further point of weakness in the claim which a notional director would consider.

48. Third, and linked to the point I have just made, a director considering the proposed claim as a whole would recognise that it was one which could be made in the name of Mr Gamett personally. This is not just a question of there being an alternative remedy for complaints which are also those of the Company but the way in which the claims

are pleaded most naturally suggests a claim between the two individuals. Thus, for example, if Mr Gamett was able to establish an agreement that the shares in CCC Germany were held by Mr Hughes on trust for the Company or an agreement that Mr Hughes would account to the Company for the profits of CCC Germany, there does not seem to be any reason why Mr Gamett is not entitled to pursue his claims under the agreement and to enforce the terms of that agreement personally but for the benefit of the Company including by orders in relation to the shares and the profits.

49. Importantly from the position of a director, bringing the claims in this way would also provide the Company with protection from any exposure to the costs of those claims. A director considering whether to continue the claims in the name of the Company would, in my view, be extremely concerned about the costs exposure this would bring to the Company given the weakness of the claims which I have described above. When considering the mandatory bar under s.263(2)(a), the claim is one which the Company is notionally advancing on its own behalf and it must be assumed therefore the Company would be subject to the costs consequences of that claim failing.

50. Mr Gamett's answer on the issue of costs came in two stages. On 27 April 2026, he confirmed through his solicitors that he would be willing to give an undertaking to pay the Company's costs of the proceedings and any adverse costs order made against the Company. Then, on 30 April 2026, he confirmed through his solicitors that he was not pursuing his application for an indemnity from the Company. Both of these confirmations relate to the derivative claim rather than a claim brought by the Company itself but I will assume that Mr Gamett would take the same position in a claim by the Company i.e. he would seek to ensure that there would be no exposure to costs (whether those of Mr Hughes or Mr Gamett's own costs) on the part of the Company. On this assumption, the position taken by Mr Gamett would provide the notional director with some comfort that the costs of the claim would be covered by the shareholder. However, this is not a complete answer as it would still be the Company which would be prima facie liable for the costs. Accordingly, in the absence of any evidence about the ability of Mr Gamett to satisfy both the costs which the Company would incur and any adverse costs (or fortification for those costs), it seems to me that the availability of a different route by which the Company would have no exposure to costs would be particularly relevant to the notional director.

51. Fourth, even leaving aside the issues with establishing the building blocks of liability, there appears to be a very substantial mismatch between the potential benefits of the claim and the substantial time and expense which would be incurred in seeking to obtain those benefits.

52. Starting with the claim to the shares of CCC Germany, that company has ceased operations and the claim to its shares now does not appear to have any tangible value to the Company. Moreover, even before its operations ceased, it appears that Mr Hughes did not consider that it had any value. In 2023 he told Laceys that "*CCC GmbH is worth little to nothing, because CCC ltd owns all of the company IP. And as a going concern CCC GmbH is too reliant on one person – Paul, thus it is worth almost nothing.*"

53. The most potentially valuable element of the proposed claim would be for an account of the profits of CCC Germany but this is the aspect of the alleged agreement where Mr Gamett faces a significant difficulty, namely that he has received very substantial sums which Mr Hughes says represent his share of those profits. Mr Gamett has not provided an alternative explanation for his receipt of these monies and, on the face of the evidence therefore, he would be seeking to recover profits for the Company of which he has already received a significant share.

54. The other claims to financial loss are very largely unquantified and appear to me to be either speculative or lacking in sufficient detail for a director to consider that they merit continuation, or are too small to merit the expense involved in a claim. As to this:

    54.1. Where the claims are for loss of profits which the Company would have made but for the alleged breaches of duty by Mr Hughes, I would have expected to see some attempt at the quantification of these profits. It appears from the pleading in ¶117b for example that Mr Gamett has knowledge of the sales of the German subsidiary and even in the absence of information from CCC Germany it ought to have been possible to identify at least an approximate volume of both the purchases which CCC Germany is alleged not to have made from the Company (as claimed in ¶117a) and the loss of sales by the Company (as claimed in ¶117b). In the absence of any quantification, these claims would involve a detailed (and therefore time-consuming and costly) exploration of the business of both the Company and CCC Germany over an extended period but with no real idea of the value of the ultimate claims.

54.2. It is not clear to me that the allegation in ¶117e leads to a claim given that the pleading is simply that the prices at which CCC Germany sold products "*could*" have encouraged customers of the Company to move to CCC Germany. However, even if it does, it is a claim of uncertain value but which would appear to require a granular consideration of the customers of the Company and CCC Germany to seek to identify those who might have switched their supply and the reasons for that switch.

54.3. On the other hand, where the claims are more detailed, it does not appear that there are substantial in size. Thus, for example, the claims in ¶117d and ¶117f appear to be very limited in value, while it is not alleged that the Company actually paid any interest (¶117g).

55. There will also be questions of limitation which may well limit the period of time in respect of which the Company could pursue claims for equitable compensation for breach of directors' duty. Although this aspect of the claim was not covered in any detail at the hearing, the hypothetical director would want to know not just the headline figures for the potential claims but also when they are said to have arisen given that the relevant timeframe here is 2002 to 2024 and limitation issues may limit recoveries to those losses said to have arisen after mid-2019 (i.e. in the six years up to the date of issue of the Claim Form).

56. Fifth, in so far as the claim relates to the closure of CCC Germany (Particulars of Claim ¶121-129), it is hard to see how this can be characterised as a breach of duty by Mr Hughes when it was precisely what the Company (acting by Mr Gamett) in effect demanded should happen when the solicitors acting in the name of the Company required CCC Germany to cease using the Company's intellectual property by a letter dated 1 March 2024. Mr Gamett had himself made similar demands to Mr Hughes by an email dated 4 February 2024 (and sent from the Company's "*Legal Department*"). There was also force in Mr Richmond's points that the reputational damage claimed is

not a recognised head of loss and, even if it were, the evidence relied upon does not establish any material loss of reputation.

57. Sixth, the complaint about the use by CCC Germany of the Company's trademarks and licences (which forms a significant part of the complaints in ¶130-140 of the Particulars of Claim) illustrates the unusual nature of the claims against Mr Hughes for breach of his duties owed to the Company but by reference to the way he caused CCC Germany to operate. The written argument for Mr Gamett referred to the Company having objected to the use of its intellectual property from at least 2010 but it was said that Mr Hughes "*continued to authorise the use of the same by CCC Germany, and failed to effect an agreement which would regulate the position properly*". However, Mr Hughes was only one of three directors of the Company and the other two directors (including Mr Gamett) could, by their majority, have caused the Company to take action to deal with this if it had been considered that there any such action to take. It is hard to understand the complaint about Mr Hughes failing to act in accordance with his duties to the Company to protect its intellectual property when the other same point could be made about the other directors. It is also unclear precisely what damage it is said that the Company suffered and in what amount. At best, the notional director would regard the claims in ¶130-140 as vague and insufficient to give rise to a claim which they would wish to continue.

58. I consider therefore that any director looking at the claims would conclude, based on the points I have identified above, that the claims should not be pursued by the Company.

59. This is sufficient to dispose of the application pursuant to s.263(2)(a). However, I will also consider the other arguments which were made at the hearing.

<u>Ratification/authorisation</u>

60. Mr Richmond's second argument under s.263(2) was that the relevant wrongdoing alleged against Mr Hughes had been authorised and/or ratified so the mandatory bar in s.263(2)(c) would apply. This bar requires the court to be "*satisfied*" that "*the action or omission was authorised*" or "*has been ratified*".

61. It is therefore relevant where there is conduct which would otherwise be a breach of duty giving rise to a claim by the relevant company but there has been some separate authorisation or ratification by the company. This could take the form of informal ratification by the assent of all eligible shareholders as in Re Duomatic Ltd [1969] 2 Ch 365. As Ms Mulla pointed out, this involves the relevant shareholders having full knowledge of the relevant facts and making an informed decision as to whether to ratify what has occurred (Instant Access Properties Ltd (in liquidation) v Rosser [2018] BCC 751 at [375]).

62. I was not taken to any authority which considers the nature of the proof required of the ratification or authorisation (or where authorisation/ratification was an answer to the claim). There is also a difficulty in the present case in distinguishing between the merits of the underlying claims and the issues of authorisation and ratification because much of the same material was deployed by Mr Hughes on these points although they are conceptually separate.

63. Starting with authorisation, this essentially requires me to conclude that Mr Hughes is correct about the terms of the agreement with Mr Gamett such that his actions in relation to CCC Germany were authorised in advance by that agreement. This seems to me to be a significant step beyond the conclusions I have reached above about whether a notional director would have chosen to continue the claims in their current form and on the basis of the materials before me. While I am satisfied that the merits of those claims are weak and they face the other difficulties which I have identified, I am not persuaded that I should conclude, even on a provisional basis, that Mr Hughes's actions were authorised where such a conclusion is not necessary in the light of conclusion above on the mandatory bar in s.263(2)(a) and my conclusion below on the discretionary exercise.

64. As regards ratification, this is where the overlap between the material relied on for each argument illustrates the conceptual difficulty. The starting point is that ratification would come into play where the oral agreement was as alleged by Mr Gamett with the result that Mr Hughes could be said to be in breach of his duties (as those duties flow from the agreement) but Mr Hughes could demonstrate that these breaches were nevertheless ratified after the event. The argument for ratification in this circumstance is, in summary, that Mr Gamett was aware of the relevant conduct of Mr Hughes and

did not take any steps to cause the Company to assert or bring a claim for more than 20 years. This would be ratification by acquiescence.

65. As I have already found, the absence of a claim is a fundamental weakness for Mr Gamett's case as to liability. That absence provides strong support for Mr Hughes's position as to the true terms of the agreement. However, for ratification to be an answer, I have to assume that Mr Gamett has a sufficiently meritorious case that the oral agreement he alleges was in place. It seems to me that it would be inconsistent to conclude that the evidence about Mr Gamett's conduct from 2002 onwards would be insufficient to knock out the claim under s.263(2)(a) but would satisfy me that the wrongdoing had, definitively, been ratified under s.263(2)(c). In other words, if the claims were otherwise going forwards, then the issues of authorisation and ratification would be a live issue but not determinative at this stage.

66. In these circumstances, if I had concluded that the bar in s.263(2)(a) had not applied because at least one director would continue the claim, then I would not have been satisfied that the mandatory bar based on authorisation or ratification would have applied.

(ii) <u>Discretion</u>

67. The second part of Mr Richmond's argument was that, even if the mandatory bars I have referred to did not apply, then I should exercise my discretion against allowing the claim to continue.

68. I agree with Mr Richmond. It seems to me that, looking at the factors set out in s.263(3) which are particularly relevant in this case, but also bearing in mind all of the features of the case which I have set out above, the balance weighs substantially against giving permission even if I had concluded that at least one director would choose to continue the claim. For the reasons given below, the factors at s.263(3)(b) and (f) are of particular force in this case but I will deal with each of sub-paragraphs (a)-(f) below.

69. S.263(3)(a) requires the Court to take into account whether or not Mr Gamett is acting in good faith in seeking to continue the claim. On its face, this is presented as a binary issue, with a member either acting in good faith or bad faith. In <u>Iesini</u> (at [121]) the Court recognised that a claimant member may have more than one motive (or be

seeking to obtain other benefits) and approached the issue of good faith by asking whether the dominant purpose behind the proposed derivative claim was to benefit the Company and whether or not, but for the collateral purpose, the claim would not have been brought at all.

70. Mr Richmond submitted that Mr Gamett was not acting in good faith. Ms Mulla said that the derivative was plainly intended to be for the benefit of the Company.

71. This dispute is not an easy one to resolve. While the claim is, on its face, for the benefit of the Company as it seeks the return of assets to the Company (the shares and profits of CCC Germany) and damages or compensation for its benefit, I have concerns about the motivation of Mr Gamett in seeking to bring the claim in derivative form. The claim does appear to be part of a wider dispute between Mr Gamett and Mr Hughes and, as I have referred to above, the route by which the alleged oral agreement is translated into a claim by the Company for breach of director's duty is a convoluted one.

72. It is also notable that the claim has been made now, more than 20 years after the alleged agreement, but only shortly after Mr Gamett sought to persuade Mr Hughes to agree to a variation in their respective shareholdings in the Company including through threats to close down CCC Germany; that the claim as made now is materially different from that previously advanced by Mr Gamett; that the claim seeks an account of all of the profits of CCC Germany but Mr Gamett himself appears to have received a substantial part of these and is not proposing to pay these sums over the Company; and that Mr Hughes has complaints about the way in which Mr Gamett has unilaterally caused the Company to deal with the declaration and payment of dividends, and the way in which the relationship between the Company and Gaia (a company wholly owned by Mr Gamett) has come about.

73. The question is whether, in the light of these matters, I am satisfied that the derivative claim is not being pursued in good faith. Notwithstanding the trenchant criticisms of Mr Gamett by Mr Richmond, I am not so satisfied at this stage.

74. However, it seems to me that the concerns I have about the motives of Mr Gamett do mean that this is not a factor of any great weight in the overall exercise of my discretion

(and I note that in both Iesini and Franbar the fact that the applicant was found not to be acting in bad faith did not result in permission being given).

75. Under s.263(3)(b), I have to consider the importance that a director acting in accordance with s.172 would attach to continuing the claim. As William Trower QC (as he then was) put it in Franbar at [35]:

> "*…if he would not attach very much importance to the continuation of the claim, that is likely to count against the grant of permission. If, in fulfilling his duty to promote the success of the company, he would attach substantial importance to the continuation of the claim, that factor is likely to count in favour of granting permission.*"

76. Assuming that I am wrong about my conclusion under s.263(2)(a) above, and a director or directors would seek to continue the claim, then I do not consider that such a director would attach much importance to continuing the claim (s.263(3)(b)). I have already explained the weaknesses of the claim and, in particular, the absence of material from which to conclude that the claims are substantial in value.

77. Moreover, the importance of the claim to the Company would be very substantially diminished by the fact that a director would be well aware that the claim could be pursued personally by Mr Gamett and so would not be likely to be lost if it were not continued by the Company. This was a relevant consideration in Franbar at [37] in which the Judge drew a contrast between the somewhat uncertain nature of the complaints about breach of duty and the fact that several of the complaints could be more naturally formulated as breaches of a shareholders' agreement and as acts of unfair prejudice. This is all the more so here given that the starting point for the majority of the complaints is an alleged agreement between Mr Hughes and Mr Gamett.

78. S.263(3)(c) is not relevant in this case (as the acts and omissions relied on have already occurred) while neither s.263(3)(d) or (e) carry any particular weight as the Company is split 50/50 between Mr Gamett and Mr Hughes meaning that ratification is not possible nor will the Company make an independent decision as to whether or not to pursue the claim. The fact that there are no independent members of the Company also means that there is nothing for me to consider under s.263(4).

79. The final factor at s.263(3)(f) – whether the act or omission gives rise to a cause of action which the member could pursue in his own right rather than on behalf of the Company – would, in my view, be particularly powerful in this case. I say this for two particular reasons.

80. First, the nature of the claim itself drives the conclusion that it would better be brought as a claim between Mr Gamett and Mr Hughes as the majority of the claims made are either to enforce the terms of an agreement between them or for damages for breach of that agreement. As I have set out in paragraph 15 above, the breaches of duty in ¶94-116 of the Particulars of Claim are all expressly said to be a breach of the oral agreement. These could plainly be the subject of a personal action. Indeed, a personal action would have potential advantages in that it could cover the situation in which a Court held either that (a) there was an agreement containing at least some of the terms alleged by Mr Gamett but that these terms gave rise only to contractual claims and could not be translated across into duties owed by Mr Hughes to the Company or (b) Mr Hughes is correct about the nature of the agreement such that Mr Gamett may have a personal right against Mr Hughes in relation to the profits of CCC Germany derived from sales outside Germany.

81. In so far as there are other claims which do not rely on the oral agreement – and the claims in ¶121-129 (closure of CCC Germany) and ¶130-140 (exploitation of the Company in favour of CCC Germany) do not refer to that agreement – these are complaints which Mr Gamett would be able to include within an unfair prejudice petition is he so wished. As I have explained in paragraphs 56 and 57 above, they have their own difficulties and it seems to me that I am in a similar position to the Judge in Franbar who explained at [37] that the hypothetical director in his case was faced with complaints which were:

> "*not yet in a form in which the hypothetical director might be expected to conclude that there were obvious breaches of duty which ought to be pursued and that the recovery to be expected in consequence of those breaches would be substantial*.

82. Second, pursuing the action through claims available to Mr Gamett personally, would eliminate any costs risk on the part of the Company. I have already explained above how Mr Gamett sought to deal, relatively late in the day, with the complaints from Mr

Hughes that Mr Gamett was exposing the Company to (a) his own costs (through the application for an indemnity) and to (b) its own costs of the action and to the adverse costs of Mr Hughes (as no undertaking to pay the Company's costs or adverse costs had been offered prior to 27 April 2026). However, even the final position taken by Mr Gamett would leave the Company potentially exposed to its own costs and to adverse costs if Mr Gamett was not good for his undertaking and there was no evidence as to his means. By contrast, in a personal claim, the risk to the Company would be eliminated.

83. I have also considered two variations on the application for general permission suggested by Mr Gamett, namely that I should allow part of the claim to proceed or I should give permission but only up to a certain stage of the proceedings (such as disclosure). I do not agree however, that either is appropriate in the circumstances of the case.

84. I do not consider that the claim can be split out into its constituent parts so as to allow some aspects of the claim to continue with permission refused on others. The weakness affecting the starting point for the alleged oral agreement – namely the claim by the Company to the shares and profits of CCC Germany – inevitably impacts upon the merits of the subsequent claims for the more granular aspects of the alleged agreement. Further, it would not be satisfactory to create a situation in which there is a potential multiplicity of proceedings with the claims split between personal and derivative actions.

85. I also do not consider that it is appropriate to provide a limited permission for the claims to continue until disclosure. The way in which the claims are put invites a detailed consideration of the operations of the Company and CCC Germany over a very lengthy period – 2002 to 2024 – meaning that disclosure would be both costly and time-consuming. It does not seem to me to be right to cause this expenditure of time and money to take place where the issues with the way the claim is put in the context of a derivative action suggest that it will be to no substantial purpose. Although Mr Gamett complained that there was a lack of information and documentation from CCC Germany, this seemed to me to be directed at internal material showing how CCC Germany was operated on a day to day basis whereas the key issues were the existence

and terms of the agreement reached in 2002 which would depend principally on materials crossing the line between Mr Hughes and Mr Gamett (and so would not be internal to CCC Germany).

86. By contrast, even on Mr Hughes's case, it would appear that Mr Gamett may have some personal rights against Mr Hughes in relation to CCC Germany and so disclosure may serve a more useful purpose in that context.

(iii) Non-disclosure

87. The duty of disclosure at the first permission stage was considered by David Donaldson QC in Re Seven Holdings Ltd [2011] EWHC 1893 (Ch) at [62]. Mr Donaldson QC said, in some closing remarks having already dealt with the application for permission to continue the derivative action, that an applicant for such permission was under an obligation to present and explain the matter "*transparently and fairly*" and that this included drawing "*the attention of the court squarely to any legal and evidential difficulties and to any facts at odds with its contentions.*"

88. However, it does not appear that non-disclosure was an issue between the parties and Mr Donaldson QC did not therefore need to address the consequences of any non-disclosure, and I am not aware of any case involving a derivative action in which this has been considered.

89. As a consequence, Mr Richmond fell back on the position in other without notice applications where the starting point in response to any substantial or deliberate failure is likely to be "*immediate discharge (without renewal)*" (Males LJ in Derma Med Ltd v Ally [2024] EWCA Civ 175 at [29]-[30]).

90. Mr Richmond relied on the following matters which he said amount to extensive and material non-disclosure:

90.1. The failure to exhibit the pre-action correspondence between Laceys and Trowers. As to this, Laceys had written on 22 December 2023 to both Mr Hughes and CCC Germany alleging that they were each liable to the Company for damages for "*breach of director's duty and of* [sic] *breach of contract.*" As to the latter claim, it appears to be a reference to an agreement between the

Company and CCC Germany. Trowers had then responded on 5 March 2024 rejecting the claims made by Laceys and referring to some of the documentation on which Mr Hughes relied at the hearing before me.

90.2. The inconsistency between the position which Mr Gamett was now adopting and the version of events he had previously advanced in relation to the ownership and sharing of profits of CCC Germany.

90.3. The failure to refer to previous acknowledgements by Mr Gamett that Mr Hughes was the owner of CCC Germany.

90.4. The failure to refer to the £2.8 million which Mr Gamett had received in respect of the profits of CCC Germany.

90.5. The failure to refer to Mr Gamett's control of the Company since 2023 and the fact that he had caused it not to pay dividends to Mr Hughes while, at the same time, causing it to pay dividends to himself.

90.6. The failure to refer to the establishment of Gaia.

91. I would agree with Mr Donaldson QC about the need for an applicant under s.263 to present the case fairly and transparently, and to identify the legal and evidential difficulties. The fact that permission at stage one will be dealt with on the papers emphasises the importance of these requirements. Moreover, it is no answer to the need for fair presentation that the alleged wrongdoer will have the opportunity to present his or her case as the second permission stage. Each of the permission stages is intended to operate as a filter but the effectiveness of the review at stage one would be materially reduced if applicants were not required to satisfy particular standards of disclosure at that stage.

92. Applying this approach, it seems to me that Mr Gamett ought to have drawn the first four of the points I have identified above to the attention of the Court at the first permission stage. While the Court was only concerned with whether or not there was a prima facie case, it was incumbent upon Mr Gamett to provide the Court with the case

which had been advanced by Mr Hughes and the materials which undermined his own case as to the existence and terms of the alleged oral agreement at the heart of the claim.

93. The more difficult question is the appropriate response to the failure by Mr Gamett. As I put to Mr Richmond in the course of the argument on this point, it seems to me that there is a difference between the case in which an applicant has obtained injunctive relief on a without notice basis but where there was material non-disclosure on the application, and the stage one permission hearing in a derivative action. Taking a freezing injunction as an example, if discharge of the relief obtained without a regrant is the starting point, then an applicant who makes non-disclosure will risk losing the protection of that order but its underlying claim would be unaffected. By contrast, if the response to non-disclosure at stage one permission is discharge without re-grant of permission to continue, then the impact would be felt on the underlying claim which would fall away.

94. This seems to me to be a more far-reaching impact than in any injunction case, particularly if permission to continue the derivative action would otherwise have been given. In these circumstances, I consider that the question of the appropriate response to non-disclosure should be left to a case in which it would be a live issue and where the Court can hear fuller argument than was made to me. As I have already decided that permission should not be given to continue the claim either on the mandatory basis set out in s.263(2)(a) or in the exercise of my discretion under s.263(3), it is not necessary for me to reach a conclusion on this point.

F CONCLUSION

95. For the reasons given above, I do not give permission for the derivative action to continue.