*420 Iesini v Westrip Holdings Ltd

Positive/Neutral Judicial Consideration

Court
Chancery Division (Companies Court)

Judgment Date
16 October 2009

Report Citation
[2009] EWHC 2526 (Ch)
[2010] B.C.C. 420

Chancery Division (Companies Court)

Lewison J.

October 16, 2009

H1. *Derivative claims—Breach of directors' duties—Application for permission to continue derivative claim—Permission granted at first stage of application of prima facie case—Application at second stage—Requirements of second stage—Whether only prima facie case as at first stage—Position of director under s.172 duty—Good faith of applicant—Whether alternative remedy an absolute bar to permission—Views of independent member—Whether permission should be given—Companies Act 2006 ss.172, 260, 261, 263, 994, 996.*

H2.. This was an application under s.261 of the Companies Act 2006 for permission to continue a derivative claim under s.260 of the Act against the newly constituted board of directors of a company for breach of duty.

H3.. The company, "Westrip" was formed as a vehicle to raise and provide funding for the development of a mineral exploration licence in Greenland. An exclusive exploration licence for an area of West Greenland had been granted to an Australian company, "Rimbal", owned by "B" and "W", but this only covered exploration and not the extraction of metals. The terrain involved was such that extraction posed serious practical problems. Westrip agreed to purchase B and W's shares in Rimbal in return for the allotment of redeemable preference shares in Westrip to B and W, so that Westrip could exploit the licence. Westrip resolved to issue such shares without voting, dividend or winding-up rights. At that time, however, Westrip's articles of association did not allow for the issue of redeemable preference shares. Westrip and B and W later entered into an agreement which stated that Rimbal held its licence on trust for Westrip. If the agreement was breached by Westrip, B and W were entitled to rescind it and opt to retain the shares in Rimbal and sue for damages. Westrip adopted new articles of association enabling the directors to allot and issue compliant redeemable preference shares. Westrip entered a joint venture with another company to exploit the licence. "I", was a shareholder and director of Westrip and later he was suspended as director of the company. Westrip became financially unable to allot the redeemable preference shares and it was discovered that the shares had not been issued. The board was legally advised that B and W had a right to rescind. B and W gave notice exercising that right and sought to have the shares in Rimbal re-transferred to them. Westrip accepted the rescission and offered to settle Rimbal's claims to be substituted to the joint venture agreement.

H4.. I and other Westrip shareholders applied under s.261 of the Companies Act 2006 for permission to continue a derivative claim and argued that Westrip's board had breached its duty by failing to consider defences which the company might advance to challenge the rescission, that it had a claim for restitution in respect of costs incurred in developing the licence, and that Westrip held the licence on trust so that Rimbal did not have the right to be substituted to the joint venture agreement. Norris *421 J. at the first stage of the application directed the application to proceed to the second stage (at which the company could provide evidence). At the second stage B, W and Rimbal submitted that s.263(2)(a) of the Companies Act 2006 required permission to be refused because a person acting in accordance with the s.172 duty to promote the success of the company

would not seek to continue the claim. Westrip and some respondent board members argued that the claimants were not seeking to pursue the derivative action for Westrip's benefit, but for the collateral purpose of benefit of the joint venture company, which had provided them with an indemnity for costs and damages.

H5.. **Held** , refusing permission to continue the derivative claim as it related to certain allegations but adjourning the application so far as it related to the trust claim:

H6.. 1. Under the Companies Act 2006 s.260 a derivative claim was in respect of a cause of action vested in the company seeking relief on behalf of the company in respect of an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. Section 261 provided for a two-stage procedure where a member wished to bring a derivative claim on behalf of the company. At the first stage, the applicant was required to make a prima facie case for permission to continue a derivative claim at which the court considered the question on the basis of the evidence filed by the applicant only, without requiring evidence from the defendant or the company. The court was required to dismiss the application if the applicant could not establish a prima facie case. The prima facie case to which s.261(1) referred was a prima facie case "for giving permission". This necessarily entailed a decision that there was a prima facie case both that the company had a good cause of action and that the cause of action arose out of a directors' default, breach of duty (etc.). Norris J. considered the first stage application on paper, and considered that there was a prima facie case. The second stage was now before the court.

H7.. 2. At the second stage it was not simply a matter of establishing a prima facie case, as had been the previous position under the common law, because that formed the first stage of the procedure. It would be wrong to embark upon a mini trial of the action. (*Fanmailuk.com Ltd v Cooper [2008] EWHC 2198 (Ch), [2008] B.C.C. 877 applied* .) However at the second stage something more than a prima facie case was required: the court would have to form a view on the strength of the claim in order properly to consider the requirements of s.263 . As the action had yet to be tried the view would be a provisional one. In particular in this case s.263(2)(a) and s.263(3)(b) required to be considered. Section 263(2)(a) applied a mandatory bar on derivate claim only where the court was satisfied that no director acting in accordance with s.172 would seek to continue the claim. (*Airey v Cordell [2007] EWHC 2728 (Ch); [2007] B.C.C. 785* and *Franbar Holdings Ltd v Patel [2008] EWHC 1534 (Ch); [2008] B.C.C. 885 applied* .)

H8.. 3. Factors which a director acting in accordance with s.172 would consider included: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay its own costs and the defendant's as well; any disruption to the company's activities while the claim was pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on. The weighing of all these considerations was essentially a commercial decision, which the court was ill-equipped to take, except in a clear case.

H9.. 4. If some directors would, and others would not, seek to continue the claim, s.263(3)(b) should be applied, when many of the same considerations would apply. As a matter of strict legal right, B and W had been entitled to rescind or terminate the agreement when they had done so. Westrip's board had taken and followed counsel's advice on that matter. No criticism could be legitimately levelled at the board re re-transferring the shares in Rimbal to B and W. It was impossible to say that ***422** it had been negligent or in breach of duty in doing so. Further, if the old board, including the first applicant, had done what the agreement required it do, there would have been no question of rescission. This was clear case in which the strength of the claim against the board was so weak that no director, acting in accordance with s.172 , would seek to continue the claim against the directors in respect of their actions in accepting the rescission. Alternatively, a person acting in accordance with s.172 would attach little weight to continuing it under s.263(3)(b) .

H10.. 5. The restitutionary claim contained no allegation of breach of duty by a director. It was thus not a derivative claim as pleaded and would have to be brought, if at all, pursuant to an order of the court made in proceedings under s.994 for unfairly prejudicial conduct as envisaged by s.996(2)(c) which authorised civil proceedings being brought in the name and on behalf of the company by persons the court directed.

H11.. 6. The best course of action, exercising the powers in s.261(4)(c) , was to direct the board to reconsider Westrip's defence to Rimbal's claim for substitution, on the basis that there might be a strong claim that Westrip held the licence on trust. If the board decided to defend that claim, there would be no need for a derivative action.

H12.. 7. On some miscellaneous matters, a derivative claim was brought in good faith (a matter for the court to take into account under s.263(3)(a)) if the claimant brought the claim for the benefit of the company even if there were other benefits which would derive from the claim: here the dominant purpose of the action was to benefit Westrip. (*Nurcombe v Nurcombe (1984) 1 B.C.C. 99,269; [1985] 1 W.L.R. 370* and *Barrett v Duckett [1995] B.C.C. 362 applied* .) If the rescission claim had been allowed to proceed, I would not have been regarded as a proper claimant as having participated in the wrong of which he complained, for on one view the real case of Westrip's loss was not the new board's failure to investigate a possible defence, but the old board's failure to follow steps which led to the new board finding itself in the predicament that it did. (*Nurcombe v Nurcombe (above) applied* .) The availability of an alternative remedy was not an absolute bar to a derivative claim: if it were then it would have been a mandatory ground for refusing permission under s.263(2) rather than a discretionary consideration for the court under s.263(3)(f) . From the point of view of the company itself a petition under s.994 was far preferable, principally because it would only be a nominal party and would not incur legal costs, whereas in the ordinary way if a derivative action was brought for its benefit, it would be liable to indemnify the claimant against his costs, even if the claim was unsuccessful, and the potential liability of the company for costs was a proper consideration for the court in deciding whether to allow a derivative claim to proceed. In the present case the combination of that potential liability and the availability of an alternative remedy under s.994 would have led to the conclusion that if the application so far as it related to the trust claim had not been adjourned, it would not have been appropriate to allow the derivative claim to proceed. In relation to the court having "particular" regard under s.263(4) to the views of members of the company who had no personal interest, direct or indirect, in the matter, it must be as satisfied as it can be on an interim application that they were not financially interested in the outcome (beyond their interest as shareholders in the company).

H13. Cases referred to:

Airey v Cordell [2007] EWHC 2728 (Ch); [2007] B.C.C. 785
Barrett v Duckett [1995] B.C.C. 362
Central Estates (Belgravia) Ltd v Woolgar [1972] 1 Q.B. 48
DPR Futures Ltd, Re (1989) 5 B.C.C. 603; [1989] 1 W.L.R. 778
Fanmailuk.com Ltd v Cooper [2008] EWHC 2198 (Ch); [2008] B.C.C. 877 ****423***
Foss v Harbottle (1843) 2 Hare 461
Franbar Holdings Ltd v Patel [2008] EWHC 1534 (Ch); [2008] B.C.C. 885
Godden v Merthyr Tydfil Housing Association (1997) 74 P. & C.R. D1
Goldsmith v Sperrings Ltd [1977] 1 W.L.R. 478
Jaybird Group Ltd v Greenwood [1986] B.C.L.C. 319
Konamaneni v Rolls Royce Industrial Power (India) Ltd [2003] B.C.C. 790; [2002] 1 W.L.R. 1269
Little Olympian Each-Ways Ltd, Re [1994] B.C.C. 959
Lowe v Fahey [1996] B.C.C. 320
Nurcombe v Nurcombe (1984) 1 B.C.C. 99,269; [1985] 1 W.L.R. 370
Prudential Assurance Co Ltd v Newman Industries Ltd (No.2) [1982] Ch. 204
Shah v Shah [2001] EWCA Civ 527; [2002] Q.B. 35
Smith v Croft (1986) 2 B.C.C. 99,010; [1986] 1 W.L.R. 580
Smith v Croft (No.3) (1987) 3 B.C.C. 218

Wallersteiner v Moir (No.2) [1975] Q.B. 373

H14. Representation

John Wardell QC and Elizabeth Weaver (instructed by Withers LLP) for the claimants.
Michael Todd QC and Ruth Holtham (instructed by Farrer & Co) for the first, fourth and fifth defendants.
Peter de Verneuil Smith (instructed by SC Andrew LLP) for the second, third, sixth and seventh defendants.

JUDGMENT

Lewison J.:

Introduction

1. Mr Dimitri Iesini and his co-claimants are shareholders in Westrip Holdings Ltd ("Westrip"). They say that the defendants (other than Westrip itself) have deliberately engaged in a course of conduct which has led to Westrip losing ownership and control of a very valuable mining licence and which, but for their intervention, would have led to Westrip losing all or almost all of its remaining assets. They say that the course of conduct that they allege amounts to breaches of duty by the individual defendants. They apply to the court under s.261 of the Companies Act 2006 for permission to continue a derivative claim on behalf of Westrip in which they claim to reverse the alleged asset stripping and also claim declarations about Westrip's ownership of certain assets.

Background facts

2. Rimbal Pty Ltd ("Rimbal") is an Australian company beneficially owned by Mr Gregory Barnes ("Mr Barnes"). Mr Barnes is a geologist experienced in mining. In May 2001 the Government of Greenland Bureau of Minerals and Petroleum granted Rimbal an exclusive exploration licence for an area in West Greenland. This licence has been referred to as the Tanbreez licence. The Tanbreez area is thought to contain substantial quantities of valuable and rare metals. These include zirconium (used in high tech products), tantalum (used in capacitators to slow electrical charges), niobium (used in steel alloys), uranium and rare earths. The Tanbreez licence, however, does not allow these metals to be extracted (for which a further licence will be necessary) and, moreover, the terrain is such that ***424** extraction poses serious practical problems. Nevertheless, it is common ground that the Tanbreez licence is a very valuable asset. In 2007 it was valued at $900 million.

3. Westrip was formed as a vehicle to raise and provide the funding for the development of this mineral exploration licence. It is a company incorporated in England and Wales. Until a boardroom coup in June 2008 Mr Iesini was a director of the company, together with (among others) Mr Barnes and Ms Janine Walker. His brother, Mr Giacobbe Iesini (the second claimant) was also a director of the company from about March 2006 until the boardroom coup. Westrip contracted with Rimbal on the terms of two licences, referred to respectively as the "2002 licence" and the "2004 licence". The shareholders of Rimbal at the time were Mr Barnes and Ms Walker (but Ms Walker held her single share as Mr Barnes' nominee). Under the terms of the 2002 licence:

(i) Westrip was to control the management and implementation of the scheme for the development of the licensed areas (or "tenements");
(ii) Rimbal assigned to Westrip all of its present and future rights to all profits arising from any exploitation of mineral deposits within the tenement;
(iii) if Westrip paid £2.5 million, 51 per cent of Rimbal's shares would be transferred to Westrip (although it is difficult to see how Rimbal itself could have procured the transfer of its own shares);
(iv) the term of the 2002 licence was two years from May 2002; and
(v) the agreement was governed by English law.

4. The 2004 licence was in the same terms, except that the period of the licence was three years from July 2004.

5. In fact Westrip made no payment under the terms of either licence, so no shares in Rimbal were transferred.

6. In 2006 Rimbal acquired (or "pegged") another exploration licence for a different area of Greenland. This licence was originally number 2005/17. In 2007 the area covered by the 2005/17 mineral exploitation licence was subdivided into "the Northern Licence" (also known as the "Kvanefjeldt Licence") which is Licence No. 2005/28, and "the Southern Licence" which is Licence No. 2005/29. The application for subdivision was made in January 2007 and granted on May 1, 2007.

7. In 2006 Westrip had agreed in principle with Mr Barnes and Ms Walker for the purchase of their shares in Rimbal. It was envisaged that the consideration for the purchase would be the allotment of redeemable preference shares in Westrip. An extraordinary general meeting (EGM) of the members of Westrip took place on June 10, 2006. One of the matters discussed was the proposal to allot £2.5 million of redeemable preference shares. The minutes of the meeting recorded:

> "These shares are being allotted to Greg [Barnes] and Janine Walker in consideration of transferring Rimbal to Westrip as a wholly owned subsidiary. The transaction will be contemporaneous with the sale of a separate licence to Uranium Resources and issue of shares in the ultimate public quoted company seeking to acquire Uranium Resources. The Members' and company interests will be protected at all times by funds and shares being held in escrow …
>
> With Greg and Janine Walker exclude[d] from voting, the proposal was agreed by more than 76per cent and therefore special resolution was passed …"

8. The formal resolution stated: ***425**

> "The following resolution was passed: 1. To issue 2,500,000 redeemable preference shares without voting, dividend or winding up rights."

9. At the time, however, Westrip's articles of association did not allow for the issue of redeemable preference shares.

10. By this time Westrip had agreed terms for a joint venture to exploit the Northern Licence with an Australian company called Greenland Minerals and Energy Ltd (always referred to as "GGG" which is its Australian stock exchange acronym). The essential terms of the joint venture were that Westrip would sell a 61 per cent share in the Northern Licence in return for AUD$3 million and the issue of 30 million shares in GGG.

11. On January 18, 2007, the board of Westrip met. It was reported that Mr Barnes had agreed to sell Rimbal for £500,000 in cash and £2 million in "non-coupon redeemable preference shares". The board resolved to present the agreement to an EGM. The EGM took place on January 25, 2007. A number of resolutions were placed before the meeting as ordinary resolutions. Among those which were passed was a resolution:

> "that the ordinary shares of Rimbal Pty Ltd be acquired on the terms set out in Annex 3 and it is further resolved that Simon Stafford-Michael have the authority to negotiate the final wording of the contract and execute all such documents necessary for the closure of such transaction."

12. Annex 3 recorded that the consideration for the purchase was to be £500,000 and the allotment of 2 million redeemable non-interest non-convertible bearing preference shares. The other terms of acquisition were contained in heads of terms which were supplied to the EGM.

13. On February 28, 2007, Westrip entered into two more or less identical agreements; one with Mr Barnes and Ms Walker and the other with Ms Walker alone. These agreements are at the heart of the dispute. It is necessary to set out their terms which I do by reference to the agreement between Westrip and Mr Barnes and Ms Walker. The agreement (the "SSA") began with a number of recitals. It referred to the 2002 Licence; it recited that Rimbal had granted Ms Walker a 50 per cent interest in Exploration Licence 2001/08 which she had "rolled over" into Horrocks Enterprises Pty Ltd ("Horrocks") a company all of whose issued shares she owned. Recital F said:

> "Although Exploration Licence 2005/17 was granted in the name of [Rimbal], [Rimbal] holds it on trust for [Westrip]. [Westrip] paid for this Exploration Licence to be pegged and has met the minimum expenditure requirements to ensure that this Exploration Licence is maintained in good standing."

14. The recitals continued by saying (among other things) that Ms Walker was to enter into an agreement on substantially the same terms to sell her shares in Horrocks. Clause 2 of the SSA contained the agreement for sale and purchase. The purchase consideration was defined by the schedule to the SSA as £1,250,000 in cash or 1,250,000 redeemable shares of £1 each in the capital of Westrip. The terms of the redeemable shares were also set out in the schedule. Clause 3 set out a number of conditions which had to be satisfied before the settlement date. In the first instance the settlement date was March 14, 2007 (although this was later extended). The vendor and purchaser were to negotiate in good faith and agree the form of certain company documents. These included a notice convening an EGM proposing a special resolution to adopt certain articles of association permitting the allotment and issue of redeemable preference shares on the terms set out in the schedule to the SSA; and a resolution adopting those articles. Westrip's directors were to resolve to convene the EGM; and to send the relevant documents to those who were entitled to receive them. Westrip was ***426** to hold the EGM and the special resolution adopting the articles was to have been passed. Westrip was to send a copy of the special resolution and the articles to the Registrar of Companies; and the members of the company were to waive any rights of pre-emption. All these steps were set out in meticulous detail. Clause 3(2) provided that:

> "The conditions in clause 3 (1) are for the benefit of the Vendor and may only be waived by the Vendor."

15. Clause 4 set out what was to happen "at settlement". In particular cl.4(a) required Mr Barnes and Ms Walker to deliver share certificates in Rimbal "against consideration of the Purchase Consideration"; and cl.4(d) required the directors of Westrip to adopt a resolution allotting and issuing and to cause to be allotted and issued the redeemable preference shares. Again, all these steps were set out in meticulous detail.

16. There were a number of other relevant terms of the SSA. These included:

(i) cl.6 provided that time was of the essence of the contract;
(ii) cl.10.1 contained a warranty by Westrip (which was to be correct both at the date of the agreement and at the date of settlement) that the redeemable preference shares had been validly allotted and issued;
(iii) cl.19 provided that in the event of any breach of the agreement by Westrip Mr Barnes and Ms Walker would be entitled "to rescind" the agreement and to exercise the option to retain the shares in Rimbal and sue for damages; and
(iv) cl.21 provided that any waiver of rights under the agreement was not to have any effect unless made in writing and executed by the party whose rights were waived.

17. The terms on which the redeemable preference shares were to be issued were set out in the schedule to the agreement. In short they were to be redeemable at par six months after the settlement date. They were to carry the right to be paid the redemption amount in priority to other shareholders in the event of a winding up; but otherwise were to carry no entitlement to participate in the profits or assets of Westrip. If the shares were not redeemed on the due date, the holders of the shares were entitled to convene a general meeting of Westrip and pass a resolution for its winding up. The fact that the redeemable preference shares which the SSA required were to have rights in a winding up meant that the special resolution that had been passed back in June 2006 did not authorise the issue of compliant preference shares.

18. On March 2, 2007, Mr Tony Martin of Westrip's then company secretary, Mark Law Registrars Ltd, circulated a written resolution to all shareholders in Westrip. In his covering email he said:

> "In addition and just as important is the attached written resolution regarding the issue of preference shares at an extraordinary meeting of the company on 10 June 2006. At that time, we neglected to cover the aspect of shareholder rights in specific detail. In simple terms this makes the "Rimbal" agreement happen smoothly and gives Westrip ownership of the licences, through owning 100 per cent of Rimbal."

19. The resolution to which all the shareholders consented was, however, no more than a waiver of pre-emption rights to which they were entitled under the articles. The resolution did not change the terms on which preference shares could be allotted and issued. Thus Westrip was still not able to issue compliant preference shares.

20. On March 6, 2007, Mr Barnes and Ms Walker transferred their shares in Rimbal to Westrip. The SSA had envisaged that these shares would be transferred on the settlement date in exchange for **427* the issue of the redeemable preference shares

in Westrip, but in fact Mr Barnes and Ms Walker transferred them before they were obliged to do so; and they did not transfer the shares in exchange for the purchase consideration. On the contrary, they transferred the shares for no consideration at all.

21. On March 13, 2007, in consideration of AUD$1, Mr Barnes and Ms Walker agreed to extend the settlement date under the SSA to April 11, 2007.

22. On the following day, March 14, 2007, Rimbal, Westrip and Broadstone Resources Ltd ("Broadstone") entered into an agreement called the "Side Deed". It recited that the Exploration Licence (defined as Exploration Licence 2005/17) was held by Rimbal "a wholly owned subsidiary of Westrip". This licence is not the Tanbreez licence which Rimbal held in its own right. The recited purpose of the Side Deed was for Rimbal to give certain assurances in relation to the Exploration Licence. By cl.2.1(c) Rimbal represented and warranted to Westrip and Broadstone that "the Westrip Contractual Rights are valid and in full force and effect". The Westrip Contractual Rights were defined as:

> "… Westrip's rights to, inter alia, promote and develop the Exploration Licence by virtue of Rimbal holding upon trust for, and as nominee of, Westrip as owner of the full, absolute and entire beneficial interest in the Exploration Licence."

23. On the same day Westrip entered into a joint venture agreement with Broadstone. The joint venture agreement recited that Exploration Licence 2005/17 was:

> "presently held by a wholly owned subsidiary of Westrip ('Subsidiary') and by virtue of Subsidiary holding upon trust for, and as nominee of, Westrip as owner of the full, absolute and entire beneficial interest in the Existing Exploration Licence, Westrip is entitled to enter into this agreement."

24. The joint venture agreement allocated percentage interests in the joint venture to the two joint venture parties, with options granted to Broadstone to enlarge its percentage interest on making certain payments. By virtue of a series of subsequent deeds and novations, to which Rimbal was also a party in order to confirm the warranties given by it in the side deed, GGG now occupies the position of Broadstone as joint venturer. On the face of it is seems plain that the parties to the joint venture relied on Rimbal's warranties in entering into their arrangements.

25. In March 2007 Mr Barnes resigned as a director of Westrip.

26. On April 18, 2007, Westrip's lawyers, Jackson McDonald, prepared a checklist of the steps that Westrip needed to take in order to comply with the SSA insofar as it related to the allotment and issue of the redeemable preference shares. This checklist was never implemented.

27. On about June 8, 2007, by the second variation agreement, Mr Barnes and Ms Walker extended the settlement date under the SSA for the second time, to June 15, 2007, conditional upon Westrip having received $5 million under a royalty agreement entitling Westrip to that money. The consideration for this extension was (among other things) Westrip's agreement to pay Mr Barnes £150,000 in cash on receipt of the $5 million "in lieu of the right to redeem" the preference shares up to an amount equal to £150,000. Westrip's board had in fact resolved to make payments of £150,000 each to Mr Barnes and Ms Walker the day before, having received the $5 million under the royalty agreement. The board's decision was minuted as follows:

> "… it was agreed that payments of £150k be made forthwith to Gregory Barnes & Janine Walker under the terms of the Share Purchase Agreements (and latest draft Variations thereto)." ***428**

28. The payments to Mr Barnes and Ms Walker were made on June 12, 2007. At the time the precise character of the payments was not documented. That came later in January 2008. The remainder of the $5 million was used for the development of Tanbreez.

29. On June 14, 2007, following the passing of a special resolution at an EGM, Westrip at last adopted new articles of association enabling the directors to allot and issue compliant redeemable preference shares. The redeemable preference shares were to be redeemed at £1 per share on September 30, 2008. There were other terms attached to these shares. It is common ground that if shares had been allotted and issued under these articles, they would have complied with the requirements of the SSA.

30. The joint venture agreement was completed on about August 16, 2007. GGG, having assumed the rights and obligations of Broadstone, paid AUD$500,000 to Westrip and issued to it 30 million shares. This was the consideration for GGG's participation in the joint venture which, it will be recalled, was for the exploitation of Licence 2005/17 (which by now had been split into the Northern and Southern Licences); not the exploitation of the Tanbreez licence.

31. On September 29, 2007, Westrip held its annual general meeting (AGM). One of the agenda items was the adoption of the company's financial statements for the year ended January 31, 2007. Those financial statements were duly adopted. The significance for present purposes of that is that the financial statements contained the following note under the heading "Post balance sheet events":

> "The company acquired 100 per cent of ownership of Rimbal … on 14 June 2007 at a cost of £2,500,000. The transaction was funded by shareholder resolution of redeemable preference shares to that value."

32. On December 13, 2007 Mr Stafford-Michael and Mr Sharp prepared a memorandum about Westrip's progress and financial position. They concluded that Westrip had a need for $20 million working capital and also a need for an additional $10 million of capital. Part of the additional capital was needed "to redeem outstanding [preference] shares issued in connection with the acquisition of Rimbal Pty Ltd."

33. On January 4, 2008, Westrip's board passed an ordinary resolution authorising the company to redeem 300,000 preference shares at par. The shares were to be redeemed out of the company's capital; and Westrip's directors (with the exception of Ms Walker) completed a declaration on form 173. At the same time Westrip submitted a return to Companies House notifying its purchase of 300,000 shares. The annual return that Westrip submitted to Companies House on January 16 showed Mr Barnes and Ms Walker as each being the holder of 1,100,000 redeemable preference shares (i.e. the original 1,250,000 less the shares apparently redeemed). The desired effect of this seems to have been to characterise the payments that had been made back in June 2007 as having been made in partial redemption of the preference shares.

34. Mr Barnes was a director of another Australian mining company, and in that capacity had become embroiled in proceedings in Australia. It was those and associated proceedings that had triggered his resignation from the board of Westrip nine months earlier. Westrip sought legal advice on what Mr Barnes' ongoing role in the company should be. On February 15, 2008, Morgan Lewis, US lawyers, advised that Mr Barnes should, in effect, take a back seat during the pendency of the Australian proceedings. They gave their advice on the basis on a number of assumption, recorded in their letter of advice, one of which was: ***429**

> "Mr Barnes is a founding shareholder of the Company, holding an approximately 15.0 per cent voting stake, with additional preference shares which may be redeemed in or about September 30, 2008 …"

35. Mr Barnes was sent a copy of their advice on March 10, 2008, or thereabouts. Shortly thereafter Westrip's board split into two camps. Each camp was, at least on the face of it, engaged in attempting to raise finance for Westrip. Mr Schønwandt, the chairman of the board, led negotiations with Weyhill Establishment to which he had been introduced by Ms Moss of Vera Ltd. On April 16, 2008, Mr Sundell, the chief executive officer (CEO) of Weyhill, wrote to Mr Schønwandt. He said that Weyhill had two areas of particular concern. The first was that the funding be made through a new company to be domiciled in Liechtenstein, which would become Westrip's holding company. This new corporate entity would be run by Mr Schønwandt and Mr Barnes. The second was the management of Westrip. Mr Sundell said that Mr Stafford-Michael and Mr Scanlon (who was then the managing director) must leave the board and that a new managing committee should be formed to administer the company in Perth. There was a board meeting of Westrip on the same day. Mr Schønwandt reported to the board that Mr Sundell had offered funding on the security of Westrip's GGG shares; and that among the terms were that Mr Stafford-Michael and Mr Scanlon must leave the board. He added that he had "received feedback" from several members purporting to represent a majority that the board should resign en masse. After discussion the board resolved to meet again on April 23 and to convene an EGM on May 7.

36. On May 5, 2008, Mr Schønwandt and Mr Sharp wrote to all the members of Westrip. They said that they had come to an agreement with Weyhill for the provision of $20 million interim debt facility secured on Westrip's GGG shares. Weyhill would also require a charge over the company holding the Tanbreez licence (i.e. Rimbal). Interest would be payable at less than 15 per cent. They also referred to the management changes that Weyhill required. The letter continued by saying that more than 60 per cent of the members had asked that the entire board resign, and stated:

> "I have been informed that Greg Barnes has requested an EGM to accomplish these changes in lieu of voluntary resignations and that he currently holds proxies, including his own shareholding, that represent approximately sixty seven per cent of the outstanding Westrip shares. This overwhelming majority makes it very likely that Westrip will be able to make the required changes and move to closing the interim funding."

37. A term sheet for the Weyhill loan, of the same date, reflects these terms. The letter did not mention the proposal for a new holding company to be formed in Liechtenstein. But the term sheet does not mention the proposal for a new holding company to be formed in Liechtenstein either. At some stage however (the date is not clear) two Liechtenstein foundations were established (or proposed to be established: again it is not clear which). The laws (or draft laws) of each foundation named the beneficiaries of the foundation. One foundation, to be called the Qaqortoq Foundation listed among its beneficiaries Westrip (25 per cent), Mr Barnes (10 per cent) Mr Read (9 per cent) Mr Powar (9 per cent) Mr Sharp (9 per cent) Ms Walker (4 per cent) Mr Schønwandt (1 per cent) Mr Bosme (1 per cent) and Mr Kasserer (1 per cent). The other, to be called Westriver Foundation, listed the same individuals among its beneficiaries, but not Westrip. The laws (or draft laws) stated that each beneficiary had the right to claim the assets of the foundation.

38. The purpose of the foundations is obscure. Mr Iesini says: ***430**

> "The original plan was to use Westrip's GGG shares to raise £20 million. This £20 million would be used to create two highly leveraged hedge funds which would raise sufficient monies to be able to fund Westrip's needs. In other words, the only capital introduced at the first stage was going to come via Westrip's shares in GGG other than the £250,000 borrowed from Westrip."

39. Mr Iesini goes on to say that the two hedge funds "would operate through" the two Liechtenstein foundations. How they would "operate through" the two foundations remains obscure. Mr Read, who is one of Mr Iesini's co-claimants, and was to be a beneficiary of the foundations, has given no evidence.

40. The circular letter of May 5, 2008, was followed by a lively email debate among Westrip's members about the merits of the Weyhill offer. The position of the supporters of the offer was put by Mr Sharp:

> "WE ARE BROKE, WE ARE ON THE BRINK OF INSOLVENCY. If we don't put up the collateral that we have then we will not get finance from anyone."

41. On May 15, 2008, Mark Law Registrars Ltd resigned as Westrip's company secretary. On May 23 an electronic copy of Westrip's share register was made. It did not contain any record of redeemable preference shares having been issued to Mr Barnes or Ms Walker.

42. Meanwhile Mr Iesini was in discussion with Mr Shamazian of Exchange Minerals Ltd as an alternative potential funder. By the end of May 2008 there was a draft agreement in existence. Under the terms of the draft Exchange Minerals would provide a facility of AUD$20 million, bearing interest at 9.5 per cent per annum (but compounded monthly), secured by a first fixed and floating charge. Among the other terms of the draft were a right for the lender to nominate three members of the

board, one of whom was to be the chairman. A board meeting took place on May 30. Mr Schønwandt refused to discuss the proposed facility offered by Exchange Minerals and left the meeting. The remaining board members discussed the Exchange Minerals offer. Mr Stafford-Michael pointed out that the company was on the verge of insolvency and that the directors were bound to consider all offers made. In the course of the meeting Mr Barnes telephoned in and made forceful comments (the contents of which are not recorded in the minutes, although Mr Iesini's evidence is that Mr Barnes spoke against the Exchange Minerals offer). The upshot of the meeting was that the board decided to put both the Exchange Minerals offer and the Weyhill offer before the company in general meeting.

43. An EGM took place on June 9, 2008. The principal item before the meeting was a motion to remove the board, with the exception of Mr Schønwandt and Ms Walker. The motion was supported by Mr Barnes. In the course of the discussion he was asked whether it was his intention to insist on being paid for his preference shares in September. He replied that he had made it clear at previous meetings that he was prepared to extend that time in the interests of the company and accordingly would not exercise that option in the near future. The vote was then held and the motion to remove the board was passed. Mr Barnes, Mr Powar and Ms Walker were appointed as new directors, and Mr Schønwandt continued as chairman of the board. Mr Powar had declared an interest as a senior vice president of Weyhill. It was also pointed out that Mr Read was also a vice-president of Weyhill.

44. Later that day a second part of the EGM was held to discuss funding options. Mr Stafford-Michael is recorded in the minutes as having said that with the change of board members the Exchange Minerals offer was now redundant; and that the Weyhill proposals were the only offer now on the table. Mr Iesini says in his evidence that he had expected Mr Shamazian to attend the EGM to explain the Exchange Minerals offer to the shareholders, but that he failed to appear and gave no explanation. Mr Iesini says that Mr Stafford-Michael subsequently told him that the reason ***431** why Mr Shamazian did not come was because Mr Barnes had told him that Westrip had already raised $20 million and no longer needed Exchange Mineral's funds. This is third or fourth hand hearsay. Mr Barnes denies having said this to Mr Shamazian. He says that he discussed the situation with Mr Shamazian and the possibility that the board might put Westrip into liquidation; and that, as a result of the discussion, Mr Shamazian decided not to attend the EGM. It is impossible to decide where the truth lies, but the minutes of the meeting do not support Mr Iesini's account. Moreover, Mr Iesini did not himself attend the second part of the meeting. If he had expected Mr Shamazian to attend it (and was unaware of his decision not to attend) that seems very surprising. Even if Mr Shamazian did not attend the meeting personally, the Exchange Minerals offer, if still on the table, could have been put to the meeting. At all events, again for reasons that are obscure, the Weyhill offer did not proceed; and negotiations with Exchange Minerals were not re-opened.

45. On June 23, 2008, Mr Barnes sent a letter to the directors and shareholders of Westrip. He said that in September a payment of £2.1 million would be due for the purchase of Rimbal and that "if payment is not made Rimbal reverts back to the original owners". He also said that the sale of the Northern Licence had not been a good deal for Westrip, chiefly because it had left Westrip with a tax bill of $3 million. He and the board were working to find a solution.

46. On July 24, 2008, the board suspended Mr Iesini from his duties with the company on the ground that he had been in breach of contract and in breach of his fiduciary obligations to Westrip. No details of the allegations were given at the time or subsequently.

47. Despite the resignation of Mark Law as Westrip's company secretary, it still retained the company's records. The board made a number of written requests for the books and records during the summer of 2008; but they were not produced to the company's lawyers until September 25, 2008 (a Thursday), some five days before the redemption date of the preference shares that were to have been allotted and issued under the SSA. At some stage before the handover of the books and records the share register was retrospectively altered. The alteration purported to show that redeemable preference shares had been issued to Mr Barnes and Ms Walker on April 30, 2007. Why April 30 was chosen as the date remains a mystery. The records

handed over also included draft unsigned share certificates also bearing that date. The records handed over also purported to show a partial redemption of those preference shares.

48. If preference shares compliant with the SSA had been issued, the redemption date was fast approaching. Westrip did not have the money to redeem the shares. This was pointed out by, among others, Mr Stafford-Michael in a letter circulated to shareholders on September 15, 2008. That was the very day on which Lehman Brothers collapsed. The prospects of raising large sums of cash at short notice were not promising. As Mr Schønwandt put it in evidence:

> "It was not the moment to be trying to find £2.2 million plus funding for further development costs against a long distant hoped-for profits stream. The board concluded that not only could Westrip not make any payment to Mr Barnes or Ms Walker, but further, it could not approach them with any meaningful proposal to make payment in the future."

49. The board embarked on inquiries to determine whether compliant preference shares had in fact been issued. During the course of investigations made over September 29 and 30, it was discovered that the steps required to allot and issue the shares (which had been clearly set out in the SSA) had not in fact been taken. The board decided to instruct counsel (Mr Alan Boyle QC and Mr Richard Walford) to advise. They advised in consultation on September 30, and recorded their advice in a written note. They pointed out that the board's efforts to ascertain the relevant facts had been hampered by difficulties in obtaining Westrip's books and records from its former company secretary. Mr Boyle ***432*** and Mr Walford were themselves only instructed late on September 29; and the material with which they were supplied was itself supplemented during the course of the consultation as more information became available. They summarised the two key issues:

(i) whether Westrip had complied with its obligations under the SSA to create and allot compliant preference shares to Mr Barnes and Ms Walker; and
(ii) if not, whether there were any steps that Westrip could take to rectify the situation so as to preserve for Westrip its interest in Rimbal and Horrocks and the value of the underlying mineral licences.

50. Having gone through the facts as they appeared, counsel concluded that "the simple and straightforward points" were:

(i) prior to June 14, 2007, no purported allotment of redeemable preference shares could have been valid; and
(ii) after that date, there was no evidence of any actual decision by the board of directors to make such an allotment.

51. The first consequence of these conclusions was that Westrip had been in breach of a number of its obligations under the SSA since June 15, 2007, and that the vendors had a right to rescind. Counsel then considered whether the breaches could be remedied by the late allotment of compliant preference shares. They concluded that it was unlikely that this could be done, not least because under the terms of the company's articles, the redemption date for the shares had arrived; and time was of the essence of the SSA. They concluded, therefore, that if a remedy was to be found it would require a further agreement by Mr Barnes and Ms Walker to extend time for settlement and to a change in the terms of the preference shares postponing the redemption date as well as a change to the company's articles of association to enable new preference shares to be issued. They advised therefore that Mr Barnes and Ms Walker should be asked for their agreement and also advised that advice should be taken from Western Australian lawyers.

52. On October 2 Westrip wrote to Mr Barnes and Ms Walker. The letter pointed out all the defects in the internal steps that Westrip had taken to issue redeemable preference shares. It did not attempt to put any "spin" on Westrip's failures. But,

as advised, the letter did ask for Mr Barnes' and Ms Walker's agreement to a further extension of time. Since Mr Barnes and Ms Walker were directors of Westrip and therefore knew what advice had been given, any "spin" would probably have been pointless.

53. On October 7 Westrip received advice from Mallesons, Western Australian lawyers. Their advice was that the advice given by Mr Boyle QC and Mr Walford was consistent with Western Australian law; and that, based on the known facts, Mr Barnes and Ms Walker were entitled to rescind.

54. On the following day, October 8, 2008, Mr Barnes and Ms Walker gave notice exercising their right to rescind under cl.19 of the SSA. They also asserted a right to have the Rimbal shares re-transferred to them. Morgan Lewis immediately sent a copy of that letter to Mallesons and asked whether it was appropriate for Westrip to comply with their demands or whether there was "some other action or defence Westrip needs to take." Mallesons' advice, given on October 10, was that although the right to terminate in case of breach of contract was not absolute, "the available facts favour Barnes & Walker". They further advised that it would be difficult for Westrip to satisfy an Australian court that Mr Barnes or Ms Walker had breached their good faith obligations or engaged in unconscionable conduct in circumstances where they had substantially complied with their ***433** obligations under the SSA; and where the £150,000 paid to them was paid to secure variations to the SSA and was separate from the SSA itself.

55. The Westrip board met on October 10. Two lawyers were in attendance. The meeting considered the legal advice that had been given both in England and Australia and concluded that Mr Barnes and Ms Walker did have the right to rescind and that although it was not certain that a Western Australian court would grant specific performance it was "hugely likely". Based on that conclusion the board resolved to execute the share transfer forms relating to Rimbal and Horrocks. In short, the board accepted that the SSA had been validly rescinded.

56. In December 2008 Westrip consulted senior and junior counsel in Australia on the question whether licence 2005/17 (subsequently split into the Northern Licence and the Southern Licence) was held by Rimbal on trust for Westrip. Instructions on the facts were given to counsel by Mr Barnes, Ms Walker and Mr Sharp. Clearly it was in Mr Barnes' interest as the shareholder in Rimbal for there to be no trust. Ms Walker had the same interest. There was therefore a clear conflict of interest between Westrip on the one hand, and Mr Barnes and Ms Walker on the other. Counsel were provided with a number of documents. These included the SSA (which contained recital F reciting the trust) the joint venture agreement between Westrip and Broadstone (which did likewise) and the side deed made between Rimbal, Westrip and Broadstone (by which Rimbal warranted the existence of the trust). They recorded that in their discussions with Mr Barnes he had vehemently denied that Rimbal had agreed to hold the licence on trust for Westrip. But counsel noted that both Mr Barnes and Ms Walker had signed the SSA which contained an acknowledgement of the trust. They briefly recounted the history of the other documents, including the joint venture agreement and the side deed. They recorded that they had been asked to advise on the question whether the arrangements between Westrip and Rimbal amounted to the creation of a trust over licence 2005/17; and, if not whether the arrangements otherwise amounted to the acquisition of a proprietary interest by Westrip. They concluded that there was no evidence to suggest that, as a matter of Australian law, there was a declaration of trust by Rimbal. Nor was there a basis for considering that Westrip acquired some other proprietary interest in the licence. In reaching that conclusion they considered recital F in the SSA which they said did not amount to a declaration or acknowledgment of trust by Rimbal (which was not a party to the SSA). They considered that although the side deed suggested that such a trust already existed it fell short of a declaration of trust and did not create any proprietary rights.

57. On February 13, 2009, Rimbal's Australian lawyers wrote to Westrip. They asserted that as a result of the rescission of the SSAs there had been a total failure by Westrip to provide the consideration due under those agreements. The letter asserted that the purpose of the SSAs was to enable Westrip to obtain Licence 2005/17; and that it was as a result of having

obtained the Rimbal shares that Westrip entered into the joint venture with Broadstone and later GGG. The letter went on to say that Westrip's share in the joint venture and its shares in GGG were held on trust for Rimbal as a result of the rescission.

58. On March 6, 2009, Rimbal issued a writ in Western Australia. It claimed a right to be substituted as a party to the joint venture agreement in place of Westrip, the recovery of moneys and benefits received by Westrip under the joint venture agreement and a transfer of Westrip's issued shares in GGG. Mallesons were consulted in May. Their letter of advice was dated May 15, 2009. It was addressed to the Westrip board, with copies to Mr Sharp and Mr Barnes. The letter recorded that they had been instructed by Mr Barnes (a director of the company) and Mr Sharp "(an external consultant to the Company with authority from the Board to act on the Company's behalf)". They set out the background to the dispute and the proposed settlement. Their advice was that: ***434**

> "Rimbal has at least reasonable prospects of successfully pursuing the Company for remedies arising out of the Company's failure to issue Rimbal the redeemable preference shares … under the … [SSAs]"

59. They further advised that:

> "In circumstances where a court is likely to form the view (based on the materials presently before us) that the Company holds Exploration Licence Number 2005-17 on trust for Rimbal, it is our view that the terms are reasonable as it will involve a monetary settlement (in effect) of approximately AUD$8 million."

60. But they pointed out that it was a commercial decision for the board whether to settle on those terms. Curiously, in a letter dated September 23, 2009, Mallesons said that they had not received any instructions from Mr Barnes himself in late 2008 and early 2009 and that:

> "Accordingly, Mr Barnes' instructions cannot be said to have affected the advice given by Mallesons in relation to either the rescission of the SSAs or … the proposed settlement of CIV 1447."

61. The last part of this statement is difficult to reconcile with the opening of their letter of advice of May 15, 2009, which addressed the question of settlement. At some stage the board also saw a copy of the legal advice that Mr Barnes had obtained from Mr Grant Donaldson S.C. Mr Donaldson's view was that Westrip had no grounds for resisting Rimbal's claim. The proposed settlement of the action was in two stages: first a bi-partite settlement between Rimbal and Westrip and second a tri-partite settlement between Westrip, Rimbal and GGG. The second stage of the settlement has not been completed.

62. The claim form in this action was issued on June 26, 2009. On July 10, 2009, Norris J. considered the application to continue the derivative claim on paper and directed that the application proceed to the second stage of the statutory procedure. On July 27,. Proudman J. granted a freezing order over Westrip's 30 million shares in GGG and its interest in the Northern Licence. The freezing order also extended to Tanbreez.

The claimants' case

63. Mr Todd QC, appearing with Ms Holtham for Westrip, Mr Powar and Mr Schønwandt, complains with justification that the claimants' case has changed markedly from the case that was presented to Norris and Proudman JJ. The case as presented to me was heavily reliant on three strands:

(i) an allegation that the board of Westrip colluded in the rescission as part of a conspiracy to deprive Westrip of its assets;
(ii) an allegation that the board of Westrip were in breach of duty in failing to consider possible defences which Westrip might advance to challenge the rescission; in particular a defence that Mr Barnes and Ms Walker were estopped from alleging that compliant preference shares had not been allotted and issued in time; and
(iii) an allegation that, whether or not the rescission was effective, Westrip was and remains entitled to assert ownership of the 30 million GGG shares and to assert beneficial ownership of the Northern Licence on the ground that Rimbal held it on trust for Westrip.

64. Despite Mr Todd's grumbling, he was content to deal with the new case without an adjournment; and so will I. ***435**

Conspiracy

65. The draft amended particulars of claim allege that the following overt acts were carried out pursuant to the conspiracy:

(i) the creation of Weyhill, the Liechtenstein Foundations and the making of the Weyhill offer;
(ii) the use of the Weyhill offer to change the board of directors of Westrip;
(iii) the promoting and making of a false claim for rescission;
(iv) the acceptance of that claim by a board acting in breach of duty;
(v) the re-transfer of the shares in Rimbal and Horrocks to Mr Barnes and Ms Walker; and
(vi) the decision of the board not to defend the proceedings issued by Rimbal in Western Australia.

Estoppel

66. Although the draft particulars of claim allege that compliant redeemable preference shares were in fact allotted (in the sense that Mr Barnes and Ms Walker became unconditionally entitled to be entered on the register as holders of the shares), Mr Wardell QC, appearing with Ms Weaver for the claimants, rightly in my judgment did not press this allegation. It is plain that there are a variety of technical defects in Westrip's internal procedures which have the result that no compliant preference shares were allotted or issued before the redemption date; let alone before the settlement date. These defects were convincingly explained by Mr Boyle QC and Mr Walford; and convincingly supported by Mr Todd. However, the draft amended particulars of claim go on to allege that Mr Barnes and Ms Walker are estopped from asserting that no complaint redeemable preference shares were issued in time. The estoppel is alleged to arise from the following:

(i) budgets and spreadsheets produced by Westrip to show its financial position referred to the redeemable preference shares held by Mr Barnes and Ms Walker and the need to redeem them. Ms Walker was a director of Westrip at the time;
(ii) Westrip's financial statements for the year ended January 31, 2007, recorded that it had acquired ownership of Rimbal on June 14, 2006, at a cost of £2.5 million which it had funded by the issue of redeemable preference shares to that value. The financial statements were approved by the board on September 20, 2007, and at Westrip's AGM on September 29, 2007; and
(iii) in conversations in late 2007 and at Westrip's EGM on June 9, 2008, Mr Barnes and Ms Walker assured Westrip that they would not seek to redeem the remainder of the preference shares until further funds were available.

67. The draft amended particulars of claim go on to allege that Westrip acted on the common understanding that compliant redeemable preference shares had been allotted and issued in the following ways:

(i) Westrip paid £300,000 to Mr Barnes and Ms Walker in redemption of some of the redeemable preference shares;
(ii) Westrip incurred substantial expenditure in connection with Tanbreez; and
(iii) because of the assurances given by Mr Barnes and Ms Walker, Westrip committed its funds to the development of Tanbreez. ***436**

The legal framework

68. The new procedure for derivative claims is now contained in the Companies Act 2006 . Its broad outlines, although not every detail, follow the Law Commission's recommendations in their report on Shareholders' Remedies (Law Com. 246). Section 260 deals with the circumstances in which a derivative claim may be brought. It says:

> "(1) This Chapter applies to proceedings in England and Wales or Northern Ireland by a member of a company—
>
> (a) in respect of a cause of action vested in the company, and
> (b) seeking relief on behalf of the company.
>
> This is referred to in this Chapter as a 'derivative claim'.
>
> (2) A derivative claim may only be brought—
>
> (a) under this Chapter, or
> (b) in pursuance of an order of the court in proceedings under section 994 (proceedings for protection of members against unfair prejudice).
>
> (3) A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
>
> The cause of action may be against the director or another person (or both)."

69. Section 261 provides:

> "(1) A member of a company who brings a derivative claim under this Chapter must apply to the court for permission (in Northern Ireland, leave) to continue it.
>
> (2) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission (or leave), the court—
>
> (a) must dismiss the application, and
> (b) may make any consequential order it considers appropriate.
>
> (3) If the application is not dismissed under subsection (2), the court—
>
> (a) may give directions as to the evidence to be provided by the company, and
> (b) may adjourn the proceedings to enable the evidence to be obtained.
>
> (4) On hearing the application, the court may—

(a) give permission (or leave) to continue the claim on such terms as it thinks fit,
(b) refuse permission (or leave) and dismiss the claim, or
(c) adjourn the proceedings on the application and give such directions as it thinks fit."

70. Section 262 deals with a different situation, namely where the proceedings have been brought by the company; and the claim could be pursued as a derivative claim. It enables a member to apply to the court for permission to continue the claim as a derivative claim on the ground (among others) that the company is not pursuing the claim diligently.

71. Section 263 of the Act sets out the circumstances in which the court is bound to refuse permission; and also contains a non-exhaustive list of the matters that the court must take into account in considering whether or not to give permission. It provides:

"(1) The following provisions have effect where a member of a company applies for permission (in Northern Ireland, leave) under section 261 or 262.

(2) Permission (or leave) must be refused if the court is satisfied— **437*

(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or
(b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or
(c) where the cause of action arises from an act or omission that has already occurred, that the act or omission—

(i) was authorised by the company before it occurred, or
(ii) has been ratified by the company since it occurred.

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

(a) whether the member is acting in good faith in seeking to continue the claim;
(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;
(c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—

(i) authorised by the company before it occurs, or
(ii) ratified by the company after it occurs;

(d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;
(e) whether the company has decided not to pursue the claim;
(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.

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

72. Since section 172 plays an important part in the considerations that the court must take into account, it is convenient to quote it now:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the environment,
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
> (f) the need to act fairly as between members of the company.
>
> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."
> ***438**

Derivative claims

73. I should begin by saying a little about derivative claims generally. In the first place the new code has replaced the common law derivative action. A derivative claim may "only" be brought under the Act. As s.260(1) makes clear a derivative claim is one in which the cause of action is vested in the company, but where the claim is brought by a member of the company. This reflects the old law in which a derivative action was an exception to the general principle (known as the rule in *Foss v Harbottle (1843) 2 Hare 461)* that where an injury is done to a company only the company may bring proceedings to redress the wrong. Allied to this principle was the principle that whether a company should bring proceedings to redress a wrong was a matter that was to be decided by the company internally; that is to say by its board of directors, or by a majority of its shareholders if dissatisfied by the board's decision. The court would not second guess a decision made by the company in accordance with its own constitution. The exception to these principles was necessitated where the company's own constitution could not be properly operated. If the wrongdoers were in control of the company (because they were a majority of the shareholders) they would not in practice vote in favour of taking proceedings against themselves, even though the taking of proceedings would be in the company's best interests. As Lord Denning M.R. put it in *Wallersteiner v Moir (No.2) [1975] Q.B. 373* , 390:

> "It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v. Harbottle (1843) 2 Hare 461* . The rule is easy enough to apply when the company is defrauded by outsiders. The company itself

> is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs – by directors who hold a majority of the shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress."

74. Lord Denning was clearly contemplating a case in which the company's cause of action was a cause of action against the "insiders" themselves who would be liable for damages. Indeed that seems to be the usual situation in which derivative actions were allowed to continue. That is why this exception to the rule in *Foss v Harbottle* (above) was often called a "fraud on the minority".

75. A derivative claim, as defined by s.260(3) is not, however, confined to a claim against the insiders. As the concluding part of that sub-section says, the cause of action may be against the director or another person (or both). Nevertheless the cause of action must *arise from* an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust *by a director* of the company. A derivative claim may "only" be brought under Pt 11 Ch.1 in respect of a cause of action having this characteristic (although this restriction does not appear to apply to a derivative claim brought in pursuance of an order made under s.994). Thus the section contemplates that a cause of action may arise from, say, the default of a director, but nevertheless is a cause of action against a third party. A claim against a person who had dishonestly assisted in a breach of fiduciary duty or ***439** who had knowingly received trust property would be paradigm examples. It is also to be noted that it is not a requirement that the delinquent director should have profited or benefited from his misconduct. He may be guilty of no more than negligence in managing the company's affairs. However, since the cause of action must arise from his default (etc.) a derivative claim brought under Pt 11 Ch.1 will not allow a shareholder to pursue the company's claim against a third party where that claim depends on a cause of action that has arisen independently from the director's default (etc.). This view would be consistent with what the Law Commission said in their report Shareholders' Remedies which paved the way for this part of the Companies Act 2006 . They said:

> "6.31 So far as the second situation is concerned, one respondent gave the following example. A profitable company is a victim of a tort by a third party, and the board, although otherwise committed to the well-being of the company, have ulterior motives of their own for not wishing to enforce the remedy for the tort. Although the board would in those circumstances be in breach of duty, their breach would not have given rise to the claim.
>
> 6.32 We accept that in this type of situation an individual shareholder would have no right to bring a derivative action against the third party tortfeasor under our proposals. (There would of course be a potential claim for damages against the directors themselves, although this may give rise to difficulties of causation or quantification, and it is possible that the directors may not have sufficient funds to meet the claim). However, we do not consider that this is an issue which needs to be addressed for two main reasons.
>
> 6.33 First, we are not aware of any cases under the current law where a derivative action has been successfully brought in circumstances such as those described in paragraph 6.31.
>
> 6.34 Secondly, (and more importantly) it is consistent with the proper plaintiff principle which we endorsed in the consultation paper and which received virtually unanimous support on consultation. The decision on whether to sue a third party (ie someone who is not a director and where the claim

> is not closely connected with a breach of duty by a director) is clearly one for the board. If the directors breach their duty in deciding not to pursue the claim then (subject to the leave of the court) a derivative claim can be brought against them. To allow shareholders to have involvement in whether claims should be brought against third parties in our view goes too far in encouraging excessive shareholder interference with management decisions. This is particularly important as we are proposing that derivative actions are to be available in respect of breaches of directors' duties of skill and care. A line has to be drawn somewhere and we consider that this is both a logical and clearly identifiable place in which to draw the line."

76. Under the old law there was a procedural problem: if the fraud was not admitted by the insiders, how was it to be proved? As the Court of Appeal observed in *Prudential Assurance Co Ltd v Newman Industries Ltd (No.2) [1982] Ch. 204* , 221:

> "It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. Such an approach defeats the whole purpose of the rule in *Foss v. Harbottle* and sanctions the very mischief that the rule is designed to prevent. By the time a derivative action is concluded, the rule in *Foss v. Harbottle* can have little, if any, role to play. Either the wrong is proved, thereby establishing conclusively the rights of the company; or the wrong is not proved, so *cadit quaestio* ."

77. The procedural solution that the Court of Appeal devised was to require that: ***440**

> "In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a *prima facie* case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle* ."

78. The Act now provides for a two-stage procedure where it is the member himself who brings the proceedings. At the first stage, the applicant is required to make a prima facie case for permission to continue a derivative claim, and the court considers the question on the basis of the evidence filed by the applicant only, without requiring evidence from the defendant or the company. The court must dismiss the application if the applicant cannot establish a prima facie case. The prima facie case to which s.261(1) refers is a prima facie case "for giving permission". This necessarily entails a decision that there is a prima facie case both that the company has a good cause of action and that the cause of action arises out of a directors' default, breach of duty (etc.). This is precisely the decision that the Court of Appeal required in *Prudential* (above). As mentioned, Norris J. considered the application on paper, and considered that there was a prima facie case. Hence the hearing before me.

79. However, in order for a claim to qualify under Pt 11 Ch.1 as a derivative claim at all (whether the cause of action is against a director, a third party or both) the court must, as it seems to me, be in a position to find that the cause of action relied on in the claim arises from an act or omission involving default or breach of duty (etc.) by a director. I do not consider

that at the second stage this is simply a matter of establishing a prima facie case (at least in the case of an application under s.260) as was the case under the old law, because that forms the first stage of the procedure. At the second stage something more must be needed. In *Fanmailuk.com Ltd v Cooper [2008] EWHC 2198 (Ch); [2008] B.C.C. 877* Mr Robert Englehart QC said that on an application under s.261 it would be "quite wrong … to embark on anything like a mini-trial of the action". No doubt that is correct; but on the other hand not only is something more than a prima facie case required, but the court will have to form a view on the strength of the claim in order properly to consider the requirements of s.263(2)(a) and 263(3)(b) . Of course any view can only be provisional where the action has yet to be tried; but the court must, I think, do the best it can on the material before it.

80. One innovation of the new code is the ability of a shareholder to apply to the court under s.262 for permission to take over a claim that the company has already brought. The Law Commission explained the thinking behind this as follows:

> "6.63 … We do not want individual shareholders to apply to take over current litigation being pursued by their company just because they are not happy with the progress being made. The provision is intended to deal with those situations where the company's real intention in commencing proceedings is to *prevent* a successful claim being brought."

81. In parallel with a derivative action, there was (and is) the possibility of bringing a petition for unfair prejudice. This procedure is now governed by s.994 of the Companies Act 2006 . The relief which the court may give under s.996 is very wide-ranging ("such order as it thinks fit"); but the section specifically provides that the court may require the company to do an act that the petitioner has complained that it has omitted to do; or authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as it may direct. If a petition is brought the court will decide (on the balance of probabilities) in the course of the petition whether the affairs of the company have been conducted in a manner unfairly prejudicial to the petitioner. It is only if the court has decided that they have that it will go on to consider the appropriate relief. It will be noted that s.260(1) contains a general definition of "derivative claim" and s.260(2) envisages ***441** two different ways in which such a claim may be brought. One is "under this Chapter", in which case the restriction on the permissible cause of action contained in s.260(3) applies ("A derivative claim *under this Chapter* may only be brought …"). The other is pursuant to an order made in proceedings under s.994 , in which case the restrictions in s.260(3) do not apply. In that case, the general definition in s.260(1) is the only relevant definition of a derivative claim.

82. Accordingly it seems to me that where the petitioner's complaint is that the company has failed to assert a good claim against a third party the court's powers under s.996 would include the making of an order requiring the company to assert that claim, if necessary by taking or defending proceedings. Since the company's claim would be a claim against a third party, once the court had decided that a failure to assert that claim had unfairly prejudiced the petitioner, the directors would not need to be parties to the subsequent claim against the third party. In addition the width of the court's jurisdiction under s.996 enables the joinder of third parties to the petition itself, at least where relief is claimed against them: *Re Little Olympian Each-Ways Ltd [1994] B.C.C. 959* ; *Lowe v Fahey [1996] B.C.C. 320* .

83. On the other hand, it may be that the company's cause of action is a cause of action only against the directors for loss suffered as a result of their default or breach of duty (etc.). In such a case the directors will be necessary parties to the company's claim. It may be, therefore, that different procedural routes will be adopted depending on the company's underlying claim.

Is there a mandatory bar on the claim?

84. Mr de Verneuil Smith, appearing for Mr Barnes and Ms Walker and their companies Rimbal and Horrocks, submitted that this was a case in which I was required to refuse permission because s.263(2)(a) applied. This says that the court must refuse permission if the court is "satisfied" that:

> "a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim."

85. As many judges have pointed out (e.g. Warren J. in *Airey v Cordell [2007] EWHC 2728 (Ch); [2007] B.C.C. 785* , 800 and Mr William Trower QC in *Franbar Holdings Ltd v Patel [2008] EWHC 1534 (Ch); [2008] B.C.C. 885* , 893–894) there are many cases in which some directors, acting in accordance with s.172 , would think it worthwhile to continue a claim at least for the time being, while others, also acting in accordance with s.172 , would reach the opposite conclusion. There are, of course, a number of factors that a director, acting in accordance with s.172 , would consider in reaching his decision. They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on. The weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case.

86. In my judgment therefore (in agreement with Warren J. and Mr Trower QC) s.263(2)(a) will apply only where the court is satisfied that *no* director acting in accordance with s.172 would seek to continue the claim. If some directors would, and others would not, seek to continue the claim the case is one for the application of s.263(3)(b) . Many of the same considerations would apply to that ***442** paragraph too.

87. Mr de Vernueil Smith also emphasised that the claim under consideration is the claim against the directors themselves for default or breach of duty (etc.). What the hypothetical director had to consider was not whether (for example) Mr Barnes was entitled to terminate the SSA but whether the board had been in breach of duty (etc.) in accepting that he could, having had the benefit of legal advice both in England and Australia. Likewise, in relation to the trust claim the question was not whether the trust claim was a good one; but whether the board were in breach of duty (etc.) in proposing to compromise Rimbal's action on the basis of the legal advice they had received from counsel and solicitors in Australia.

88. Even if I were not satisfied that no director, acting in accordance with s.172 , would seek to continue the claim, the importance that such a director would attach to continuing the claim is a relevant discretionary consideration. I will therefore consider the merits of the claims first.

Rescission of the SSAs

89. Mr Wardell QC accepted that, rightly or wrongly, the rescission had taken place and that history could not be undone or rewritten. The company's claim, therefore, was limited to a financial claim against the board for breach of duty in accepting Mr Barnes' entitlement to rescind.

90. Although it was at one time disputed, Mr Iesini now accepts the Westrip did not issue compliant preference shares in time. Since the SSA provided expressly that time was of the essence of the contract, late allotment and issue of compliant preference shares would not have cured the problem. (Indeed although Mr Boyle and Walford considered that it was too late to issue the shares after the *redemption* date had passed, it seems to me that it was already too late to issue them once the *settlement* date had passed). Accordingly, as a matter of strict legal right, Mr Barnes and Ms Walker were entitled to rescind (or terminate) the SSAs when they did. But whether this conclusion is right or wrong, the fact remains that the board took advice from eminent and specialist counsel on what is a very technical matter of company law. They followed that advice. It is, in my judgment, impossible to say that they were negligent or in breach of duty in doing so. Moreover, if the old board (who included Mr Iesini and his brother) had done what the SSA required Westrip to do, and had done so before they were ousted in the boardroom coup in June 2008, there would have been no question of rescission. Mr Wardell's answer was that they relied on professionals (solicitors and company secretary) to do the necessary and could not be criticised for that. But if they could not be criticised for following the advice of apparently incompetent professionals, how can the new board be criticised for following the advice of apparently competent professionals?

91. It follows that any defence that Westrip might have had must be based either on waiver or estoppel. None of the lawyers consulted by the board, either in England or Australia, expressly considered whether there might be a defence based on waiver or estoppel. However, that is not the fault of the board. Mallesons were asked on October 8, 2008, immediately following the rescission notice, whether there was "some other action or defence that Westrip needs to take". The question posed was entirely open. Mallesons' reply considered, albeit briefly, both obligations of good faith and unconscionable conduct, and said that the facts favoured Mr Barnes and Ms Walker. I do not see how the board can realistically be criticised for that.

92. It is also worthy of note that the particulars of claim, served in June 2009, did not allege an estoppel or waiver. Rather it alleged that the rescission and its acceptance was a sham (an allegation that has now been withdrawn) based on an assertion that compliant redeemable preference shares had in fact been issued (an allegation that has been abandoned) and that the board did not believe that they had not (an allegation for which there is no evidence at all). The allegation of an estoppel did ***443** not surface until Mr Iesini's fifth witness statement dated September 16, 2009. The plea of estoppel is now contained in the draft amended particulars of claim. If it has taken this long for Mr Iesini to raise the allegations of waiver and estoppel, I do not see that it is realistic to criticise the board for not having raised them in the much shorter timescale in which they were operating.

93. During the course of these proceedings Mr Iesini has received advice from Lipman Karas, who are Australian lawyers. The advice was given on September 16, 2009. It was not, therefore, before the board when they came to their decision to accept the rescission. Lipman Karas' advice is that the right to rescind contained in cl.18(a)(iii) of the SSA is likely to be interpreted by an Australian court as amounting to a right to terminate the agreement, rather than a right to rescind it ab initio. The consequence of this, they suggest, is that termination would not affect rights and obligations arising from partial performance or causes of action accruing from breach. They say that:

> "Barnes and Walker may therefore be prevented by a Court from exercising the rights to terminate [under the SSA] if Westrip is able to establish that Barnes and Walker had affirmed the Agreements, that they should be estopped from terminating the Agreements, or that they were in breach of implied terms requiring them to act in good faith."

94. So far as affirmation is concerned, they say it is not possible to assess whether the agreements have been affirmed. They do not however, address the impact of cl.21 of the SSA (any waiver must be in writing).

95. So far as estoppel is concerned they say:

> "On the material available to us we consider that the conduct of the parties demonstrates that each of them shared an agreed assumption that the redeemable preference shares had been validly issued and allotted to Barnes and Walker and that their relationship, prior to October 2008, was conducted on the basis of that shared assumption. Circumstances such as the entry of the redeemable preference shares in the names of Barnes and Walker into Westrip's share register and entry into the Second Variation Agreement support the existence of this assumption."

96. In my judgment this reasoning does not withstand analysis. To take the second variation agreement first, its purpose was to extend the settlement date under the SSA. The settlement date was the date on which the redeemable preference shares were to be allotted and issued. But if the parties were acting on the shared assumption that the shares "had been" validly issued and allotted, what was the point of extending the settlement date? I cannot see the answer to that question. The postponement of the settlement date is, as it seems to me, wholly inconsistent with any assumption or understanding that compliant redeemable preference shares had *already* been allotted and issued. So far as the entry on the share register is concerned, this had not happened when the electronic copy of the share register was taken in May 2008. It happened at some time between then and September 25, as is now common ground, although the entry was back-dated. There is no evidence that Mr Barnes or Ms Walker knew that the entry had been made; and no evidence that they did anything that could support the estoppel after the date upon which the entry was actually made.

97. Insofar as the claim relies on the payment of £300,000 made in June 2007 as contributing to the estoppel, the claim has two major problems. First, the payment was made pursuant to the second variation agreement, which postponed the settlement date. As I have said, the postponement of the settlement date is inconsistent with a shared assumption that compliant preference shares had already been issued. Accordingly, Mallesons' advice to the effect that the payment of £300,000 was not paid under the original SSA was, in my judgment, correct. Even if it was not correct it was, to put it no higher, a reasonable view to take. Secondly, the payment was not characterised as a partial redemption ***444*** until the events of January 4, 2008. On that date the board passed an ordinary resolution to redeem the shares, and the board purported to do so out of the company's capital. But s.173 of the Companies Act 1985 (which was in force at the time) says that a payment out of capital by a private company for the redemption of shares "is not lawful" unless the requirements of ss.173–175 are satisfied. One of the requirements of s.173 was that the payment must be approved by a special resolution of the company. There was no such resolution: there was only an ordinary resolution of the board. There is, in my judgment, a heavy burden placed upon a party who seeks to support an estoppel by relying on a transaction that Parliament has said is not merely invalid but "unlawful". It is true that in *Shah v Shah [2001] EWCA Civ 527; [2002] Q.B. 35* the Court of Appeal took a more flexible view of the effect of statutory requirements on alleged estoppels by convention than had been taken by the same court in *Godden v Merthyr Tydfil Housing Association (1997) 74 P. & C.R. D1* . However, even in *Shah v Shah* the court recognised that the public policy reasons underlying a statutory requirement may preclude its being overridden by estoppel. In the present case the statutory prohibition must be aimed at protecting the members of a company and its creditors. In my judgment these considerations of public policy mean that the statutory prohibition cannot be overridden by an estoppel by convention alleged to arise between the company and only one or two of its members.

98. Looked at in the cold light of day, after several rounds of written evidence, skeleton arguments, the reading of seven lever arch files of exhibits and some four days of legal argument, there is a little more mileage in the estoppel argument based on the approval of Westrip's financial statement for the year ending January 31, 2007, which was collectively approved by the shareholders after the expiry of the last of the extended settlement dates. But even that would have to surmount the difficulty caused by Mr Barnes' letter of June 23, 2008, in which he said that if payment was not made Rimbal would "revert back to the

original owners". The remedy for non-payment on the redemption date (if the redeemable preference shares had in fact been issued) was not reversion of shares in Rimbal, but the winding up of Westrip. In the course of a winding up, Mr Barnes and Ms Walker would have been entitled to prove for their debt, but the shares in Rimbal would have been sold, together with all Westrip's other assets. The shares in Rimbal would only revert to their original owners if the redeemable preference shares had not been issued by the settlement date. So Mr Barnes' letter of June 23 is inconsistent with the alleged common assumption.

99. At the time of the decision to accept the rescission, the board did not of course have the benefit of the detailed arguments deployed before me. They were also conscious of the fact that Westrip had no money. So even if the estoppel argument had been run, Westrip could not have redeemed the shares; and in the financial climate then prevailing (just at the start of the credit crunch) the board cannot be said to be in breach of duty in thinking that finance would be hard to raise. Failure to redeem the shares would have caused Westrip to be wound up.

100. There is a subsidiary part of the claimants' argument on rescission which I found hard to understand. It is said that an Australian court would construe the right to rescind as a right to terminate the SSA prospectively, thus discharging the parties from future performance, rather than a right to rescind ab initio. Thus far, I am willing to agree. It follows, so the argument runs, that rights which have accrued before the termination are unaffected by the termination. I am willing to agree with that too. On that footing, it is argued that the shares in Rimbal, which had already been transferred to Westrip by Mr Barnes and Ms Walker before the termination did not have to be re-assigned to them once the SSA was terminated. I simply do not understand how that can be. In the first place Westrip did not have a right to the shares under the SSA until the settlement date, and then only in exchange for the purchase consideration. The premature delivery of the share certificates was not something to which Westrip was entitled. It gave no consideration for that premature transfer. So it is not deprived ***445*** of any accrued rights by having to re-transfer them on termination. Secondly, if the argument is right, Westrip would be entitled to keep the shares without paying for them. I cannot see any court allowing that outcome.

101. It follows in my judgment that no criticism can be legitimately levelled at the board for re-transferring the shares in Rimbal to Mr Barnes and Ms Walker following the termination of the SSA.

102. In my judgment this is a clear case. The strength of the claim against the board is so weak that I conclude that no director, acting in accordance with s.172 , would seek to continue the claim against the directors in respect of their actions in accepting the rescission of the SSA. If I am wrong about that, the case is so weak that a person acting in accordance with s.172 would attach little weight to continuing it.

Restitution

103. The restitutionary claim is pleaded in the draft amended particulars of claim as follows:

> "105. Further or in the alternative, in the belief that it owned the licences Westrip incurred expenditure in developing the Tanbreez licence as set out above. If, contrary to Westrip's case, its belief that it owned the Licences was wrong because the share purchase agreements were liable to be and have been validly rescinded, it incurred that expenditure acting under a mistake. Rimbal and Horrocks would be unjustly enriched at the expense of Westrip by the re-transfer of the shares as they would benefit from the enhanced value of the Tanbreez licence.

106. The claimants, on behalf of Westrip, therefore seek an order for restitution of the value of the benefit conferred on Rimbal and Horrock. The claimants cannot particularise the value of the benefit at this stage: it will be a matter for expert evidence."

104. The striking point about this plea is that it contains no allegation of default or breach of duty (etc.) on the part of any director of Westrip. The cause of action does not arise out of the default or breach of duty (etc.) of a director. As pleaded, therefore, it is not a derivative claim which can be brought under Ch.1 . It must be brought, if at all, pursuant to an order of the court made in proceedings under s.994 .

The trust claim

105. The trust claim differs from the rescission claim in a number of respects:

(i) if the trust exists, it exists independently of any default or breach of duty (etc.) by the board. If it exists it does so because Westrip paid for the pegging of the licence and (more importantly) because Rimbal has acknowledged and warranted the existence of the trust in a number of deeds to which Westrip was a party and upon which it plainly relied in entering into JV arrangements;
(ii) if there is a trust it still exists, and Westrip's primary concern must be to establish beneficial ownership of its own assets. Unlike the rescission claim therefore, this is more than a financial claim against the directors;
(iii) if the trust exists, then as it seems to me, Westrip will have provided good consideration under the terms of the joint venture with Broadstone and subsequently with GGG. If that is right, then Westrip will be entitled to retain both its share in the joint venture and also its shares in GGG; ***446***
(iv) since the trust claim exists independently of any default or breach of duty (etc.) by the directors, it is not a cause of action which arises out of any such default or breach of duty (etc.). The underlying trust claim does not, therefore, fall within the definition of a derivative claim capable of being brought under Ch.1 (although it could be brought following proceedings under s.994);
(v) Mr Todd's clients (Mr Schønwandt, Mr Powar and Westrip) have now accepted that there is at least an arguable claim that the trust exists, and have said that the board will reconsider their decision to enter into the proposed consent order forming the second stage of the proposed settlement. If, having reconsidered the position, the board decides to assert the existence of the trust there is no real point in pursuing a claim against them because their previous decision will not have resulted in any loss to Westrip.

106. The board defend their decision principally on the ground that they took legal advice from senior and junior counsel in Australia and also from Mallesons and followed that advice. There is force in that defence, although it is to some extent undermined by the fact that the board apparently allowed the instructions to counsel to be given by Mr Barnes and Ms Walker who had an obvious conflict of interest.

107. My personal view (for what it is worth, and I appreciate that it is the board's view that counts) is that the trust claim is a strong one based both on the underlying facts, and also (to my mind more importantly) on the acknowledgements by Rimbal of the existence of the trust in the side deed and the subsequent deeds of novation coupled with the obvious reliance by Westrip and GGG on those acknowledgements. I do not consider that these documents were given any real weight by Australian counsel. I find that surprising. There are, however, factors other than the strength of the claim that the board will have to consider in making a decision whether or not to assert the trust. As I have said those factors are ones that the court is ill-equipped to weigh.

108. In those circumstances I consider that the best course of action is for me to exercise the power under s.261(4)(c) of the Act and to direct the board to reconsider Westrip's defence to the action brought by Rimbal.

109. If they decide to maintain a defence to the claim, then there will be no need for a derivative action. If on the other hand, they decide to sign the tri-partite consent order, Westrip's claim to beneficial ownership of both licence 2005/17 and the GGG shares will have been irretrievably lost. In that event, there may well be something of real value to argue about. Either way, the board will have to explain its decision and the reasoning process that led to it.

110. I might add that GGG is of course entitled to defend the claim brought against it on the basis that the trust exists and that its joint venture partner remains Westrip.

Conspiracy

111. In the end I think that Mr Wardell accepted that the conspiracy claim added little if anything to the other claims. I think that this is right. So far as the Weyhill offer is concerned, that went nowhere. If, as I have concluded, the directors were justified in accepting the effectiveness of the rescission of the SSAs, their action in doing so was not unlawful. Since the consent order in the Australian proceedings has not been signed off, no loss has been caused to Westrip. ***447**

Miscellaneous matters

112. A number of other points were argued. In the light of my substantive decision they may not arise; but I should deal with them briefly.

Are the claimants proper claimants?

113. Both Mr Todd and Mr de Verneuil Smith argued strenuously that the claimants (and in particular Messrs Iesini) were not proper claimants. This was in part based on an allegation that they were not acting in good faith in seeking to continue the claim (which is one of the factors that the court must consider pursuant to s.263(3)(a) of the Act).

114. Mr Iesini revealed in his third witness statement that he and his co-claimants had the benefit of an indemnity from GGG; but he refused to disclose its terms. At the beginning of the hearing I ruled that it had to be disclosed; and it was. An examination of the terms of the indemnity show that in return for the indemnity as to both costs and damages, the claimants have promised GGG to use their best endeavours to procure that Westrip enter into an agreement to terminate the existing joint venture. Among those terms is the transfer of the Southern Licence to a subsidiary of GGG. The indemnity also provides for GGG's consent to be obtained before the claimants take any material step in the action or settle the claim.

115. Mr Todd relied on the decision of the Court of Appeal in *Nurcombe v Nurcombe (1984) 1 B.C.C. 99,269, 99,273; [1985] 1 W.L.R. 370* , 376 in which Lawton L.J. said:

> "It is pertinent to remember, however, that a minority shareholder's action in form is nothing more than a procedural device for enabling the court to do justice to a company controlled by miscreant directors or shareholders. Since the procedural device has evolved so that justice can be done for the benefit of the company, whoever comes forward to start the proceedings must be doing so for the benefit of the company and not for some other purpose. It follows that the court has to satisfy itself that the person coming forward is a proper person to do so. In Gower, Modern Company Law , 4th ed (1979), the law is stated, in my opinion correctly, in these terms, at p. 652:

> 'The right to bring a derivative action is afforded the individual member as a matter of grace. Hence the conduct of a shareholder may be regarded by a court of equity as disqualifying him from appearing as plaintiff on the company's behalf. This will be the case, for example, if he participated in the wrong of which he complains.'"

116. This approach was followed by Lawrence Collins J. in *Konamaneni v Rolls Royce Industrial Power (India) Ltd [2003] B.C.C. 790; [2002] 1 W.L.R. 1269* . Likewise in *Barrett v Duckett [1995] B.C.C. 362* Peter Gibson L.J. said:

> "The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed."

117. In that case one of the reasons which led the court to refuse to allow a derivative action to proceed was that it was being pursued as part of a family feud, rather than for the financial benefit of the claimant. ***448**

118. In *Central Estates (Belgravia) Ltd v Woolgar [1972] 1 Q.B. 48* a lessee made a claim to acquire the freehold of his house under the Leasehold Reform Act 1967 . The making of such a claim prevented the landlord from forfeiting the lease unless the lessee had not made his claim in good faith. Lord Denning M.R. said:

> "To my mind, under this statute a claim is made in good faith" when it is made honestly and with no ulterior motive. It must be made by the tenant honestly in the belief that he has a lawful right to acquire the freehold or an extended lease, and it must be made without any ulterior motive, such as to avoid the just consequences of his own misdeeds or failures."

119. The idea that an action which is being pursued for a collateral purpose is abusive is not a new one in our law. Such an action is liable to be struck out as an abuse of process. In *Goldsmith v Sperrings Ltd [1977] 1 W.L.R. 478* Bridge L.J. (with whom Scarman L.J. agreed) considered the meaning of a "collateral advantage" in this context. He said:

> "The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land – these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an

> ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain; but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by-product of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it."

120. Mr Todd and Mr de Verneuil Smith say that it is clear from the terms of the indemnity that the action is not being brought for Westrip's benefit at all. It is really being brought for the benefit of GGG which wants to get out of the joint venture agreement (a deal that it now regrets) on the best possible terms. Mr Iesini's response is that the derivative claim, if allowed to proceed is plainly for Westrip's benefit, since if the claim succeeds it will recover substantial compensation for the loss of its interest in Rimbal and will confirm ownership of Licence 2005/17 (now the Northern and Southern Licences) and its shares in GGG. Moreover even when the indemnity is taken into account there are clear benefits to Westrip under the terms envisaged for the termination of the joint venture, since those terms make it more likely that Westrip will receive substantial amounts of cash.

121. In my judgment if the claimant brings a derivative claim for the benefit of the company, he will not be disqualified from doing so if there are other benefits which he will derive from the claim. In *Nurcombe* Lawton L.J. contrasted an action for the benefit of the company on the one hand, and an action brought for some other purpose on the other. Likewise in *Barrett* Peter Gibson L.J. drew the same contrast. Neither of them was considering a case in which a claim was brought partly for the benefit of the company, but partly for other reasons as well. In my judgment in such a case the considerations discussed by Bridge L.J. in *Goldsmith* come into play. In the present case it seems to me that Mr Iesini was entitled to form the view that unless the derivative claim was brought, Westrip ***449*** would be left with no assets at all. Thus in my judgment the dominant purpose of the action was to benefit Westrip. It cannot, in my judgment, be said that but for the collateral purpose, the claim would not have been brought at all. The claim is, in my judgment, brought in good faith.

122. However, in relation to the rescission claim there is a different objection. As the passage from *Nurcombe* shows a person may be prevented from bringing a derivative claim if he participated in the wrong of which he complains; and as the passage from *Central Belgravia* shows it will count against a claimant if the action is brought to escape the consequences of his own misdeeds. In the present case if the old board (which included both Messrs Iesini) had done what the SSA required to be done and spelled out in great detail, there would have been no question of a rescission. On one view, therefore, the real cause of Westrip's loss was not the new board's failure to investigate a possible defence based on estoppel, but the old board's failure to follow the steps set out in meticulous detail in the SSA (and in the checklist prepared for Westrip) which led to the new board finding itself in the predicament that it did. Had I formed the view that the rescission claim should be allowed to proceed I would not have considered that Messrs Iesini were proper claimants.

Alternative remedy

123. I have already quoted the passage from *Barrett* in which Peter Gibson L.J. seems to suggest that the availability of another remedy is an absolute bar to a derivative action. In *Konameneni* Lawrence Collins J. said (799; 1279) that the notion that there must be no alternative remedy is not an independent bar to a derivative action, but was simply an example of a case where there will be no relevant wrongdoer control. Whatever the correct position under the old law might have been, in my judgment under the new code the availability of an alternative remedy is not an absolute bar. If it were then it would have been a mandatory ground for refusing permission under s.263(2) rather than a discretionary consideration under s.263(3)(f) .

124. The relevant alternative remedy in the present case is an unfair prejudice petition under s.994 . From the point of view of the company itself a petition under s.994 is far preferable, principally because it will only be a nominal party and will not incur legal costs; whereas in the ordinary way if a derivative action is brought for its benefit it will be liable to indemnify the claimant against his costs, even if the claim is unsuccessful: *Wallersteiner v Moir (No.2)* . At this point I should mention briefly the decision of Walton J. in *Smith v Croft (1986) 2 B.C.C. 99,010; [1986] 1 W.L.R. 580* . Mr Todd relied on it for the proposition that a claimant must demonstrate a genuine need for an indemnity before the court will order one. However, that is not what Walton J said. In *Smith v Croft* Walton J. was concerned with two appeals from the master. The first appeal was from an order made ex parte ordering the company to indemnify the claimant against costs. The appeal against that order was allowed, and Walton J. decided that there was so little substance in the claim that no indemnity was appropriate. The second appeal was against an order permitting the claimants to tax their bills at intervals, without waiting for the outcome

of the action. It was in the context of the second appeal only (i.e. whether there should be an *interim* payment on account of costs) that Walton J. said:

> "Early payment — i.e. before the conclusion of the trial — does indeed impose an additional liability. That may become necessary: if, for example, the plaintiff is a person who literally has no resources of his own, then it may well be that an order for interim payment should be made in order to ensure that the action proceeds at all. Without the supplementary order, the original order may stand in danger of being stultified.
>
> It therefore appears to me that in order to hold the balance as fairly as may be in the circumstances between plaintiffs and defendants, it will be incumbent on the plaintiffs applying for such an ***450** order to show that it is genuinely needed — i.e. that they do not have sufficient resources to finance the action in the meantime. If they have, I see no reason at all why this extra burden should be placed upon the company."

125. Thus in my judgment Mr Michael Wheeler QC was right in Jaybird Group Ltd v Greenwood [1986] B.C.L.C. 319 , 327 to say that an indemnity as to costs in a derivative claim is not limited to impecunious claimants. The justification for the indemnity is that the claimant brings his claim for the benefit of the company (and ex hypothesi under the new law the court has allowed it to proceed). Once the court has reached the conclusion that the claim ought to proceed for the benefit of the company, it ought normally to order the company to indemnify the claimant against his costs.

126. The potential liability of the company for costs is, in my judgment, a proper consideration for the court in deciding whether to allow a derivative claim to proceed. In the present case the combination of that potential liability and the availability of an alternative remedy under s.994 would have led me to the conclusion that, on the facts as they now are, if I had not adjourned the application so far as it related to the trust claim, it would not have been appropriate to allow the derivative claim to proceed.

Views of members with no personal interest

127. In *Smith v Croft (No.3) (1987) 3 B.C.C. 218* Knox J. said (at 255):

> "Ultimately the question which has to be answered in order to determine whether the rule in *Foss v. Harbottle* applies to prevent a minority shareholder seeking relief as plaintiff for the benefit of the company is, 'Is the plaintiff being improperly prevented from bringing these proceedings on behalf of the company?' If it is an expression of the corporate will of the company by an appropriate independent organ that is preventing the plaintiff from prosecuting the action he is not improperly but properly prevented and so the answer to the question is, 'No'. The appropriate independent organ will vary according to the constitution of the company concerned and the identity of the defendants who will in most cases be disqualified from participating by voting in expressing the corporate will.
>
> Finally on this aspect of the matter I remain unconvinced that a just result is achieved by a single minority shareholder having the right to involve a company in an action for recovery of compensation for the company if all the other minority shareholders are for disinterested reasons satisfied that the proceedings will be productive of more harm than good. If Mr. Potts' argument is well founded once control by the defendants is established the views of the rest of the minority as to the advisability of the prosecution of the suit are necessarily irrelevant. I find that hard to square with the concept of a form of pleading originally introduced on the ground of necessity alone in order to prevent a wrong going without redress."

128. It seems probable that this was the inspiration behind s.263(4) which provides that:

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

129. Nevertheless this sub-section is not easy to understand. All the members of a company have an obvious interest in any claim brought on the company's behalf. The value of their shareholdings may be increased or diminished depending on the outcome. Unless "personal interest" is being used in contra-distinction to "financial interest" it is difficult to see who would not have an interest. Another possible reading is that "the matter" is not the question whether or not to give permission, but is the ***451** alleged default (etc.) of the directors out of which the cause of action has arisen. It may be that what the section is trying to get at is that the court must have regard to the views of members of the company who are not implicated in the alleged wrongdoing, and who do not stand to benefit otherwise than in their capacity as members of the company. If that reading is correct (as I think it probably is) it raises another question: how is the court to resolve any dispute about whether a member or the company is or is not involved in the alleged wrongdoing or stands to benefit otherwise than his capacity as a member of the company?

130. Mr Todd relied on the evidence of Mr Kasserer and Mr Bosme as being independent shareholders who did not support the derivative claim. Mr Iesini challenged their assertions that they had no personal interest, direct or indirect in the matter. It does appear that they have an understanding with Mr Barnes that they will receive substantial interests in Rimbal, although both of them say that nothing has been written down and nothing is legally binding. But that in itself may give them a reason to support Mr Barnes and Rimbal in the hope that gratitude for their support will spur him to honour the informal understanding. Moreover, in so far as concerns the factual basis for the trust claim Mr Iesini has demonstrated, to my mind, cogent reasons for concluding that their initial evidence was unreliable. It seems to me that in order for the court to be in a position to have "particular" regard to the views of certain members of the company it must be as satisfied as it can be on an interim application that they are not financially interested in the outcome (beyond their interest as shareholders in the company). In the present case I am not so satisfied. I do not, therefore, pay particular regard to the evidence of Messrs Kasserer and Bosme as I am not satisfied that they fall within the description of the class of member to whose evidence s.263(4) requires me to have particular regard.

The injunction

131. As mentioned, on July 27, 2009, Proudman J. granted an injunction which prevented dealings in, among other things, the Tanbreez licence and Westrip's shareholding in GGG. The only possible justification for the inclusion of Tanbreez within the scope of the order was the allegation that the rescission of the SSA was a sham. Now that that allegation has been abandoned, and that Mr Iesini accepts that the rescission was effective, it is plain that Westrip can have no further claim over the Tanbreez licence. Equally, it seems to me that since Mr Iesini asserts (and always has asserted) that Westrip is legally and beneficially entitled to the GGG shares, there can be no ground on which the freezing order can be maintained in respect of those shares. If, as he says, the shares belong to Westrip, it can do as it likes with them. Moreover the shares are very volatile, and if Westrip is prevented from dealing with them it may miss valuable market opportunities. Mr Wardell said that Mr Iesini was fearful that the proceeds of sale of the shares might be passed to Rimbal. However, in circumstances in which the board has said that it will reconsider Westrip's position in Rimbal's Australian proceedings, it does not seem to me that there is cogent evidence that that is a real risk at present.

132. Mr de Verneuil Smith submitted that the injunction should be discharged in its entirety on the ground that the basis on which it was granted was a claim that has now been abandoned. The main planks of the case as presented to Proudman J. were that the redeemable preference shares had been validly issued and that the rescission was a sham. Neither allegation is now maintained. There is some force in this submission, at least as regards the Tanbreez licence, but since I have decided that the freezing order should be lifted in relation to that, the force of the submission is limited. The allegation that the Northern and Southern Licences are held on trust by Rimbal for Westrip remains and that claim is, as it seems to me, stronger now than it was before Proudman J. In those circumstances ***452*** I consider that the injunction should remain in force in relation to those licences pending the adjournment of this application.

133. That raises the question of the cross-undertaking in damages. Mr Iesini says, that by analogy with the position of a liquidator (see *Re DPR Futures Ltd (1989) 5 B.C.C. 603; [1989] 1 W.L.R. 778)* any cross-undertaking should be limited to the value of Westrip's assets. I do not agree. In my view:

(i) The position of a liquidator is different because he has no personal interest in the outcome of the action. In the present case the claimants have a lively interest in the outcome of the action.
(ii) In *DPR* itself, assets worth £2.3 million were frozen and the offered cross-undertaking was valued at £2 million. In the present case, if the cross-undertaking is ever called upon the assets of Westrip are unlikely to be able to cover the loss.
(iii) In the present case, as Mr Iesini has said, the claimants have the benefit of an indemnity from GGG, which extends to any damages awarded against the claimants; and he relied on that in his third witness statement when dealing with the value of the cross-undertaking.
(iv) If a cross-undertaking is inadequate that may, in itself, be a reason for refusing an injunction.
(v) Had Mr Iesini pursued his alternative remedy under s.994 he would not have been entitled to limit an undertaking in that way.

134. Accordingly, while I am prepared to continue the injunction as regards the Northern and Southern licences, I will only do so on the basis of a personal cross-undertaking by Mr Iesini and his co-claimants.

Result

135. I refuse permission to continue the claim in so far as it relates to the allegations of conspiracy, the decision not to contest the rescission and the restitutionary claim. (Technically, it may be that I am, or am also, refusing permission to amend the particulars of claim, but I do not think that the technicalities matter.) I will adjourn the application insofar as it relates to the trust claim, in order to allow the board to reconsider their position. Pending the board's decision, I will continue the injunction so far as it relates to the Northern and Southern Licences, provided that the claimants give an unlimited cross-undertaking in damages.

(Order accordingly) ***453***

