

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC (COM) 2024/358

BETWEEN:

**DUK
(Acting in the names of and on behalf of)
(1) UGX
(2) THA**

Applicant/Joinder Respondent

-and-

**[1] UGX
[2] THA**

Respondents

**[3] WKU
[4] ZPP
[5] AUZ**

Additional Respondents/Joinder Applicants

Appearances:

Richard Millett KC with Nicholas Burkill, Rondelle Keller and Holly Challenger of Ogier, counsel for the Joinder Applicants

Paul Mitchell KC with Andrew Gilliland of MK Solicitors LP, counsel for the Joinder Respondent

Timothy Collingwood KC with Daniel Mitchell and Laure-Astrid Wigglesworth of Appleby, counsel for the Respondents

2024: 16 September

ORAL JUDGMENT

[1] **MITHANI J [Ag.]** This is my *ex tempore* judgment on the application heard on 12 September 2024

Background

[2] These proceedings relate to two companies, UGX and THA. The companies are registered in the BVI and are controlled as follows:

- (a) 70 percent of the shares in each company are in the ownership of a trust known as the UGX Trust.
- (b) The remaining 30 percent of the shares are in the ownership of the estate of the late SSQ

[3] These proceedings form part of a much larger dispute between the two children of the late SSQ, AUZ and DUK. I will refer to SSQ as 'the Deceased'.

[4] During his lifetime and until a few days before his death on 20th November 2021, the Deceased owned all the shares in UGX and THA, both BVI companies. Shortly before the Deceased's death, 70 percent of the shareholdings in each of UGX and THA were transferred to the UGX Trust of which AUZ is the primary beneficiary and Protector. The remaining 30 percent shareholding in each of those two companies forms part of the Deceased's estate. There is an issue as to how these 30 percent shareholdings will be divided between AUZ and DUK. As I have said, the principal beneficiary of the UGX Trust is AUZ. She is married to WKU. WKU is the investment adviser and fiduciary to the UGX Trust and is also alleged to be a *de facto*, or shadow director, of UGX and THA.

[5] UGX is alleged, directly or indirectly, to have transferred all or part of its shareholding in three subsidiary or associated companies, to ZPP. WKU is also alleged to be the Chairman and Chief Executive Officer of ZPP, alternatively a director or shadow director of that company.

[6] DUK alleges that since the Deceased's death, WKU and ZPP have taken various steps which have diminished the value of the Deceased's estate in various parts of the world. In particular, DUK alleges that WKU caused UGX to transfer most of its assets to ZPP for effectively zero consideration and

that although ZPP owes THA some \$72 million, THA has done, and is doing, nothing to recover that debt.

- [7] In these proceedings, DUK seeks leave to bring a derivative claim on behalf of UGX and THA against, amongst others, WKU and ZPP, but not AUZ. She claims to be entitled to seek such leave despite not being a registered shareholder of those companies. She relies upon an order of Mrs. Justice Young dated 16th July 2024, obtained without notice, made in probate proceedings in the High Court, which provided for DUK to be appointed administrator *ad colligenda bona* of the estate of the Deceased. DUK claims that she is, therefore, a personal representative of a shareholder of UGX and THA (i.e., her late father), within the meaning of section 184A(a) of the BVI Business Companies Act 2004 (the “**2004 Act**”).
- [8] On 31st July 2024, DUK made a ‘without notice’ application to the Commercial Court for a freezing injunction against WKU and ZPP and a proprietary injunction against ZPP. Mr. Justice Webster granted those injunctions by an order made by him on 31st July 2024. The injunctions are in support of DUK’s proposed derivative claim. Again, the basis on which DUK sought and obtained the injunctions was that pursuant to the order made on 16th July 2024, she was a personal representative of a shareholder (i.e., her late father) of UGX and THA. She, therefore, claimed to be entitled under section 184C (5) of the 2004 Act to apply for interim relief pending the determination of the derivative leave application. For the sake of convenience, I will refer, in this judgment, to the Joint Applicants for joinder, that is WKU, ZPP and AUZ, or any one or all of them, as the context may require, as ‘the Joinder Applicants’. I will refer to the application for leave brought by DUK to bring the derivative claim on behalf of any or both of UGX and THA as ‘the Derivative Leave Claim’, ‘the Derivative Leave Application’, or simply ‘the Leave Application’. I will refer to the present application, that is the application before me, as the ‘Joinder Application’. The other expressions which I will use in this judgment will be obvious from the description I give to them in the course of this judgment. I will refer to “leave” and “permission” interchangeably in the judgment.
- [9] I heard the Joinder Application on 12th September 2024. There were some documents, such as the affidavit of Mr. P, that I had not seen because they had only recently been filed (in accordance with the directions in the Leave Application). I decided to defer my decision on the application until I had

seen those documents. I informed the parties that I would let them know, in advance, of my decision on the application, to assist them in deciding whether they, or perhaps more appropriately their UK counsel, should make travel arrangements from the UK to attend court for the hearing of the Derivative Leave Application on 19th September.

- [10] On Friday 13th September 2024, I informed the parties, through my Judicial Assistant, that I would dismiss the Joinder Application with reasons to be given later. Having done so, I received an e-mail from the representatives acting for the Joinder Applicants, this morning, which stated that the Joinder Applicants intended to appeal my decision and asked if the reasons for my decision could be given today. These are my reasons for the decision, given, effectively, *ex tempore*.
- [11] AUZ is not a defendant to the proposed derivative claim. However, she claims to be entitled to seek to be a respondent to the Derivative Leave Application on the basis that, as a person directly or indirectly interested in the shares of UGX and THA (either under the estate of her late father or as a beneficiary or potential beneficiary under the UGX Trust), she has something to say to the Court which she contends the Court should take into account in deciding whether permission should be granted to DUK to bring the derivative claim on behalf of UGX and THA. AUZ is also concerned about her personal tax position in circumstances where DUK's proposed derivative claim includes claims challenging certain agreements which have delivered US tax savings to AUZ. WKU and ZPP object to the derivative claim. They contend that the claim has been brought in circumstances where it is not likely to succeed and that they should not be subjected to a claim which is brought by the wrong person and to onerous freezing and other proprietary injunctions, all obtained against them without notice.
- [12] AUZ has applied by notice dated 19th August 2024 to set aside the order made on 16th July and to revoke any grant *ad colligenda bona*, that was issued in favour of DUK. The grounds of that application are, in summary: (a) that the 16th July order was not sufficient on its own to confer upon DUK the status of administrator and that DUK failed to take the other steps which she needed to take to obtain that status; and (b) DUK: (i) is conflicted and not independent; (ii) failed to make full and frank disclosure or misstated various matters to Mrs. Justice Young when she applied for the order; and (c) is not an appropriate person to act as administrator in any event. AUZ is also seeking, as

part of the application to set aside the 16th July Order, an order that an independent professional person be appointed administrator of the BVI estate of her late father.

[13] Both WKU and ZPP have applied by notice dated 16th August 2024 to discharge the injunctions granted in this Court on various grounds, including that DUK has no purported status as an administrator of her father's estate. Mr. Richard Millett, King's Counsel, on behalf of the Joinder Applicants, also contends that DUK's proposed derivative claim is not brought in good faith and is unlikely to succeed, both matters which the Court is required to take into account when deciding whether leave should be granted to DUK to bring the derivative claim on behalf of UGX and THA.

[14] The law governing the bringing of a derivative claim is set out in section 184C of the 2004 Act. The material provisions of that section are to the following effect.

[15] First, subsection (1):

"Subject to subsection (3), the Court may, on the application of a member of a company, grant leave to that member to:

- (a) bring proceedings in the name and on behalf of that company; or
- (b) intervene in proceedings to which the company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company."

[16] Next, subsection (2):

"Without limiting subsection (1), in determining whether to grant leave under that subsection, the Court must take the following matters into account:

- (a) whether the member is acting in good faith;
- (b) whether the derivative action is in the interests of the company taking account of the views of the company's directors on commercial matters;
- (c) whether the proceedings are likely to succeed;
- (d) the costs of the proceedings in relation to the relief likely to be obtained; and
- (e) whether an alternative remedy to the derivative claim is available."

[17] And then, for the sake of completeness, subsection (3):

"Leave to bring or intervene in proceedings may be granted under subsection (1) only if the Court is satisfied:

- (a) that the company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or
- (b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders or members as a whole."

[18] The procedure for bringing a derivative claim in the BVI is slightly different from the procedure for bringing such a claim under the provisions of the British Companies Act 2006, as they apply to England and Wales. In the BVI, a derivative action can only be brought if the Court gives permission to do so before the claim is issued. The hearing of the application for permission to bring the derivative claim is to take place, as I have already indicated, on Thursday 19th September 2024. A time estimate of one day has been given by DUK for the hearing of that application.

[19] As a general rule, it is only necessary for the company on behalf of which the derivative claim is proposed to be brought to be made a party to the leave application: see section 184C(4) of the 2004 Act. That is because anything that any person who opposes the bringing of the claim wishes to say to the court or bring to the attention of the court may be done by him or her through the medium of the company that is the subject of the claim. Thus, the parties to the present leave application would usually be able to bring matters to the attention of the court through their majority or controlling holding of, or entitlement to the legal or beneficial interest in, the shares of the company, or their control of the company itself. However, the Joinder Applicants state that this is not enough in the present case. They wish to be given party status because they have a substantial interest in the proposed claim which the Court needs to hear about.

[20] The Notice of Application seeking party status summarises why the Joinder Applicants wish to obtain party status. That summary has been expanded upon at length in both the written and oral submissions made on behalf of the Joinder Applicants by Mr. Richard Millett, King's Counsel.

[21] Subject to an argument of WKU and ZPP that they are entitled to be parties in the circumstances of the present case by reason of the injunction sought and obtained against them, it is common ground

between the parties that, in the absence of an express provision in the 2004 Act about who, other than the company, should be made a party to a derivative leave application, the position concerning joinder is governed by the Eastern Caribbean Supreme Court Civil Procedure Rules 2023.

[22] CPR 19.2(3) of the 2023 Rules provides that:

"The court may, without an application, add a new party to the proceedings if -

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve the issue."

By CPR 19.3(2), it is provided:

"An application to add a new party may be made by a person who wishes to become a party."

[23] The wording of the provisions of CPR 19.2 is wide enough to make it possible for party status to be given to any person who may be affected by a claim, so the court can have material or evidence from that party which may not be available from the other parties or proposed parties to the claim. Mostly, however, party status is given to a person where there is a risk that a judgment or finding made in a claim may subsequently be impugned by that party on the ground that he or she was not a party to the claim and is, therefore, not bound by the judgment, thus giving rise to the possibility of more litigation.

[24] It is of course not for a court to attempt to judicially paraphrase the clear words of a statutory provision, particularly where the words of that provision are cast in such wide terms as CPR 19.2(3) is. Nor is it appropriate for a court to seek to identify the circumstances in which CPR 19.2(3) may be applied to provide a person with party status, and I do not seek to do so. The only matter which the Court must bear in mind is that CPR 19.2 gives it power to join a party to proceedings if the circumstances make it appropriate for it to do so. The power to grant a joinder is discretionary. It is, as I have said, also extremely wide and unfettered, subject, of course, to the limitation that it must be exercised judicially and, therefore, on a case-by-case basis. Nor is it necessary for a joinder

applicant to show that their case is one of “exceptionality”. Each case will depend upon its own particular circumstances.

[25] The statutory provisions governing the making of a derivative claim in the BVI make it clear that the respondent to a leave application must be the company on behalf of whom it is sought to bring the derivative claim. However, as I have already said, those provisions do not set out whether and when it might be appropriate for the court to join others to an application for permission to bring a derivative claim. The only authoritative direct guidance in the BVI is the decision of the Court of Appeal of the Eastern Caribbean Supreme Court in **Fok ei Yu v Basab Inc (BVIHCMA2014/0010)**.

[26] In that case, which is binding on this Court, the Court of Appeal dismissed the Appellants' application against the decision of the first instance judge not to join them in an application for leave to bring a derivative claim against the company on behalf of which the appellants had sought to bring the derivative claim. The Court of Appeal ruled that the joinder application in the court below was unnecessary since, as directors of the company, they could put in evidence on behalf of the company any material that they wished the court to take into account on the application for leave to bring the derivative claim.

[27] It is appropriate to refer to the following excerpts of the judgment of the Court of Appeal. At paragraph 8 of its judgment, the Court of Appeal stated:

The fact that the appellants asserted that they wished to be heard on the Permission Application in their capacity as 'receivers' did not provide a proper basis for seeking joinder to the Permission Application having regard to the nature of the Permission Application."

Paragraph 8 of the judgment continues:

"It is an application by which a member/shareholder of a company seeks permission to bring proceedings 'in the name and on behalf of a company' against a person alleged to have wronged the company. We can see no useful purpose to be served at the permission stage for joining the appellants in their capacity as receivers. Surely, where, as here, it is intended to bring proceedings against the appellants as defendants to the derivative action then, were the Permission Application to succeed, the appellants as parties to the action, will have every opportunity to be heard."

[28] I agree with Mr. Paul Mitchell, King's Counsel, on behalf of DUK, that this excerpt of the judgment makes it clear that a joinder application should not be a dress rehearsal of the main application that is before the court. He contends, and I agree, that, in the present case, this is precisely what the Joinder Application seeks to do. Most, if not all, of the matters the Joinder Applicants rely upon in support of their application may be relevant to the Derivative Leave Application but seem to me to be of little significance to the Joinder Application. Very little information or evidence has been adduced by the Joinder Applicants about why the matters upon which they rely in their Joinder Application cannot be brought to the attention of the court in the Derivative Leave Application by UGX and THA. The Joinder Application documents (by which I mean the application and the documents in support, including the skeleton argument) deal with the matters that the Court may need to hear about from the Joinder Applicants but little about why those matters cannot be brought to the attention of the Court by UGX and THA.

[29] It is also appropriate that I read out paragraph 9 of the judgment of the Court of Appeal:

"The 'personal interest' basis advanced by the appellants is unpersuasive for similar reasons. If the Permission Application succeeds then the appellants will become defendants to the derivative action, which will afford them a full opportunity to be heard. In the event that the Permission Application fails then that is the end of the matter. No gain or loss will have been occasioned to the appellants in their personal capacity. Were the appellants joined on this basis, the only foreseeable consequence on a failure of the application may be the attraction of a costs order. Joinder for such a purpose would be unwarranted and in our view tantamount to an abuse of process."

[30] This passage of the judgment of the Court of Appeal makes it clear that the costs indemnity that the derivative claimant will usually be entitled to will, ordinarily, not be a good reason for granting joinder. That much is also clear from the absence of that factor in the list of factors which the court must take into account under section 184C and also from the provisions of section 184D of the 2004 Act, which I will come to in a moment.

[31] On behalf of the Joinder Applicants, Mr. Millett contends that the present case may be distinguished from **Basab**. He relies on a decision of Mr. Justice Newey (as he then was) in **Kleanthous v Paphitis [2012] B.C.C. 676**, and specifically paragraph 44 of that judgment:

"Mr. Keen did not go so far as to suggest that I should refuse to hear counsel for the director defendants. In any case, I consider that the director-defendants were entitled to advance submissions to me. That must, I think, follow from the order made by Mr. Justice Floyd on 21st December, which provided for the director defendants to be made respondents to the application for permission to continue the derivative claim and to put in evidence in answer to the application."

[32] Pausing there for a moment, it is appropriate to note that Mr. Justice Newey was dealing with an order that had already been made for the relevant applicants to be joined as a respondent to the permission application. Mr. Justice Newey then went on to say:

"It seems to me moreover, that it was appropriate for the director defendants to be permitted to participate in the permission application. In the first place, section 261 of the Companies Act 2006 is not identical to section 266. In particular while section 266 states that 'the company is entitled to take part in the further proceedings on the application', section 261 says nothing about who is entitled to take part in the permission application."

[33] Mr. Justice Newey continued later on in that passage of his judgment:

"More importantly perhaps, where (as in the present case, the claimant is seeking an indemnity as to costs a defendant who is a shareholder will have an interest other than merely as a person against whom it is intended that proceedings are brought. On the facts of the present case, an indemnity would be likely to mean that the director defendants stood, in practice, to bear the bulk of Mr. Kleanthous' costs even if his claim were wholly unsuccessful. Further, while (as Mr. Keen pointed out) proposed defendants can be expected to be partisan, so can the claimant. A claimant will be in a very different position to that of, say, trustees seeking a Beddoe order."

[34] Mr. Millett also relied on other cases to support his contention. The case most closely resembling the position that applies in the BVI is **A R Evans Capital Partners Limited and Gen2 Partners Inc [2012] HKCFI 926**. In that case, Mr. Justice Barma said, at paragraphs 26 to 27:

"Mr. Yu submitted that Novel and Mr. Lau should be permitted to intervene under the ordinary principles applicable to the joinder of parties to proceedings, as they would be directly affected by any order that would be made – as plaintiffs in the High Court Action, putative defendants to a counterclaim or separate action, and as shareholders of the company against which an indemnity was sought in respect of any costs incurred by AR Evans on its behalf. Mr. Yu also pointed out that it was common for the court to receive and consider evidence and submissions from shareholders and directors of a company in opposition to applications for leave under section 168BC."

[35] Mr. Justice Barma then went on to say that he accepted the submissions put forward to him, stating that:

"I do not think that the authorities support Mr. Sussex's suggestion that permission should only be granted to a putative defendant to take part in a section 168BC application for the purpose of opposing the grant of leave in 'exceptional' cases. It seems to me that in order to carry out its function under section 168BC, the court is likely, in general, to be assisted by submissions that bear on such questions as the jurisdiction to make an order under the section, or indeed as to the merits of the proposed claim. The court would, I think, be quite capable of weighing for itself the strength of the arguments advanced on either side and would not lose sight of the fact that a putative defendant will have an interest in belittling the aspiring derivative plaintiff's prospects of success. I therefore think that Novel and Mr. Lau, whether in their capacity as shareholders or as potential defendants, are entitled to be heard in opposition to the section 168BC application."

[36] I agree with Mr. Justice Barma that "exceptionality" is not the test for granting joinder. The only direction I can give to myself in the present case, in the exercise of my discretion under CPR 19.2(3), is that the words of that provision are clear; and that I should hold to those words and decide the issue on all the circumstances that have been relied upon by the Joinder Applicants in the material lodged in support of the Joinder Application. Essentially, in exercising its discretion, the Court should decide the issue on a case-by-case basis, on the individual circumstances of each case.

[37] The approach which I have just indicated I should take is reflected by the clear words of Lord Reed in the decision of the Inner House of the Court of Session of Scotland in **Wishart v Castlecroft Securities Ltd [2009] CSIH 65**. In that case, Lord Reed said, at paragraph 19 onwards of his judgment:

"Sections 265 to 269 of the 2006 Act are concerned with decisions concerning the commencement and continuation of legal proceedings by or on behalf of a company. The provisions are intended to enable inaction on the part of those who would normally decide such matters internally to be overcome in appropriate circumstances as for example where the inaction may be the product of self-interest. They enable any member of the company, as defined, to seek the court's assistance in taking over the role of the normal decision-makers in relation to particular proceedings. The fundamental issue which the court has to determine is whether it should interfere in the management of the company by overriding the decision of those responsible under the company's articles for the management of its affairs, so as to permit proceedings to be brought on its behalf, by the member, in order to enforce the company's rights. The provisions do not have in view the interests of third parties. The directors have no interest in the proceedings as individuals (other than in the most general sense), by reason of being intended defenders in the derivative proceedings.

[38] His Lordship continued:

"The court is not being asked to determine any issue affecting their rights or obligations as individuals. Nor does any third party who might be convened as a defender in the derivative proceedings ordinarily have an interest in the leave proceedings: no legal liability will attach to them in consequence of the grant of leave. These considerations are reflected in the terms of the provisions themselves. Section 266(4)(a) requires service on the company, and section 266(4)(c) provides that the company is entitled to take part in the further proceedings on the application. No mention is made of the director whose alleged "negligence, default, breach of duty or breach of trust" lies at the root of the derivative proceedings, or of any third party who is sought to be convened as a defender. There is no indication in section 266 that the proposed defenders are intended to participate in the proceedings on the application. Furthermore, the nature of the issue raised by the application is reflected in the matters which the court is required to consider."

[39] And then continuing with the judgment:

"In accordance with section 265, the court requires to be satisfied that the applicant for leave is a member of the company, as defined, and that the proceedings for which leave is sought are in respect of an act or omission involving negligence, default, breach of duty or breach of trust by a director, as defined. In accordance with section 268, the court has to consider the importance that a person acting in accordance with a director's duty under section 172 would attach to raising the proposed proceedings, the authorisation or ratification of the act or omission in question, any decisions taken by the company not to raise or persist in the proceedings, and the views of independent shareholders. These are all matters relating to the governance of the company. The court has in addition to consider the good faith of the applicant and his ability to pursue the cause of action in his own right. There is nothing in the matters to be considered which suggests that it should ordinarily be necessary to hear the proposed defenders."

[40] Lord Reed went on to say, at paragraph 21:

"... the fact that the application contains allegations of breaches of duty on the part of the proposed defenders does not give those defenders any interest to be heard. Their rights are fully protected, even if they are excluded from the proceedings on the application. If the application is granted and proceedings are commenced, they will be able to defend the proceedings and, in doing so, to advance the same submissions as to the merits of the proceedings, or as to their being motivated by any ulterior or improper purpose, as they might otherwise have made on the application for leave. They will be able to do so in the same way as any other litigant. There is no reason why the intended defenders in derivative proceedings should have an earlier opportunity to oppose the proceedings than do the defenders in other proceedings, merely because the derivative proceedings must be preceded by an application for leave."

[41] And then, at paragraph 22, Lord Reed said this:

"It is undesirable that members should be deterred from seeking leave, in appropriate cases, by the prospect of lengthy and costly procedures. These are further reasons why additional participants in proceedings on the application for leave, besides the company as envisaged by section 266, should not normally be permitted."

[42] And, finally, at paragraph 23, Lord Reed said:

"There is a further reason why the proposed defenders should not ordinarily be involved in the proceedings. The purpose of the proceedings is to determine whether any or all of the proposed defenders should be sued on behalf of the company. It is likely ... that consideration will be given to the prospects of success of the derivative proceedings. Any weaknesses in the company's claim against the proposed defenders may be considered. Any internal company documentation which tends to undermine the claim is liable to be produced. Affidavits taken from potential witnesses may also be produced. It is not in the interests of the company, in a situation where the court is liable to authorise the raising of proceedings, that the potential defenders in those proceedings should be given advance notice of weaknesses in the company's case and of documents and witnesses which would be helpful to their defence. In practice, that may be difficult to avoid in the case of an intended defender who remains a director of the company; but it is a reason for avoiding, so far as possible, the unnecessary involvement of intended defenders in the leave proceedings."

[43] I respectfully agree with those remarks and, of course with the judgment of the Court of Appeal in **Basab**. I am not suggesting for a moment that it would never be appropriate for a director or other officer against whom a derivative claim is intended to be brought, to be or be joined as a party to the derivative leave application. But what these cases suggest to me is that leave should usually only be granted where the applicants seeking joinder can bring to the table something, or some material, that the court hearing the leave application will not ordinarily have before it from the company. That, as it seems to me, is the general approach for a court to take in any case where, as here, it is invited to join a party in circumstances where there is no risk that its judgment will be binding on that party.

[44] On the material before me, there is nothing that the Joinder Applicants wish to put forward to the court that the proposed respondents to the Derivative Leave Application cannot do themselves. The respondents to the Derivative Leave are represented by able solicitors and counsel. They have full knowledge of the issues that the Joinder Applicants wish to raise before the Court.

[45] The most that the Joinder Applicants can say to this Court about how the Court may be assisted, if they were to be given party status, is set out in the affidavits of Rondelle Keller and Mr. P. Mr. P's

affidavit was not before me on 12th September 2024 when I heard the Joinder Application. I have now read that affidavit.

[46] The assistance that Mr. Keller says that the Joinder Applicants can provide is in the most general terms. At paragraph 18 of his affidavit, he summarises the position in the following terms:

"While this matter will be addressed further in submissions, the Joinder Applicants believe that the Court should exercise its discretion to add them as parties to the Leave Application because, as set out below:

- (1) the requirements of both CPR 19.2(3)(a) and (b) are satisfied in the present case;
- (2) AUZ is interested in the Leave Application in various ways and should be entitled to be heard on it; and
- (3) basic procedural fairness and public interest in saving the court's resources require that WKU and ZPP be allowed to intervene, so that certain issues relevant both to the Leave Application and the Discharge Application can be determined at a single hearing (with WKU and ZPP being heard on those issues)."

[47] Leaving aside whether the written or oral submissions of a party are the appropriate forum for a party's case to be set out where affidavits have been filed by that party, this statement says very little. It refers to WKU and ZPP being heard on the application because it may save court resources. If that were a sound reason for a party to be granted joinder, the court would do so in every case and section 184C would have made express provision for it. Nor can I see, given what I have already said, that the Joinder Applicants' rights to a fair trial or basic procedural fairness would be prejudiced if they were not granted joinder and Mr. Keller's affidavit does not set out why. So far as court resources are concerned, joinder would have the opposite effect to what Mr. Keller states. It would mean the hearing on 19 September being vacated and yet further costs being incurred by the parties in having representation at the Derivative Leave Application by the Joinder Applicants.

[48] Mr. Keller refers, at paragraph 19 onwards of his affidavit, in more detail about why AUZ needs leave. I will come back to the points that he makes there. However, in the case of WKU and ZPP, there is nothing at all over and above the usual reasons of possible prejudice to them if a costs indemnity is

provided to DUK, to justify joinder. If that were a sufficient reason for joinder to be granted, it would be granted in every case. One only needs to consider the remarks of Lord Reed to which I have already referred (and to **Basab** itself) to know that this basis for seeking joinder is misconceived. The fact is that the leave procedures in the BVI and also in England and Wales and Scotland, incorporate sufficient safeguards to avoid a derivative applicant from pursuing a derivative claim which is an abuse of the court, which has no merit, or which is not motivated by proper bona fide reasons. For example, the provisions of section 184D of the 2004 Act make it clear that even though a derivative claimant will usually be entitled to a costs indemnity from the company, it is open to the court to refuse to provide that indemnity if the court considers that it would be unjust or inequitable for the company to bear those costs. So, the court could dismiss a derivative leave application or grant it on the basis that the derivative claimant will not receive a costs indemnity from the company. However, these are all matters for the court hearing a derivative leave application to decide.

[49] Matters such as costs and the other factors that the court has to take into account in deciding whether leave should be granted to bring a derivative claim are not appropriate for rehearsal on an application for joinder. The Derivative Leave Application will root out any claims which are not meritorious, not brought in good faith or are not likely to be cost-effective to pursue. In this context, it should also be noted that the discretion in section 184C is cast in very wide terms. The court is not restricted to considering simply the factors referred to in section 184C(2). It is able to consider any other matter which it thinks is relevant as the factors of section 184C(2) are not exhaustive.

[50] There is also very little in the affidavit of Mr. P to warrant joinder being granted. The only statement he makes about why party status should be given to the Joinder Applicants is in paragraph 32(iii) of his affidavit, in which he says:

"To the extent that the evidence which would be filed by the Ogier Defendants following a successful intervention comment upon the allegations made in the draft statement of claim, it is likely to be instructive: (1) for the Court, and (2) for the Directors, to consider the Ogier Defendants' position on such claims, and thus to consider the prospects of any claims, in particular in relation to THA succeeding. Among other matters, I also understand that the Ogier Defendants raise some issues concerning DUK's standing to make this application which may need to be addressed."

- [51] Like Mr. Keller's affidavit, there is nothing in that statement that provides any, or any sufficient, detail for the Joinder Applicants to be joined to the Derivative Leave Application. These remarks are made in the most generic terms. It is difficult to see how the court will not have those matters before it when it considers the application for permission.
- [52] Some further mention is made by Mr. P about why the Derivative Leave Application should not be granted but, very little on why the Joinder Applicants should be joined in that application, perhaps unsurprisingly because it was filed in opposition to the Derivative Leave Application, rather than in support of the Joinder Application. Paragraph 42 of Mr. P's affidavit gives generic reasons about why it would be desirable to have the Joinder Applicants joined, but there is nothing specific other than the usual reasons for granting joinder, but which apply, as I have said, in any case where joinder is sought.
- [53] On behalf of the Joinder Applicants, Mr. Millett makes several other points which he contends warrant permission being granted. First, he says that WKU and ZPP are entitled to be treated as parties to the Derivative Leave Application because both are respondents to the injunctions obtained by DUK. There is no substance in this assertion. Even though the injunction was obtained in the same claim as the Derivative Leave Application, the purpose of obtaining the injunction was to prevent WKU and ZPP from taking steps to dispose of assets which DUK alleged might have put those assets out of the reach of UGX and THA. There is nothing remarkable about that. The same position would apply if a freezing injunction was sought against a bank or another party which had no interest in the issues arising in the substantive claim but had to be enjoined to prevent a transfer of assets taking place at the behest of a substantive party to the claim. Nor is there any substance in the point that the position here is different as the Derivative Leave Application comes on for hearing before the return date of the injunction or the date of the hearing of the application to discharge it. The position might have been different if UGX and THA had applied for an adjournment of the Leave Application or a stay of it pending the matters referred to in the Probate Claim being dealt with. There is, however, no such application before the court and none that was made orally by any of the parties, other than consequentially arising from the grant of the Joinder Application.
- [54] The *res judicata* and issue estoppel points are equally without substance. It is difficult to see how any findings made in the Derivative Leave Application against the Joinder Applicants could

conceivably be carried through to the subsequent derivative claim. The Court could only be entitled to give a provisional view about the merits of the derivative claim, based on the material produced to it. The court regularly does this in other contexts, such as in connection with whether security for costs should be ordered against a foreign or an allegedly impecunious claimant, or whether leave to serve a claim outside the jurisdiction should be granted. It is difficult to see how the court's inquiry can extend any further at the Derivative Leave Application stage.

[55] On that basis, it is difficult to see how DUK could contend that any conclusion on the Derivative Leave Application could be carried through to the subsequent derivative claim if leave were granted. If I may say so, the position is very well-settled in English Law, and I am certain that the position is identical under BVI Law. The English cases that come to mind are the decisions of the House Lords in **Hunter v Chief Constable of West Midlands [1982] AC 529** and of the English Court of Appeal in **Re Queen's Moats Plc, Secretary of State for Trade and Industry v Bairstow [2003] EWCA Civ 321**, both cases with which I am well familiar because the latter case was a case on directors' disqualification, a subject upon which I have written extensively. [Citation of cases subsequently inserted].

[56] The reference in Mr. Millett's skeleton to **Ashmore v British Coal Corporation [1990] 2 Q.B. 338**, where a case of issue estoppel and, therefore an abuse of process, was detected does not appear to me to be relevant in this case. If I recall correctly, and again this is based entirely on my recollection, in **Ashmore**, the first-instance tribunal had dealt with various sample claims and dismissed them. It refused to allow a claimant to re-litigate her claim on the same issues because that would have defeated the purpose of the sample selection of cases by the first instance tribunal and, therefore, would be contrary to the interests of justice and public policy, unless there was fresh evidence which entirely changed the aspect of that case. The claimant was not able to prove this and not unnaturally, the Court of Appeal took the view that to allow her to re-litigate the matter would be an abuse of process.

[57] The case for AUZ is even less persuasive. She is concerned that if the court gives permission to DUK to bring a derivative claim, the value of the shares in UGX and THA will be considerably affected if the Court also decides to grant DUK a costs indemnity, and the claim is subsequently dismissed. I have already indicated why this is not a sufficient reason for her to be granted joinder. The court will

be mindful of her position when it decides whether to grant leave in relation to the Derivative Leave Application. It is difficult to see what giving her party status will, therefore, achieve over and above the generic reason that it may affect her position *qua* shareholder, or the value of her interest, whether direct or indirect, through a registered member whether under her late father's will or the UGX Trust.

[58] I have already said that if I were to accede to the application on this ground, it would apply in every case where the court had to consider whether a party should be joined to a derivative leave application. Quite apart from the ability of the court to take that factor into account in deciding whether to grant leave and the provisions of section 184D to which I have already referred, it must never be forgotten that this court is not just able to regularly monitor the appropriateness of continuing any costs indemnity granted by it, but also has within its armoury extremely wide powers on the incidence of costs where it finds that a derivative claimant (who has been granted leave) has brought the claim oppressively, unreasonably, inappropriately or unfairly to the prejudice of a shareholder or where he or she has abused the costs indemnity granted by the court.

[59] Nor do I consider that the personal tax position of AUZ has any bearing on whether joinder should be granted. WKU will be a defendant to the claim and as the claim primarily involves how he and ZPP acted concerning the transactions of which I have made mention, it is difficult to see what AUZ would have to say about the tax planning exercise which WKU and ZPP will not be able to bring to the attention of the court. In the derivative claim, the court will primarily be concerned to see whether the Defendants acted in breach of their duties as directors. Insofar as those transactions were carried out in breach of those duties, WKU, ZPP and any other defendants will also be able to raise any "good faith and honesty" defences (so far as available or applicable) under BVI Law. It might even be possible for AUZ to apply for leave to join the derivative claim if she feels that her concerns are not being taken into account properly by the derivative claim defendants, though that would be a matter for consideration then, not now.

[60] Likewise, it does not require joinder for the court to consider whether DUK should reasonably have pursued an alternative, more effective remedy instead of bringing a derivative claim. So far as AUZ's personal interest is concerned, the Court of Appeal could not have been more emphatic on how that

factor should feature in the exercise of the discretion of the court on whether to grant joinder – see paragraph 9 of the **Basab** judgment, which I have read out.

- [61] There are several matters, in addition to the matters I have mentioned, which Mr. Paul Mitchell, King's Counsel, on behalf of DUK contends militate against permission being granted. I respectfully agree with the substance of those points. First, he points out that this is not the first time that the Joinder Applicants have sought party status. It appears that an application of sorts was made on the 22nd August 2024 before Mr. Justice Webster which was refused. This may not have been in the nature of a formal application for joinder, but Mr. Justice Webster was invited to give the Joinder Applicants party status. He refused. Further attempts that were made for party status are summarised in paragraph 27 onwards of Mr. Mitchell's skeleton argument. I want to make it very clear that I am not saying there was ever a proper and detailed consideration of these previous applications or requests such as to make the present application an abuse of process. Plainly, Mr. Justice Webster's view was, that even if it was reached without having the benefit of material I have had and the submissions that I have heard, that joinder was not appropriate in this case. I respectfully agree with him.
- [62] Second, it must also be noted that, in the context of the timing of the Joinder Application, there has been a delay for which no proper explanation has been given by the Joiner Applicants. The Joinder Applicants became aware of the Leave Application on or about 31st July 2024 and on 8th August 2024 became aware that the Derivative Leave Application was listed for hearing on 19th September 2024. The formal application for joinder was made on 6th September 2024. There is no explanation for that delay. The Joinder Applicants knew that the grant of joinder would result in the hearing on 19th September, that is the hearing before me on Thursday of this week, having to be adjourned. The court should be wary of granting an adjournment of a hearing where it has been fixed and been known to a party or proposed for a significant period of time, and which that party knows will be adjourned if his or her application is granted
- [63] Third, as I have already said, there has been no formal application on the part of UGX and THA for an adjournment, so those companies are ready and able to respond to the Derivative Leave

Application or, at least, should be and have made provisional arrangements to appear at Thursday's hearing in person. There is no reason therefore for it not to go ahead on 19th September 2024.

[64] But several further points are made by the Joinder Applicants. First, the standing of DUK to make the Derivative Leave Application is disputed. DUK claims to make the application on behalf of her late father's estate by virtue of the grant of representation *ad colligenda bona* made in her favour. However, the Joinder Applicants dispute that DUK was entitled to obtain the grant, claiming that it was made without the Joinder Applicants being able to challenge it under the Non-Contentious Probate Rules of the BVI. The dispute is now in the Probate Court for adjudication. However, the fact is unless the grant is set aside, the court must proceed on the basis that the grant confers the necessary authority on DUK to bring the derivative claim. It has long been the law that unless it is clear that a court order is, on its face, invalid, it must be obeyed until it is set aside. The decision that comes to mind is the Privy Council decision in **Isaacs v Robertson [1985] A.C. 97**. If subsequently the grant is set aside, then subject to the court being satisfied with the status of DUK on some other basis to make the claim, the Derivative Leave Application and the derivative claim, if it has been issued, would have to be struck out or dismissed with the usual costs consequences for DUK. But that is no reason to give the Joinder Applicants party status.

[65] As I have said, the proper application for UGX and THA may have been to apply for a stay or adjournment but as I have also already indicated, there is no such application before me. Second, it is said on behalf of the Joinder Applicants that the court should or might make an order transferring the probate claim to it so there is no risk of different judges coming to different decisions. It is said by the Joinder Applicants that this can be done under CPR 69.4(4). Even if there is jurisdiction to do this, I am not prepared to exercise that jurisdiction at this stage for several reasons. So far as it concerns DUK's status to bring the derivative claim that issue is for the Probate Court.

[66] Leaving aside the extent, if any, of the beneficial interest that DUK has under the Will of her late father, the only issue for the Probate Court, as regards the status of DUK to bring a derivative claim, is the validity of any grant of representation. Even if the Probate Court decides that it cannot do this at the hearing on 17th September, it could confirm the grant for the temporary or limited purpose of allowing the Leave Application to be heard and the derivative claim to be issued. If it does, then there is no issue about DUK's standing to bring the derivative claim and the Derivative Leave Application

can go ahead on 19th September. If the grant is subsequently set aside, then DUK will know the costs consequences of this and will suffer those consequences for having brought the Derivative Leave Application when her standing for doing so was in issue. I cannot see any risk of inconsistent decisions if the matter remains in the Probate Court. I will not therefore exercise my power to transfer it to the Commercial Court at this stage, although if the Probate Judge decides that he or she wants to transfer it to this court, then that is a separate matter. I am sure that the Probate Judge will do so on a proper consideration of all the material before him or her.

[67] It cannot be emphasised enough how easy it is for interlocutory applications of this nature to spiral out of control, and it has in the present case. I accept, of course, that large sums of money are involved in this dispute but already, what should have been a straightforward application has resulted in a huge volume of documentation generated by the parties.

[68] The application was listed by me on a time estimate of two hours which I considered was very generous. Nearly a whole day was occupied with hearing the matter. Several matters raised were of little relevance to the present application, though they may be important in deciding whether the Derivative Leave Application should be granted. There is a serious risk if this matter is not properly contained by way of effective case management, there may be a further risk of irrelevant matters or applications being made to, or raised, with the court, including those made or raised in the Derivative Leave Application. The remarks of Lord Denning, Master of the Rolls, in **Wallersteiner v Moir (No. 2)** 2 All ER 849 at 859 are particularly apposite to refer in this respect.

[69] Applications of this nature should be simple and inexpensive. They should not be allowed to escalate into a minor trial. This case already has.

[70] In the final analysis, just as the Court of Appeal found that there was no reason to give the Applicant party status in **Basab**, I come to the same conclusion here. The Joinder application is dismissed. I am grateful to all counsel for the clarity of their submissions and for the helpful way in which they presented their respective cases before me and also to the legal firms instructing them. I do not do so because of any convention politeness, or custom.

[71] I am genuinely grateful to all of you. Thank you all very much.

Justice Mithani
High Court Judge [Ag.]

By the Court

Registrar

