Neutral Citation Number: [2025] EWCA Civ 595

Case No: CA-2024-001672

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
Mr Stephen Hofmeyr KC (sitting as a Deputy High Court Judge)
[2024] EWHC 2068 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2025

Before:

LADY JUSTICE KING
LADY JUSTICE ASPLIN
and
LORD JUSTICE MALES

- -

Between:

BETTA OCEANWAY COMPANY	**Respondent /Claimant**
- and -	
SC TOMINI TRADING SRL	**Respondent /Defendant**
- and -	
GEORGIOS VATISTAS	**Appellant/ Applicant**

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- -

Georgios Petrochilos KC, Tariq Baloch KC and Paul Bonner Hughes (instructed by **Three Crowns LLP**) for the **Appellant**

Steven Reed and Harry Samuels (instructed by **Bird & Bird LLP**) for the **Respondent Claimant**
Dan McCourt Fritz KC and Stephanie Thompson (instructed by **Boodle Hatfield LLP**) for the **Respondent Defendant**

Hearing date: 8 April 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 8 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. This is an appeal by Mr Georgios Vatistas, a shareholder and former director of the Romanian defendant company ('Tomini'), against the judge's dismissal of his application to be joined to these proceedings, either as a third party intervenor or as a defendant. Mr Vatistas seeks to contend that a debt which Tomini admits to be due to the claimant ('Betta') is not in fact due and that these proceedings are part of a fraudulent scheme between Betta and Tomini, both of which are ultimately owned by the same individual, to acquire his minority shareholding in Tomini for nothing.

2. The judge, Mr Stephen Hofmeyr KC, held that the English court is not the natural forum in which to address this issue, which should be addressed in the Romanian courts; that the question whether and on what basis the claim should be defended was a matter for Tomini's board of directors, so that allowing Mr Vatistas to defend the claim would enable him to usurp the powers vested by Tomini's constitution in its directors; that Mr Vatistas's case was a weak one, unsupported by any clear contemporaneous documentary evidence; and that the appropriate remedy if the proceedings were an abuse of process was for them to be struck out, which was not the remedy which Mr Vatistas sought.

Background

3. The claimant, Betta Oceanway Company, is a Liberian company under the ultimate control of Mr Nemr Diab, a Lebanese national.

4. The defendant, SC Tomini Trading SRL, is a Romanian company which was founded in 1999 by Mr Vatistas, who was initially a director and the majority shareholder. Its business was the trading of scrap metal and shipping. Its principal customer was a Panamanian company called Sovereign Seatrade Corp. Using funds advanced by Sovereign, Tomini would acquire scrap metal from various suppliers to be sold to Sovereign on FOB Constanza terms. Sales to Sovereign at current market prices would then reduce the amount outstanding due to Sovereign.

5. As a consequence of the global financial crisis, the price of and demand for scrap metal collapsed during the summer of 2008. This left Tomini unable to repay the funds advanced by Sovereign out of the proceeds of sales. By June 2009 Tomini's debt to Sovereign, which it was unable to pay, amounted to 194,183,519.08 Romanian leu (which we were told is equivalent to approximately US $40 million). Tomini's financial difficulty resulted in a series of contracts dated June and July 2009, as follows:

   (1) By a contract dated 19th June 2009 between Mr Vatistas and Mr Diab's Lebanese company, Abbotswood Holding SAL, Mr Vatistas sold 55% of the shareholding in Tomini to Abbotswood for 165,000 Romanian leu (equivalent to approximately US $55,000). Mr Vatistas remained as a minority shareholder, holding 43% of the shares; his nephew held the other 2%.

   (2) By a contract dated 22nd July 2009 between Mr Vatistas and Abbotswood, it was agreed that Abbotswood would pay US $3,945,000 to Sovereign, 'being settlement of the outstanding between [Tomini] and [Sovereign]'.

(3) By a further contract dated 22nd July 2009 between Abbotswood, Sovereign and Tomini, Sovereign declared, in consideration of receiving the sum of US $3,945,000 from Abbotswood 'as payment on behalf of [Tomini]', that 'we cancelled all the debts of [Tomini] and we will not have any claims against [Tomini] and/or against its shareholders and/or its directors in relation with the aforementioned debts'.

(4) Finally, a contract dated 23rd July 2009 between Sovereign and Abbotswood recorded that Sovereign was a creditor of Tomini in an unspecified amount and that Sovereign wished to assign that debt to Abbotswood for a payment of US $3,945,000; the contract provided that upon payment of this sum, Tomini would 'automatically and by right cease to be indebted' to Sovereign; and that Tomini would register in its books a debt of US $3,945,000 owed to Abbotswood and payable on 31st December 2014.

6. There is a dispute as to the effect of these contracts:

(1) Mr Vatistas says that their effect was to cancel (or 'forgive') the debt owed to Sovereign. Sovereign had decided to exit the scrap metal business and it did so in return for the payment of US $3,945,000 by Abbotswood. In return for that payment, Abbotswood acquired a majority shareholding in Tomini which, with its debt cancelled save for the smaller sum of US $3,945,000, remained a viable company.

(2) Betta and Tomini say that the debt was not cancelled, but assigned to Abbotswood, in exchange for the payment of US $3,945,000, with the result that Tomini remained liable for the full sum of 194,183,519.08 Romanian leu. However, Abbotswood took no steps to enforce this debt, which at all times Tomini remained unable to pay. If this understanding of the agreements is correct, therefore, Tomini would be insolvent if the debt were to be enforced.

7. In my view these contracts are not clearly drafted and their effect is ambiguous. On the face of the documents, either of these views is possible and we have not been shown whatever material may exist by way of context which might enable a final conclusion to be reached. Mr Vatistas accepts, however, that the debt was not shown as having been cancelled in Tomini's books. He says that this was deliberate, because a forgiven debt is taxable under Romanian law and Tomini wished to avoid this tax liability. Accordingly the debt continued to be recorded as a debt owed to Sovereign. Mr Vatistas says that when Tomini's auditors raised concerns about this potential tax liability, Mr Diab directed that it be recorded instead as a debt owed to Abbotswood, and arranged for a backdated notice of assignment to be fabricated, purporting to show notice to Tomini that Sovereign had assigned the debt to Abbotswood on 31st December 2013. Mr Vatistas signed an acknowledgement of this notice on behalf of Tomini, confirming that it was liable for the debt and undertaking to pay as directed by Abbotswood. Although Mr Vatistas's evidence does not face up to this point, it follows that (on his case) he was personally implicated in this fraud on the Romanian tax authorities.

8. In 2015 and 2016 further documents were executed. These included an assignment, by which Abbotswood assigned the debt to Betta, and a Credit Agreement dated 15th January 2015 between Betta and Tomini which provided that the debt would be

treated as an interest-free loan to Tomini repayable in five monthly tranches between 1st March and 1st July 2015. None of these tranches was paid. In his initial evidence in these proceedings Mr Vatistas claimed that this had been done without his knowledge, but this was shown to be untrue: he was aware of and involved in the execution of these documents.

9. By a further document dated 8th November 2016, described as an Addendum to the Credit Agreement between Betta and Tomini (together, the 'Credit Agreements'), the maturity dates for repayment of the debt tranches were extended to dates between 1st April 2019 and 1st April 2021. This Addendum was governed by English law and provided for the exclusive jurisdiction of the English courts or, at the lender's (i.e. Betta's) option, LCIA arbitration in London. The Addendum was signed by Mr Vatistas on behalf of Tomini.

10. On 30th July 2020 Mr Vatistas's appointment as a director of Tomini was terminated by a general meeting of the company's shareholders. Mr Vatistas challenged this in the Romanian courts, but the challenge was unsuccessful.

11. Under Tomini's Articles of Association, Abbotswood was entitled to exercise a call option to acquire Mr Vatistas's and his nephew's shares at market value, that value to be determined by an accountancy firm selected by Abbotswood, in the event that he ceased to be a director of the company. Abbotswood exercised that option and, on 15th December 2020, initiated proceedings in Romania to enforce it. Mr Vatistas has challenged the exercise of the option in the Romanian courts. According to Mr Vatistas, Abbotswood's position in that litigation is that Tomini is liable to pay the debt of 194,183,519.08 Romanian leu, with the consequence that (because it cannot pay) Tomini is effectively insolvent and the shares are worthless; and that Abbotswood is therefore entitled to acquire them for nothing.

The LCIA arbitration

12. On 11th May 2022 Betta commenced an LCIA arbitration against Tomini pursuant to the arbitration clause in the 2016 Addendum to the Credit Agreement dated 15th January 2015. Its Request for Arbitration stated that the relief sought was a declaration confirming the existence, legality, validity and quantum of the debt owed by Tomini to Betta. Betta did not at that stage seek a monetary award, but reserved 'the right to proceed to a monetary award if necessary'.

13. Initially, Mr Vatistas was appointed by a Tomini shareholders meeting to conduct its defence of the arbitration. On 21st October 2022 he filed a Statement of Defence rejecting Betta's claim and contending that the Credit Agreement dated 15th January 2015 was a sham which was void and unenforceable, and that there was no debt owed by Tomini as the debt had been cancelled as a result of the contracts concluded in 2009. The Defence contended also that as the Credit Agreement was void, the arbitral tribunal lacked jurisdiction.

14. Betta's response was to request that the tribunal discontinue the arbitration without prejudice to its claims. This was opposed by Mr Vatistas on behalf of Tomini, but Mr Diab instructed Tomini's board of directors to consent to the discontinuance and the board agreed to do so. Mr Diab also called a meeting of Tomini's shareholders to terminate Mr Vatistas's authority to act on Tomini's behalf in the arbitration.

15. The arbitral tribunal was therefore faced with a situation, once Mr Vatistas's authority had been terminated, in which the parties jointly requested the discontinuance of the arbitration without prejudice to Betta's claims. In the event the tribunal declined to accede to this request. Instead, by its Procedural Order No. 5, it ordered that the arbitration proceedings would be discontinued 'with prejudice' (i.e. so as to preclude the bringing of any further claim) unless Betta commenced English court proceedings against Tomini by 13th June 2023 putting in issue the validity of the Credit Agreement and either including Mr Vatistas as a party or notifying him of the commencement of the proceedings and confirming its consent to any application by him to join the proceedings as an interested third party intervenor permitted to make submissions to the court. The tribunal explained its reasons for making this order as follows:

> '20. Taking the above circumstances into account, the Tribunal considers that a real risk of abuse of process exists in this case.
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> 21. Concretely, the record of these proceedings shows that the parties, in their Claim Submissions and Statement of Defence, respectively, have raised real issues regarding the validity and/or enforceability of the Credit Agreements. Neither party's position, as set out in those submissions, seems manifestly without merit, and there is, as a result, a real question to be determined whether the Credit Agreements are valid or not. Considering the arbitration clause in the 2016 Credit Agreement, and the parties' express representation that this Tribunal has jurisdiction to determine the validity of the Credit Agreements, it appears uncontested to this Tribunal that it has primary jurisdiction to rule on the validity and/or enforceability of the Credit Agreements.
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> 22. The above validity and/or enforceability issues have been raised in proceedings where both the Claimant and the Respondent are under the control of one individual, Mr. Diab. The record shows … that Mr. Diab, using his Abbotswood email account (i.e. that of the Respondent's majority shareholder) but signing for Betta (i.e. the Claimant) effectively instructed the Respondent's directors to terminate the mandate of the Respondent's authorised representative in this arbitration, Mr. Vatistas. On their face, these emails appear to show the Claimant instructing the Respondent on the Respondent's defence in this arbitration. The Tribunal also notes that Mr. Vatistas appears to be the only person, on the Respondent's side, contesting the validity of the Credit Agreements. … It seems to the Tribunal that if there is a real issue to be heard concerning the validity of the Credit Agreements then it is hard to conceive of a situation where it would not be in the Respondent's best interests, as opposed to the interests of its majority shareholder, to contest the debt allegedly due under those Credit Agreements, especially where, as we understand it, acceptance of the debts would render the Respondent insolvent. In the Tribunal's view, there is, in other

> words, a real risk that Mr. Diab is disregarding the separate legal personalities of Betta and Abbotswood and using these entities interchangeably to control the outcome of the arbitration by taking steps to procure that the very serious issues of fraud and illegality raised in the Statement of Defence will not be duly aired and heard.
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> 23. However, the Tribunal is mindful of the fact that the Claimant has – repeatedly – represented to this Tribunal that the only reason it is seeking the discontinuance of these arbitration proceedings is so that all of its claims (including future claims) can be heard in a forum whose jurisdiction is not subject to challenge. It is due to this representation that the Tribunal cannot – at least at this stage – agree with the Respondent that the Claimant does not intend to file its claims before the High Court.
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> 24. The Tribunal is therefore willing to give the Claimant the benefit of the doubt and to allow it to demonstrate its good faith by filing its claims before the High Court of England and Wales. If the Claimant makes this filing and pays the arbitration costs by 13 June 2023, these proceedings will be discontinued "without prejudice", as the risk of abuse of process described above will not have materialised. It is only in such circumstances that the Tribunal, as the forum of primary jurisdiction, is willing to cede its jurisdiction to a different forum – i.e., the High Court of England and Wales.'

16. Betta commenced these proceedings by issue of its claim form on 7th June 2023, but did not include Mr Vatistas as a party or (at that stage) provide him or Tomini with a copy of it. It confirmed to the tribunal that it would consent to any application by Mr Vatistas to be joined to the proceedings and contended that it had thereby complied with the requirements of Procedural Order No. 5. On 14th June 2023 Betta made a further application to the tribunal that the arbitration be discontinued without prejudice. In response, the tribunal requested that Tomini clarify whether it would consent to any application by Mr Vatistas to join in the court proceedings. Tomini's response was that it could not answer this question without first having sight of the claim form and Mr Vatistas's arguments, but that 'it would not unreasonably withhold any consent before the High Court'.

17. The tribunal was not impressed. In an email to the parties dated 28th June 2023 it commented that it was hard to understand why, if Betta was acting in good faith, it had not provided Mr Vatistas with a copy of the claim form; that Mr Diab, who controlled both Betta and Tomini, could easily have procured that a copy of the claim form was provided to Tomini; and that as Procedural Order No. 5 was clearly designed to allow Mr Vatistas to join or intervene in the court proceedings, it was not clear why Tomini's consent to such joinder needed to be dependent on the precise content of the application. Accordingly it ordered, by Procedural Order No. 6, that determination of Betta's application to discontinue the arbitration would be stayed until the English court had ruled on Mr Vatistas's application to join or intervene in the proceedings.

18. Betta's response was an application to the court under section 68 of the Arbitration Act 1996 to set aside Procedural Order No. 6 for serious irregularity, on the basis that the tribunal had failed to comply with its general duty of fairness under section 33 of the Act and had exceeded its powers. That application was dismissed by Mrs Justice Dias on 13th October 2023 on the ground that the order was not an award, so that section 68 did not apply, although she added that even if it had been an award, it was not tainted by any irregularity. As Mrs Justice Dias observed, referring to the paragraphs of Procedural Order No. 5 which I have set out above:

> '22. … It is apparent that the tribunal had formed the view that there was a real risk of abuse given that Mr Diab effectively controlled both parties to the dispute. It considered that there were genuine issues about the validity of the agreements, but that Mr Vatistas was the only person who appeared to be contesting their validity.'

Romanian criminal proceedings

19. I should add for completeness that at one stage Mr Vatistas sought to persuade the criminal authorities in Romania to carry out an investigation, but those authorities declined to do so. It is regrettable that Mr Vatistas did not bring this latter fact to the attention of the court, but in my judgment this criminal complaint has no bearing on the issue for decision in this appeal.

Mr Vatistas's application

20. On 27th September 2023 Betta provided Mr Vatistas with a copy of the claim form. The principal relief sought, as in the arbitration, consists of a declaration that the Credit Agreements are valid and bind the parties, together with judgment in the sum of 194,183,520.54 Romanian leu. However, other claims are also included which are also said to have been assigned to Betta and which were not subject to arbitration.

21. On 8th November 2023 Mr Vatistas invited Betta and Tomini to consent to him being added to the proceedings as a third party intervenor permitted to make submissions to the court. Betta declined to consent and Tomini did not respond. Mr Vatistas therefore issued an application to be joined as a third party intervenor pursuant to CPR 3.1(2)(m) or added as a defendant pursuant to CPR 19.2(2) on 18th December 2023. On this appeal the application to be joined as a third party intervenor has been abandoned and we are concerned only with the application to be added as a defendant. That seems realistic as it is clear that what Mr Vatistas wants to be able to do is to participate fully in the proceedings, including by calling evidence and making submissions, with a view to showing that Tomini's debt was cancelled by the arrangements made in 2009 and that these proceedings are an abuse of process apparently brought for the purpose of acquiring his shares for nothing.

22. Mr Vatistas's application to be joined has been strongly resisted by Tomini, on whose behalf a Defence has been served admitting the validity of the Credit Agreements, admitting liability for the debt of 194,183,520.54 Romanian leu, and saying that it does not oppose the making of a declaration. Other liabilities are also admitted.

The judgment

23. The judge dismissed Mr Vatistas's application. His first reason for doing so was that the English court is not the natural forum in which to address Mr Vatistas's underlying concern, which the judge characterised as a concern that, as a minority shareholder, he was prejudiced by the decision of the majority shareholders to admit Betta's claim, and that this concern, together with any dispute about the value of Mr Vatistas's shareholding, should be addressed in Romania.

24. The judge's next point was that the question whether and on what basis Betta's claim should be defended was a question for Tomini's board of directors and that Mr Vatistas had no standing to bring any claims or advance any defences. To allow him to participate in order to do so would usurp the authority of the board.

25. Next, the judge had regard to the practical consequences which would arise if Mr Vatistas were permitted to participate in the proceedings, in particular that Mr Vatistas would be required to file a statement of case which would invite the court to disregard the defence which Tomini had served in favour of a defence raised by a minority shareholder without authority. This would increase the costs of the litigation. The judge envisaged that this would create a difficulty for Betta because 'On the one hand, the claimant has to meet the case advanced by the defendant in its defence, and on the other hand, it would need to meet the case advanced by Mr Vatistas insofar as that does not match the defendant's case'.

26. The judge did not accept Mr Vatistas's contention that his participation was necessary in order to avoid an abuse of process. He said that he could not and would not attempt to resolve the dispute whether the debt was owing, but regarded Mr Vatistas's case as 'weak' and 'against the weight of the contemporaneous documentary material'. He added that 'even if the allegation were true, the fact that it is true would not *per se* render these proceedings an abuse of process' because the more natural place to look for a remedy was in Romania.

27. Finally, the judge said that even if the proceedings were an abuse of process, permitting Mr Vatistas to make submissions would not be an appropriate remedy. The natural remedy was for the proceedings to be struck out, but that was not the relief which Mr Vatistas sought.

28. For these reasons, the judge was not persuaded that it would be desirable to add Mr Vatistas as a party; the court could resolve all the matters in issue without his involvement; it was not established that there was an issue involving Mr Vatistas and an existing party which was connected to the matters in dispute; and it was not desirable to add him to the proceedings. Mr Vatistas's complaint was that Tomini was running the wrong defence which was 'an internal corporate dispute between him and the defendant'.

29. After permission to appeal to this court was granted, the arbitral tribunal extended the stay granted by Procedural Order No. 6 until the outcome of the appeal process.

Submissions

30. On behalf of Mr Vatistas, Mr Georgios Petrochilos KC submitted (in outline) that the judge had failed to apply the correct test under CPR 19.2(2) and had failed to take account of important factors, in particular that:

(1) Betta and Tomini are both under the control of a single individual, Mr Diab;

(2) as a result, there is a risk that these proceedings are an abuse of process, as the arbitral tribunal had recognised;

(3) there is unrebutted evidence from Mr Vatistas that the judgment of the English court in these proceedings will be an important factor for the Romanian court in determining the value of Mr Vatistas's shares in Tomini; and

(4) the arbitral tribunal perceived the very same risk of abuse, which is what had led it to issue Procedural Orders Nos. 5 and 6.

31. Mr Petrochilos submitted that these errors could all be traced back to the same flawed premise, namely that the dispute was a 'classic shareholder dispute' that ought to be resolved in Romania.

32. On behalf of Tomini, Mr Dan McCourt Fritz KC emphasised that the judge's order was the result of a discretionary case management decision, which turned on a multifactorial evaluative assessment, with which this court can only interfere in very limited circumstances. He submitted (again in outline) that there was no flaw in the judge's reasoning and that the judge had taken into account all the factors relied on by Mr Vatistas, but had nevertheless been entitled to conclude that joinder was not desirable.

33. Tomini also served a Respondent's Notice, contending that the judge should have gone further than saying that the merits of Mr Vatistas's case were weak. Rather, he should have said that the case had no real prospect of success, so that it was not even properly arguable. This aspect of Tomini's case was addressed by junior counsel, Ms Stephanie Thompson.

34. On behalf of Betta, formally Mr Steven Reed neither supported nor opposed the appeal, but he nevertheless submitted that the judge had taken into account all of the factors relied on by Mr Vatistas.

CPR 19.2(2)

35. CPR 19.2(2) provides that:

> 'The court may order a person to be added as a new party if—
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> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
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> (b) there is an issue involving the new party and an existing 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 that issue.'

36. The term 'the matters in dispute in the proceedings' must be given a wide interpretation, in order to ensure that persons whose rights may be affected by the court's decision can be heard when it is desirable that they should be. In the present case, it might be said that because both existing parties to the proceedings are in

agreement that the debt is due, the existence of the debt is not a matter in dispute, and that accordingly CPR 19.2(2) cannot apply. But that approach would be wrong, as explained by Sir Terence Etherton MR in *In re Pablo Star Ltd* [2017] EWCA Civ 1768, [2018] 1 WLR 738:

> '50. On its literal wording CPR 19.2(2)(a) is directed to a situation where, prior to the joinder of the new party, there already exists a dispute which is the subject of the proceedings. In the present case, aside from the issues which the Welsh Ministers wish to raise if they are joined, there is not and has never been, strictly speaking, any dispute. The proceedings were for the restoration of Pablo Star to the Register of Companies and the Registrar of Companies consented to the restoration. There is no suggestion that, even if the Welsh Ministers are not joined, the only other party to the proceedings, namely the Registrar of Companies, would wish to argue that some sanction should apply to Mr Price because the court was misled on the making of the Restoration Order or on the making of the Variation Order or because Mr Price was in breach of undertakings to the court.
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> 51. The provisions of CPR 19.2(2) ought, however, to be given a wide interpretation. The words "in dispute" ought to be read as "in issue". That is consistent with authority that the court's powers to add a party under CPR 19.2 can exist after judgment even though, on a literal approach, there is no longer a matter in dispute: *Dunwoody Sports Marketing v Prescott* [2007] EWCA Civ 461 at [23]; [2007] 1 WLR 2343. It is also consistent with cases such as *Stanhope* [1994] BCC 84 and *Blenheim* [2000] BCC 554, in which the court permitted third parties to be joined to an application for restoration of a company to the Register of Companies and, for all practical purposes, it was only the intervention of the third parties which put in dispute whether or not the company should be restored.
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> 52. *Stanhope* was decided under the differently worded provisions of the former Ord. 15.r.6(2) of the Rules of the Supreme Court but both Aldous and Tuckey LJJ in *Blenheim*, which concerned the provisions now to be found in CPR 19.2(2), regarded the correct approach to be the same under both. In the first instance decision in *Stanhope* [1993] BCC 603 at 605G His Honour Judge Weeks QC quoted Lord Denning MR in *Gurtner v Circuit* [1968] 1 All ER 328 at 331-332, [1968] 2 QB 587 at 595, who said that the rule should be given a wide interpretation. Although the Court of Appeal allowed the appeal from his decision (on a substantive point of law), the Court of Appeal did not disagree with his view about the interpretation of the joinder rule and upheld his decision to order joinder of the third party. As Tuckey LJ said in *Blenheim* at 574G, the provisions of what are now CPR 19.2(2) "are

> drawn in wide general terms to ensure that parties whose rights may be affected by a particular decision have a right to be heard."
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> 53. The present proceedings were commenced to determine whether or not Pablo Star should be restored to the Register of Companies. That was the matter in issue (*scil*. "in dispute") in the proceedings. The Welsh Ministers wish to be joined in order to argue that the Restoration Order and the Variation Order should not have been made and should be revoked. Accordingly, Registrar Barber was correct to treat the application of the Welsh Ministers as capable of falling within CPR 19.2(2)(a).'

37. However, a third party will not be joined unless it is 'desirable' that he should be. The need for this condition to be satisfied operates as a control mechanism to ensure that a third party is not permitted to gatecrash proceedings in which he has no legitimate business, where his presence would unduly complicate or add to the cost of the proceedings or where his presence would add nothing because the relevant issues are being contested by the existing parties. Sir Terence Etherton MR went on to explain what he described as 'the twin lodestars' to be considered on an application under CPR 19.2(2). He distinguished between third parties whose interests would be directly affected by the litigation and those who would only be indirectly affected:

> '60. In considering whether or not it is desirable to add a new party pursuant to CPR 19.2(2) two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the Overriding Objective in CPR Part 1. There are important practical considerations for strictly limiting the circumstances in which third parties are joined to applications to restore a company to the register, and they apply equally to applications to set aside an order for restoration. There may be many third parties who perceive that their interests may be indirectly affected by restoration and who may wish to advance all manner of reasons for seeking to prevent or reverse an order for restoration rather than wait to face and, where appropriate, resist actions of the company against them or others which the company perceives to be in its best interests. That is particularly true, in a case like the present, when it is sought to restore a company to the Register of Companies in order to resurrect an asset in the form of a cause of action against third parties.
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> 61. In such a case, it is well established that the court will not allow the intervention in proceedings for restoration by a third party who merely wishes to argue that the proceedings which the revived company proposes to bring against the third party have no prospect of success: *Stanhope* [1994] BCC 84 at 90D.
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> 62. By contrast, the court will allow intervention by a third party whose interests will be directly affected by the restoration

> and who would otherwise have no opportunity to be heard on the issue of whether, in the light of that direct effect, restoration is just: *Blenheim* at [2000] BCC 554 at 574B.'

38. Although this passage was concerned with the circumstances in which a party would be added to applications concerned with the restoration of a company to the register, the need to limit the circumstances in which a third party should be permitted to join in private litigation between other parties is of general application.

39. In the example given by Sir Terence Etherton, there is no need and it is not desirable for the third party to be joined in order to resist the restoration of the company because, if the restored company chooses to bring a claim against it, it will still be able to argue that the claim should be summarily dismissed. That is the appropriate forum for that question to be decided. The third party's interests are not directly affected by the decision to restore the company. Indeed, they are hardly affected at all.

40. Similarly, in general it is not desirable for a shareholder to be joined simply because he wishes to contend that the defendant company's board of directors are not conducting its defence as efficiently as they should, even if that failure will or may adversely affect the value of his shares. Under the company's constitution, its management is entrusted to the directors, and a shareholder can no more intervene in decisions about the conduct of litigation than in any other aspect of the company's management. The remedies available to him are a matter for the internal law of the company and the courts of its place of incorporation. However, that potentially common situation is very far from this case.

41. Mr McCourt Fritz submitted that even in a case where the conditions in paragraphs (a) and (b) are satisfied, the court must still exercise a discretion whether to order joinder, as shown by the word 'may' in the introductory words of CPR 19.2(2). There was, therefore, a three-step process: (1) is there a matter in issue involving the new party which is connected to the matters in dispute; (2) is it desirable to add the new party so that the court can resolve that issue? (3) should the new party be added in the exercise of the court's residual discretion? In most cases, however, that is likely to be an unnecessarily complicated approach. It is hard to envisage circumstances in which the court would conclude that it was desirable to add the new party in order to resolve all the matters in dispute, but would nevertheless decline to do so. However, one important function of the word 'may', underlining as it does the discretionary nature of the court's decision, is to enable conditions to be attached to the joinder in an appropriate case. The court is not necessarily faced with a binary choice between allowing and refusing joinder.

The matter in dispute

42. The first step is to identify the matter in dispute in the proceedings which the court needs to resolve. In this case, that is straightforward. The matter in dispute, giving that term the wide interpretation held to be necessary by *In re Pablo Star*, is the existence and validity of the debt alleged by Betta and admitted by Tomini. There can be no real doubt that, without Mr Vatistas's participation, the court will be invited to resolve that issue on the basis that the debt is admitted, probably with limited or no evidence and with any evidence which is served being untested, and that it is likely to make the declaration which Betta seeks without any adversarial procedure. On the other hand, if

Mr Vatistas is joined as a defendant, the existence of the debt will be contested and the court is likely to have the benefit of evidence and contested submissions going to that issue.

43. Thus, although the judge said that the court could resolve 'all the matters in issue in the proceedings without the involvement of Mr Vatistas', it is difficult to see how that could be done if a wide meaning of 'the matters in issue' is applied, as required by *In re Pablo Star*.

Desirable – the approach on appeal

44. The real question is whether Mr Vatistas is directly affected by these proceedings in such a way as to make it desirable that he should be joined as a defendant. I accept that the question whether joinder is desirable requires an assessment of all the relevant factors, and therefore that this court can only intervene if the decision was one which no reasonable tribunal could have reached, or if there is some identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, or a failure to take account of some material factor, which undermines the cogency of the conclusion (see *In re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031, paras 72 to 78, referring to a number of well-known authorities explaining the limited scope of appellate review in such a case).

The purpose of the litigation

45. In my judgment, however, there is one major factor which the judge did not take into account. Although he mentioned, in his introductory summary of 'the background facts', the fact that Mr Diab is the ultimate controller and beneficial owner of both parties to these proceedings, he did not at any stage step back to consider how very odd these proceedings are in the light of that fact. This is in effect a case where Mr Diab's right hand is suing his left hand to establish liability for a debt which everyone knows that the left hand cannot pay. That is an unusual feature of this litigation which at least ought to make one wonder what it is really for. Moreover, the principal remedy sought is a declaration that a debt is due, in circumstances where both parties to the litigation agree that it is due. Normally, if a debtor owes money to a creditor, and both of them agree that the money is due, and there is no issue about its quantum, there is no need to resort to expensive arbitration or litigation. The debtor will simply pay the money or, if it cannot do so, the parties will agree that the debt is due and it will be recorded as such in their books. Either way, there is no need for the court to get involved.

46. So it is a reasonable inference that Mr Diab, who is plainly in a position to control both parties to the litigation, and who on the evidence before the court does in fact exercise at least some control over Tomini (see para 14 above), has some ulterior purpose in causing Betta to bring these proceedings. Mr Vatistas suggests that the ulterior purpose is for Mr Diab to use a declaration by the English court that Tomini is liable for the equivalent of US $40 million, knowing that Tomini cannot pay, in order to establish in the Romanian valuation proceedings that Mr Vatistas's shares in Tomini are valueless, and thereby to acquire them for nothing. He says, in evidence which has not been contradicted, that a judgment by the English court will be an important factor in the analysis being conducted by the Romanian court in the valuation proceedings.

47. Mr McCourt Fritz makes the point that Mr Vatistas is not a Romanian lawyer and is not qualified to give evidence to that effect. But neither he nor Mr Reed was able to explain the purpose of this litigation. Mr McCourt Fritz said that this was a matter for Mr Reed, as it was Betta which had brought the claim. Mr Reed said only that Betta had brought these proceedings because it had been directed by the arbitral tribunal to do so in Procedural Order No. 5. But that does not answer the question why proceedings are necessary. It merely pushes the question one stage back, leaving unexplained why the arbitration proceedings were necessary in the first place.

48. In these circumstances it seems to me that it is a reasonable inference that the purpose of this litigation, and before that the purpose of the arbitration, was indeed to use a declaration by the English court in order to obtain Mr Vatistas's shares in Tomini for nothing. I would not exclude the possibility that there is some other legitimate purpose for these proceedings. But if there is, we have not been told what it is. No other explanation has been offered. I regard that as telling in circumstances where the point had been clearly raised by Mr Vatistas, notwithstanding his lack of qualification as a Romanian law expert. In this way, and in contrast with the position of an ordinary shareholder complaining that the directors are not doing a good job of defending litigation, Mr Vatistas will be directly affected by this litigation.

49. Moreover, if the debt is indeed due, so that Tomini is effectively insolvent and Mr Vatistas's shares are valueless, so too are the shares held by Abbotswood, Mr Diab's company. If that is the position, why is Mr Diab so keen to acquire Mr Vatistas's shares? Conversely, however, if the debt has been cancelled as Mr Vatistas contends, the shares do have value and there is good reason for Mr Diab to seek to acquire them for as little as possible, and for nothing if he can.

50. As Mr McCourt Fritz came close to accepting, none of these matters was considered in the judgment, despite the fact that they were clearly raised, and despite the arbitral tribunal's view 'that a real risk of abuse of process exists in this case'. Of course, the judge was not bound by that view, and was entitled to form his own conclusion, and I would not wish to be too critical of an *extempore* judgment. Nevertheless, I respectfully consider that the absence of consideration of these matters in the judgment is an error which, applying the principles explained in *In re Sprintroom Ltd*, requires that this court consider the matter afresh.

Real prospect of success

51. None of this would matter if, as Ms Thompson contended, Mr Vatistas's case that the debt was cancelled in 2009 has no real prospect of success, so that it would be liable to be summarily dismissed. Ms Thompson made some powerful submissions in support of the Respondent's Notice, saying that the judge should have gone further than he did in dealing with the merits. She pointed out that the court does not have to accept without analysis everything said by a party in a witness statement and that in some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents (cf. *ED& F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] CP Rep 51; and *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3, [2021] 1 WLR 1294). She submitted that this is such a case: Mr Vatistas's case that the debt was cancelled depends entirely on his own assertion and is unsupported by any contemporary document, even though as a former director of Tomini he had access to extensive documentation. She pointed out also

that on Mr Vatistas's own case he has participated in a fraud on the Romanian tax authorities, that he has signed a number of documents which he now contends to be shams (including the 2016 Addendum to the 2015 Credit Agreement), and that in at least one respect (see para 8 above) his evidence in these proceedings has been shown to be false, as he was aware of the 2015 Credit Agreement.

52. I would accept that if Mr Vatistas is joined as a defendant in order to advance the case which he wishes to advance, he will have a lot of explaining to do. He does not, as matters presently stand, seem likely to be the most credible witness. But as I have already explained, there appears to be at least some force in his explanation of the 2009 contractual arrangements. Moreover, if Tomini remained liable for a debt which it was unable to pay, why would Mr Diab agree to pay US $4 million to acquire a majority shareholding in an insolvent company? And the fact is that no attempt has been made by Abbotswood, and subsequently Betta, to enforce the liability to pay the debt which is said to exist. Even when the arbitration was commenced, Betta did not seek a monetary remedy, but only a declaration. The fact that these proceedings appear to have been brought for some ulterior purpose leads me to think that, despite its problems, there may after all be something in Mr Vatistas's case. It follows that there are also points which Mr Diab will need to explain, as I have already indicated.

53. In these circumstances I am not prepared to hold that Mr Vatistas's case has no real prospect of success. That is a conclusion which should only be reached in clear cases, and more complex cases are unlikely to be capable of being resolved in a summary way without conducting a mini-trial without the assistance of disclosure and oral evidence which is inappropriate at this stage of the proceedings (*Lungowe v Vedanta Resources Plc* [2019] UKSC 20, [2020] AC 1045, para 95, cited in *Okpabi* at para 21). Further, once the conclusion is reached that Mr Vatistas's case is not suitable for summary dismissal, it is not appropriate in my judgment to treat its merits or lack of merits as a relevant consideration in deciding whether it is desirable for Mr Vatistas to be joined as a defendant. It is sufficient that there is a real issue which on the material available the court cannot determine.

Is it desirable that Mr Vatistas should be joined as a defendant?

54. The conclusions reached so far mean that this court must decide for itself whether it is desirable that Mr Vatistas should be joined as a defendant; and that this question arises on the basis that there is a real risk that these proceedings constitute an abuse of process, brought for the ulterior purpose of obtaining Mr Vatistas's shares for nothing, when the true position is that the debt has indeed been cancelled; but that this court cannot determine one way or the other whether that is indeed the position. In these circumstances I consider that there is a strong case that Mr Vatistas should be joined, so that the court can consider on the basis of full evidence whether the declaration which Betta seeks should be made. But before reaching a final decision I must examine the factors which led the judge to conclude otherwise.

55. The judge's first point was that the English court is not the natural forum in which to address Mr Vatistas's underlying concerns, which should be addressed in the Romanian courts. I respectfully disagree. The question whether these proceedings are an abuse of process is a matter for the English court to determine.

56. The judge's next point was that the question whether and on what basis Betta's claim should be defended was a question for Tomini's board of directors and that to allow Mr Vatistas to participate would usurp the authority of the board. However, Mr Vatistas's participation will not change Tomini's position, which will continue to be that the debt is due, in accordance with the decision which has been taken by its board. Mr Vatistas's participation will not be on the basis that it is for him to determine what Tomini's case is or should be. His authority to do so has been validly revoked. Rather, his position will be that in admitting the debt, Tomini is participating in a fraudulent scheme which is an abuse of the process of the English court. That does not involve any usurpation of the authority of the board.

57. The judge's concerns about the practical consequences for the litigation if Mr Vatistas is permitted to participate are likely to be more illusory than real. Undoubtedly Mr Vatistas's participation will increase the costs of the litigation, as without his participation Betta would already be in a position to seek judgment on the basis of Tomini's admissions. But the court will not be faced with alternative defences to Betta's claim. Mr Vatistas's complaint is that Tomini is not defending Betta's claim at all, and that this is not for genuine reasons but because of its participation in a fraudulent scheme. There is, therefore, no question of Betta having to meet alternative defences, although in any event this is not unusual in multiparty litigation. Rather, Betta and Tomini will make common cause and the issue will be between them on the one hand and Mr Vatistas on the other. That should not be difficult for the parties to address and the court to manage.

58. The judge did not accept Mr Vatistas's contention that his participation was necessary in order to avoid an abuse of process. But once he acknowledged that he could not and should not attempt to decide the merits of Mr Vatistas's case, Mr Vatistas's participation was the only way to ensure that there was no abuse of process.

59. The judge dealt with Mr Vatistas's contention in two ways. The first was by saying that his case was 'weak', but it is apparent (and is common ground) that he did not mean by this that it had no real prospect of success. So his decision means, in effect, that a case which has some real prospect of success, and which if true means that these proceedings do amount to an abuse of process, will never be heard. The judge's second way of dealing with this point was to say that even if Mr Vatistas's allegation is true, that would not render these proceedings an abuse of process because the more natural place to look for a remedy is in Romania. I respectfully disagree. If Mr Vatistas's allegation is true, and if he is not allowed to participate, there will very shortly be a judgment of the English court declaring a falsehood to be true, and it will be open to Mr Diab and his companies to use that judgment in Romania, where they will be able to point to the fact that Mr Vatistas was not permitted to participate in these proceedings as reinforcing the weight to be given to it. It would be unsatisfactory to leave the Romanian court to reach a conclusion directly contradictory to the declaration which, on this hypothesis, would have been granted by the English court.

60. Finally, the judge said that even if the proceedings were an abuse of process, permitting Mr Vatistas to make submissions would not be an appropriate remedy. The natural remedy was for the proceedings to be struck out, but that was not the relief which Mr Vatistas sought. In my judgment, however, the question of the appropriate remedy if Mr Vatistas is able to make good his case is not a matter which arises at this

stage. It may be that striking out would be the appropriate remedy, but before that question can be considered, the issue whether there is an abuse of process would have to be decided. That can only happen if Mr Vatistas is joined.

61. Having considered the factors which persuaded the judge that it would not be desirable to add Mr Vatistas as a party, I remain of the view that there is a real risk that these proceedings are an abuse of process and that the only way to ensure that the court does not give its authority to what may be a false declaration which would be used to mislead the court in Romania is to allow Mr Vatistas to be joined as a defendant. It is, therefore, desirable that he should be joined. I am fortified in this conclusion by the fact that this was also the view of the arbitrators, the tribunal initially chosen by the parties to resolve Betta's claim for a declaration.

62. However, I recognise that it may turn out that the debt is indeed due and that it is Mr Vatistas who is causing mischief by seeking to participate in these proceedings, rather than the other way around. I would therefore make his joinder conditional on payment into court (or the provision of security in some other form reasonably acceptable to the existing parties) of £400,000 which will stand as security for the costs of the existing parties. That is not an attempt to predict the costs of the litigation once Mr Vatistas has been joined, but is a substantial sum which will enable him to demonstrate that his case is advanced in good faith. Mr Petrochilos did not ultimately resist the suggestion that joinder should be conditional on the provision of such a sum, although he did submit that any order for such security should be of that order and should not run into millions.

Disposal

63. I would allow the appeal and would order that in the event that Mr Vatistas provides security in the sum of £400,000, he should be added as a defendant to the claim. The parties should have the opportunity to make submissions as to the time allowed for the provision of this security, but it must be provided reasonably promptly so that the matter does not drag on. Mr Vatistas will then need to serve a statement of case, after which there should be a case management conference in the Commercial Court to consider the further progress of the proceedings.

64. I would add, so that it is clear for the future, that Mr Vatistas accepts that, if he is joined, he will be liable for the costs of the litigation in the normal way if his case fails. He wants to come to the party, but he is not demanding a free ticket.

LADY JUSTICE ASPLIN:

65. I would allow the appeal for all of the reasons explained by Lord Justice Males.

LADY JUSTICE KING:

66. I agree.