

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendant.

This Document Relates To: All Actions

Master File No. 09-cv-118 (VM)

AFFIDAVIT OF ROBERT MILES, Q.C.

Exhibit 11

BUTTERWORTHS
COMPANY LAW
CASES

2001

Volume 1

EDITOR

D D PRENTICE MA, LLB, JD
of Lincoln's Inn, Barrister

*Allen & Overy Professor of Corporate Law
Fellow of Pembroke College, Oxford*

CONSULTANT EDITOR

MARY STOKES MA, BCL, LLM
of Lincoln's Inn, Barrister

SERIES MANAGER

VICTORIA MCGAVIN BA, LLB

LONDON

BUTTERWORTHS

Peskin and another v Anderson and others

COURT OF APPEAL, CIVIL DIVISION
SIMON BROWN, MUMMERY AND LAITHAM LJJ
20, 21 NOVEMBER, 14 DECEMBER 2000

Director – Fiduciary duty – Club owned by company – Club members were shareholders of company and committee members were directors – Company sold valuable assets and proceeds were distributed to club members – Club members who had resigned claimed that failure to inform them of proposed sale was breach of contract or breach of duty – Whether committee members in breach of club rules – Whether directors of company in breach of fiduciary duty

RACL owned the RAC Club and a motoring services business, RACMS. Members of the club were shareholders in RACL. In 1998 RACMS was sold and members of the club received over £34,000 each. The claimants were former members of the club who ceased to be members in the three years before RACMS was sold. On ceasing to be members of the club the claimants ceased to be shareholders in RACL, by virtue of the articles of association of the company, and therefore did not share in the proceeds of sale of RACMS. Under rule 56 of the club rules a member who resigned and reapplied for membership within three years might, if the committee so decided, be re-elected to membership without having to be proposed and seconded under the rules. The claimants took proceedings alleging that once the committee began to reconsider the disposal of RACMS it should have informed former members. The failure to do so was in breach of the contract contained in the club rules, in particular rule 19 which required the committee to report annually on 'the work done by the club'. The claimants relied on letters sent to them after resigning which informed them in accordance with rule 56 that if they wished to rejoin within three years they might do so without undergoing the formalities of election procedure. The claimants applied to amend the statement of claim to add further claimants and to claim against the defendant committee members in their alternative capacity as directors of RACL on the basis that they had a duty as directors to inform former members of the club of the proposed sale of RACMS. The defendants applied to strike out the statement of claim and for the summary determination of points of law under CPR, Pt 24. Neuberger J dismissed the claims on the grounds inter alia that the directors did not on the facts owe any fiduciary duties to members who had ceased to be members of their own choice. The members appealed.

Held – Fiduciary duties owed by directors to shareholders only arise if there is a special factual relationship between the directors and the shareholders in the particular case capable of generating fiduciary obligations, such as a duty of disclosure of material facts, or an obligation to use confidential information and valuable commercial opportunities for the benefit of shareholders and not to prefer and promote the directors own interests at the expense of

shareho
in the m
a of arran
of the
proposa
for that
entrench
scheme
b to the la
wrongd
special c
the claim
was in
c benefiti
duty to
compan
been ca

d Cases 11
Allen v
Brunnir
Chez N
Colema
Compa
e Howar
AC 8
Perciva
RAC M
Stein v

f Appeal
Former
decision
to ame
breach
g of the c

Geoffre
appe
Lord G
respe

14 Dec

i MUMM
[1] T
under C
duty br

shareholders. In this case there was no distribution contrary to the prohibitions in the memorandums before those prohibitions were deleted under the schemes of arrangement. It was not ultra vires for the directors to authorise expenditure of the company's money on investigating proposals to sell RACMS, or proposals to demutualise the company and distribute assets to members and, for that purpose, to amend the memorandums. Even a provision purporting to entrench the prohibition in the memorandum could lawfully be removed by a scheme of arrangement. The removal of the prohibition was plainly incidental to the lawful purpose of selling the motoring services business. There was no wrongdoing and no duty to disclose. The judge was right that there were no special circumstances such as to impose a duty on the directors to disclose to the claimants the proposals and plans for demutualisation generally. There was insufficient evidence that the directors were acting wrongfully by benefiting personally from the demutualisation and there was therefore no duty to disclose. In any event the duty would be to make disclosure to the company. Further any breach in relation to personal benefits would not have been causative in relation to claimants' decisions to cease to be members.

d Cases referred to in judgments

- Allen v Hyatt* (1914) 30 TLR 444, PC.
Brunninghausen v Glavanics (1999) 46 NSWLR 538, NSW CA
Chez Nico (Restaurants) Ltd, Re [1992] BCLC 192.
Coleman v Myers [1977] 2 NZLR 225, NZ CA.
Company, Re a (Case No 005136 of 1986) [1987] BCLC 82.
e *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126, [1974] AC 821, [1974] 2 WLR 689
Percival v Wright [1902] 2 Ch 421.
RAC Motoring Services Ltd, Re [2000] 1 BCLC 307.
Stein v Blake (No 2) [1998] 1 BCLC 573, [1998] 1 All ER 724, CA.

f Appeal

Former members of the Royal Automobile Club appealed against the decision of Neuberger J of 7 December 1999 in which he refused permission to amend a statement of claim against the respondents which alleged a breach of fiduciary duty owed by the respondents to the appellants in respect of the demutualisation of the Royal Automobile Club Ltd.

g *Geoffrey Vos QC* and *Daniel Lightman* (instructed by *Class Law*) for the appellants.
Lord Grabiner QC and *Craig Orr* (instructed by *Slaughter and May*) for the respondents.

h

Cur adv vult

14 December 2000. The following judgments were delivered.

i MUMMERY LJ (giving the first judgment at the invitation of Simon Brown LJ).
 [1] This is an appeal from the order of Neuberger J on 7 December 1999 under CPR Pt 24. He summarily dismissed claims for damages for breach of duty brought (or intended to be brought) by about 355 former full members

of the Royal Automobile Club (the club) against the committee of the club (the committee) and against its holding company. His judgment is now reported in [2000] 2 BCLC 1.

a

[2] He refused permission to amend the statement of claim dated 21 July 1998. He refused permission to appeal, which was granted by a single Lord Justice on 19 April 2000.

[3] The dispute arises out of the fact that the claimants did not obtain any benefit from the demutualisation of the club. That took place after their membership of the club (and of its holding company) had ceased, either by their retirement from membership or by them allowing their membership to lapse, during the period from 9 July 1995 to 28 March 1998. The substantial sums (£34,161 each) distributed to those who were members of the club at 8 July 1998 stemmed from the sale in mid-1999 of the valuable motoring services business associated with the club and its holding company.

b

[4] It is common ground that the relevant question is whether the claims have a real prospect of succeeding. If they do not, then the judge was right to dismiss them at this stage. If they do, then they should be allowed to proceed to trial in the usual way.

d

THE CLUB, THE COMPANIES AND THE MEMBERS

[5] The club was a proprietary club. It was not a members' club. It was the property of its holding company, The Royal Automobile Club Ltd (RACL), which was incorporated in 1897 as a company limited by guarantee.

[6] The full members of the club were members of RACL. The board of directors of RACL for the time being constituted the committee. The committee was vested with the entire management of the club in accordance with the rules of the club. The rules provided for the submission of an annual report by the committee to the annual general meeting under r 19 and for the election of members. Membership was from year to year ending on 31 December in each year. Subscriptions were due and payable on 1 January in each year. Membership ceased for non-payment of subscriptions. Members were permitted to resign in accordance with a notice procedure in r 56. If a member resigned and reapplied for membership within three years, he might be re-elected without being proposed and seconded, if the committee so decided.

e

[7] RAC Motoring Services (RACMS), which operated the motoring services business, was also owned by RACL. So the full members of the club had an indirect interest in it.

[8] The memorandum of association of RACL (the memorandum) contained provisions at the heart of this dispute between the former members and the committee. The objects of RACL stated in clause 3 of the memorandum included:

h

(a) To establish, maintain and conduct a club for the encouragement and development in Great Britain of the auto-motor vehicle and other allied industries, and for the accommodation of Members of the Company and their friends, and to provide a club-house or club-rooms, and other conveniences, and generally to afford to Members and their

i

frier
soci
pert
part
in p
attai
Clause 4
'I
be a
as se
shal
bon
Con
(if a
whi
Con
Con
or to
the
dete

a

b

c

d

e

f

g

h

i

Article 6

Clause
distrib
which s
Clause 4

[9] In
club, th
compan
arrange
1985 A

THE SAL

A The r

[10]
RACL
business
propose
and to
the ther

the club
is now
a

121 July
gle Lord

tain any
ter their
b

either by
ership to
bstantial
e club at
notoring
c

ie claims
s right to
proceed
d

was the
(RACL),
e

board of
ee. The
ordance
n annual
d for the
ding on
January
f

riptions.
edure in
ee years,
, if the
g

notoring
the club

andum)
members
of the
h

agement
id other
of the
rooms,
nd their
i

a friends all usual advantages, conveniences, and accommodation of a social club and centre of information and advice on all matters pertaining to auto-motor vehicles.

a (m) To sell or dispose of the undertaking of the Company, or any part thereof, for such consideration as the Company may think fit, and in particular for shares, debentures, or securities of any other company.

b (p) To do all such other things as are incidental or conducive to the attainment of the above objects, or any of them . . .

b Clause 4 provided that:

c 'The income and property of the Company, whensoever derived, shall be applied solely towards the promotion of the objects of the Company as set forth in this Memorandum of Association, and no portion thereof shall be paid or transferred directly or indirectly, by way of dividend, bonus or otherwise howsoever, by way of profit to the Members of the Company. And upon the winding up of the Company, the surplus assets (if any) of the Company or funds arising from the realisation thereof which shall remain, after payment of all the debts and liabilities of the Company, shall not be paid or distributed among Members of the Company, but shall be given, paid or transferred to such public museum or to such institution or institutions connected with engineering, or with the objects of the Company as the Directors of the Company shall determine at or before the time of dissolution of the Company . . .'

e Article 67 of the articles of association provided that:

f 'If upon the winding up or dissolution of the Company there remains any property whatsoever, the same shall not be paid to or distributed among the Members of the Company but shall be paid or applied as provided for by the Memorandum of Association.'

g Clause 4 of the memorandum of RACMS contained a prohibition on distribution to members in slightly different terms with a further clause 5 which stated that: 'No addition, alteration or amendment shall be made to Clause 4 hereof.'

g [9] In mid-1998, after all the claimants had ceased to be members of the club, these prohibitions were deleted from the memorandum of each company by the combined effect of special resolutions and two schemes of arrangement made by the court under s 425 of the Companies Act 1985 (the 1985 Act).

h THE SALE OF RACMS

A *The negotiations for sale to Cendant*

i [10] The defendants' case is that in March 1998 an approach was made to RACL by Cendant Corporation (Cendant) with a view to acquiring the business of RACMS. This is disputed by the claimants. Coincidentally, a proposal to call an EGM, as the first step in a process to demutualise the club and to demerge RACMS, was made in a letter dated 27 March 1998 from the then chairman of RACL, Mr Jeffrey Rose, to all the full members of the

club. The board resolved that it would not elect any person as a member of RACI after 27 March 1998. In May 1998 the terms of sale of RACMS to Cendant for £450m were finally agreed

B The scheme

[11] On 4 June 1998 a meeting was held for a scheme of arrangement of RACMS. On 19 June 1998 a meeting was held for a scheme of arrangement of RACI. At that meeting a special resolution was passed for the deletion of clause 4 of the memorandum.

[12] On 8 July Neuberger J approved the schemes of arrangement of RACMS and RACI under s 425 of the 1985 Act: see *Re RAC Motoring Services Ltd* [2000] 1 BCLC 307. The schemes of arrangement became effective on 9 July 1998. They facilitated the transaction for the disposal of RACMS to Cendant and enabled the members to realise their indirect interest in RACMS.

[13] The effect of the scheme was that the members ceased to be members of RACI at the close of business on 8 July 1998. A new company named RAC Acquisitions became the sole member of RACI. RAC Acquisitions itself became a subsidiary of RAC Holdings Ltd (RACH). One share of £1 each in RACH was allotted to each person who was a member of RACI at the close of business on 8 July 1998. That share was later divided into two shares of 50p each.

[14] In addition, each of those former members of RACI became a member of New Club Company Ltd, to which the entire share capital of a company called Club Acquisition Company Ltd (CACI) was transferred. CACI had, while it was a subsidiary of RACI, acquired all the assets of RACI.

[15] The New Club Company, which became and remains the ultimate proprietor of the club, was later renamed 'The Royal Automobile Club Ltd'. RACI was renamed 'RAC Ltd' and was subsequently reregistered as an unlimited company with a share capital, whereupon its name became 'RAC'.

C The sale to Lex Service

[16] On 4 February 1999 it was announced that Cendant had decided not to proceed with the purchase in view of conditions imposed by the Secretary of State for Trade and Industry on competition grounds.

[17] On 9 February 1999 Lex Service PLC announced that it was making a bid. On 21 May Lex Service made an offer to the shareholders in RACH to purchase their shares. That offer became unconditional on 9 July 1999. The sale took place for £437m.

[18] The end result was that Lex Service became the holding company of RACH, RACI and RACMS and that the members, in their new capacity as shareholders in RACH, received about £34,000 each direct from Lex Service in respect of the sale of their shares in RACH.

THE PROCEEDINGS

[19] As the claimants had all ceased to be members of the club and to be members of RACI before the schemes of arrangement took effect, they never became shareholders in RACH. So they never became entitled to receive any part of the benefits flowing from the sale of RACMS to Lex Service.

[20] The defendant on or after had ceased name RA

[21] The defendant for breach of the opt continue defendant failed to c instructio RACMS, proposed distributi

[22] It before th their mer would ha would th Service ir

[23] O defendan no real p

THE JUDGE

[24] The grounds of claim.

[25] The club, (inc work do members of the cl about th and the and prop a discret reapplied former r

[26] I pleaded no real j follows:

1. A c compan
2. A c he had, the shar

as a member of
of RACMS to

a

arrangement of
of arrangement
the deletion of

b

arrangement of
RAC Motoring
ement became
the disposal of
their indirect

c

to be members
company named
Acquisitions
share of £1
r of RACL at
ided into two

d

RAC became a
e capital of a
s transferred.
the assets of

e

the ultimate
le Club Ltd'.
stered as an
came 'RAC'

f

! decided not
the Secretary

was making
rs in RACH
9 July 1999.

g

company of
capacity as
Lex Service

h

b and to be
, they never
receive any
ice.

i

[20] The majority of the personal defendants were the directors of RACL and the members of the committee at the material time. Four of the defendants only became directors of RACL and members of the committee on or after 1 January 1998, by which time most, if not all, of the claimants had ceased to be members. RACL is a proposed defendant under its new name RAC Ltd.

[21] The claims in the draft amended statement of claim were for damages for breach of fiduciary duties of disclosure and for being wrongfully deprived of the opportunity to make a fully informed choice as to whether or not to continue their membership of the club. The basis of the claims was that the defendants, in breach of a fiduciary duty owed by them to the claimants, failed to disclose to them the plans, discussions, proposals, investigations and instructions relating to the demutualisation of the club and the demerger of RACMS, in particular the expenditure by them of the assets of RACL on the proposed cancellation of clause 4 of the memorandum, so as to permit distributions to be made to the members.

[22] It is alleged that, if these matters had been disclosed to the claimants before they retired, they could then have made an informed decision about their membership. They would have decided not to retire. Instead, they would have remained members of the club and shareholders in RACL. They would then have been entitled to benefit from the sale of RACMS to Lex Service in 1999.

[23] On 7 December 1999 Neuberger J acceded to an application by the defendants under CPR Pt 24 to dismiss the action on the ground that it had no real prospect of success.

THE JUDGMENT OF NEUBERGER J

[24] The claims were unsuccessfully advanced to the judge on a number of grounds which have now been dropped from the draft amended statement of claim.

[25] The judge rejected the claimants' contentions that the Rules of the club, (including r 19 which required the committee to report annually 'on the work done by the club'), represented the terms of a contract between the members of the club or between the members and the committee; that r 19 of the club put the committee under an obligation to inform the members about the developments and all likely future developments affecting the club and the company and its subsidiaries, including discussions, investigations and proposals with a view to selling RACMS; and that r 56 (which conferred a discretion on the committee to re-elect a member who had resigned and reapplied for membership within three years of his resignation) entitled former members to be reinstated automatically.

[26] As for the remaining claims based on breach of fiduciary duty as pleaded in the draft amended statement of claim, the judge held that they had no real prospect of succeeding. In outline, his reasoning on this issue was as follows:

1. A director does not owe a general fiduciary duty to shareholders of the company.

2. A director of a company could owe a fiduciary duty to shareholders, if he had, in relation to the sale of shares, special knowledge not possessed by the shareholders.

3. There was no fiduciary duty in the circumstances of this case. The judge identified eight factors leading him to that conclusion: (1) the absence of any special facts in the relationship of the directors and the members of RACL, which would make the existence of a fiduciary duty more likely; (2) the claimants had resigned membership of their own motion, uninfluenced by any information provided by, or views expressed by, the directors; (3) no specific transaction was in contemplation at the time of the resignations; (4) the defendants did not, in their capacity as directors of RACL, benefit from the claimants ceasing to be members, either directly (eg they did not acquire shares from the members or encourage them to part with their shares) or indirectly (eg by minimising the number of members, so as to increase their share of the proceeds of sale); (5) the alleged interest of the directors in profits from the sale in the form of 'golden helios and employment contracts' did not impinge on the issue whether they were under a duty to disclose at an early stage the possibility of selling off the RACMS business; (6) the investigation and promotion of proposals for the demutualisation of RACL (including the incurring of costs in relation to the amendments of the memoranda of RACL and RACMS sanctioned by the court) did not involve the directors in the pursuit of an unauthorised and improper object; (7) it was unreasonable for directors to be put in the sort of position which the claimants' contentions would necessarily involve with regard to the disclosure of contemplated arrangements or transactions best kept confidential; and (8) the claimants' arguments would place directors in the unfortunate position of being 'damned if they do and damned if they don't', if they were put under a duty to disclose to the members a contemplated sale which might, or might not, happen.

FIDUCIARY DUTIES – THE LEGAL PRINCIPLES

[27] There was no serious dispute between Mr Vos QC, for the claimants, and Lord Grabiner QC, for the committee and RAC Ltd, about the relevant legal principles governing the fiduciary duties of company directors.

[28] For his part, Mr Vos accepted that the fiduciary duties owed by the directors to RACL do not necessarily extend to the individual members of the club and that, in general, directors do not, solely by virtue of the office of director, owe fiduciary duties to the shareholders, collectively or individually.

[29] According to the headnote in *Percival v Wright* [1902] 2 Ch 421 that case decided that:

'The directors of a company are not trustees for individual shareholders, and may purchase their shares without disclosing pending negotiations for the sale of the company's undertaking.'

[30] The apparently unqualified width of the ruling has, over the course of the last century, been subjected to increasing judicial, academic and professional critical comment; but few would doubt that, as a general rule, it is important for the well-being of a company (and of the wider commercial community) that directors are not overexposed to the risk of multiple legal actions by dissenting minority shareholders. As in the affairs of society, so in the affairs of companies, rule by litigation is not to be equated with the rule of law.

[31] F
by the c
a circumst
the shar
action, a
of fiduci

[32] A
b [1998] 1
recognise
is owed b
a duty ha
part with
c sustained
the misaj
distinct f
director 1

[33] T
d relationl
by them.
legal rel
relationl
case. Eve
direct an
e generatin
to the sh
valuable
by the dir
prefer an

[34] T
f salient fe
Fiduciary
and loyal
person w
treated as
g benefit o
depending
care of hi
example,
to, and de

h holding th
or dispos
to make n
negotiatio
specific in
capable o
i obligation
benefit, se
them to ta

e. The judge
 sence of any
 s of RACI, a
 rely; (2) the
 fluenced by
 tois; (3) no
 nations; (4)
 benefit from
 not acquire b
 t shares) or
 rease their
 rs in profits
 cts' did not
 at an early c
 ivestigation
 cluding the
 la of RACI
 ctors in the
 sonable for d
 ontentions
 ntemplated
 claimants'
 of being
 nder a duty
 might not, e

claimants,
 re relevant f
 is.
 ved by the
 bers of the
 e office of
 ively.
 421 that g

individual
 g pending h
 course of
 emic and
 al rule, it
 mmercial
 iple legal i
 ety, so in
 the rule

a [31] For his part, Lord Gribner accepted that the fiduciary duties owed by the directors to the company do not necessarily preclude, in special circumstances, the coexistence of additional duties owed by the directors to the shareholders. In such cases individual shareholders may bring a direct action, as distinct from a derivative action, against the directors for breach of fiduciary duty.

b [32] A duality of duties may exist. In *Stein v Blake and others (No 2)* [1998] 1 BCLC 573 at 576, 579, [1998] 1 All ER 724 at 727, 729 Millett LJ recognised that there may be special circumstances in which a fiduciary duty is owed by a director to a shareholder personally and in which breach of such a duty has caused loss to him directly (eg by being induced by a director to part with his shares in the company at an undervalue), as distinct from loss sustained by him by a diminution in the value of his shares (eg by reason of the misappropriation by a director of the company's assets), for which he (as distinct from the company) would not have a cause of action against the director personally.

d [33] The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to the shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities, which have been acquired by the directors in that office, for the benefit of the shareholders, and not to prefer and promote their own interests at the expense of the shareholders.

f [34] These duties may arise in special circumstances which replicate the salient features of well-established categories of fiduciary relationships. Fiduciary relationships, such as agency, involve duties of trust, confidence and loyalty. Those duties are, in general, attracted by and attached to a person who undertakes, or who, depending on all the circumstances, is treated as having assumed, responsibility to act on behalf of, or for the benefit of, another person. That other person may have entrusted or, depending on all the circumstances, may be treated as having entrusted, the care of his property, affairs, transactions or interests to him. There are, for example, instances of the directors of a company making direct approaches to, and dealing with, the shareholders in relation to a specific transaction and holding themselves out as agents for them in connection with the acquisition or disposal of shares; or making material representations to them; or failing to make material disclosure to them of insider information in the context of negotiations for a take-over of the company's business; or supplying to them specific information and advice on which they have relied. These events are capable of constituting special circumstances and of generating fiduciary obligations, especially in those cases in which the directors, for their own benefit, seek to use their position and special inside knowledge acquired by them to take improper or unfair advantage of the shareholders.

[35] The court has been referred to the valuable and detailed surveys of the authorities, expounding the special circumstances which justify the imposition of fiduciary duties on directors to individual shareholders, in the judgments of Court of Appeal in New Zealand in *Coleman v Myers* [1977] 2 NZLR 225 (especially 323-325, 328-330) and of the Court of Appeal of New South Wales in *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 (especially 547-560). In both of those cases fiduciary duties of directors to shareholders were established in the specially strong context of the familial relationships of the directors and shareholders and their relative personal positions of influence in the company concerned.

[36] The cases of *Allen v Hyatt* (1914) 30 TLR 444 at 445 (directors making representations to secure options to purchase shares of shareholders and undertaking to sell shares of shareholders in agency capacity); *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126 at 1132-1133, 1135-1136, [1974] AC 821 at 834, 837-838 (directors' use of fiduciary power of allotment of shares for a different purpose than that for which it was granted, and so as to dilute the voting power of the majority shareholding of issued shares); *Re a company (Case No 005136 of 1986)* [1987] BCLC 82 at 84-85; and *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192 at 208 were also cited. See also the discussion in Spencer Bower *Actionable Non-Disclosure* (2nd edn, 1990) pp 417-435.

[37] The claims for breach of fiduciary duty owed by the directors to the members of the club are put in several different, though interrelated and overlapping, ways. They have been argued on the appeal by Mr Vos (who did not appear below) with a somewhat different emphasis than before the judge as indicated in a draft reamended statement of claim. This judgment will refer to certain passages in the draft amended statement of claim (which have since been deleted), since they were the pleaded claims before the judge.

THE ULTRA VIRES EXPENDITURE POINT

[38] Mr Vos's primary attack on the judgment focused on point (6) in the above summary of the list of factors considered by the judge.

[39] He asserted, and Lord Grabiner accepted, that directors act in breach of the fiduciary duties owed by them to the company, if they participate in the commission of acts ultra vires the company

[40] Mr Vos went further and asserted that, where all the directors are involved in the same ultra vires act, they are under a duty to disclose to the individual members their intention to commit, and their commissions of, ultra vires acts and the ultra vires intentions and acts of their fellow directors. In such a case proper disclosure by the directors to the company cannot be made. The duty to disclose to the company would lack content, if all the directors are embarked on a course which is ultra vires and benefits them all, but is detrimental to the shareholders at large.

[41] This additional duty to disclose ultra vires intentions and acts to individual shareholders does not, he emphasised, depend on establishing special circumstances justifying an exception to the general rule that fiduciary duties are owed by the directors only to the company. He made separate submissions on that exception to the principle in *Percival v Wright* (above). They are discussed later in this judgment.

of the
y the
in the
1977]
eal of
R 538
ors to
mial
sonal

ectors
olders
oward
-1133,
uciary
hich it
ajority
1986)
[1992]
Bower

to the
ed and
s (who
ore the
gment
(which
judge

in the

breach
pate in

ors are
to the
ons of,
ectors
not be
all the
em all,

acts to
lishing
e that
e made
Wright

[42] Further, liability for non-disclosure to the shareholders is not abrogated by s 35 of the 1985 Act, as amended by s 108(1) of the Companies Act 1989. It is true that sub-s (1) provides that:

'The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum.'

But sub-s (2) provides that:

'A member of a company may bring proceedings to restrain the doing of an act which but for subsection (1) would be beyond the company's capacity ...'

and sub-s (3) provides that:

'It remains the duty of the directors to observe any limitations on their powers flowing from the company's memorandum; and action by the directors which but for subsection (1) would be beyond the company's capacity may only be ratified by the company by special resolution.'

[43] The claimants' primary case in this court is that the directors of RACL owed a fiduciary duty to disclose to them their ultra vires intentions and acts; and that they acted in breach of duty by not disclosing to them their intentions not to observe, and their failure to observe, the limitations on their powers flowing from the provisions of clause 4 of the memorandum. If there were no such duty of disclosure to the members, the right of the members to seek to restrain the commission of ultra vires acts under s 35(2) of the 1985 Act would be sterilised. Disclosure was also required so that the members could consider whether to ratify under s 35(3) of the 1985 Act the ultra vires acts by special resolution.

[44] Mr Vos reminded the court of the approach which it should take at this early stage (without the benefit of disclosure and evidence) in these unprecedented proceedings: when the full facts are not known and when the legal principles are in a state of development, the court should be cautious in concluding that the claims have no real prospect of succeeding.

[45] The argument was developed in this way. The fiduciary duty of disclosure of ultra vires intentions and acts is owed to the members, because the damage caused by the breach of duty is to the personal interests of the individual shareholders (in this case the retired members), not to the value of the company or its assets or the shares in it.

[46] The directors should have disclosed to the members intended and actual expenditure from 1996 onwards of RACL's assets (eg on professional advice), which was considerable and was committed to the furtherance of complex proposals for the restructuring of the company in order to allow distribution of the proceeds of the intended sale of RACMS among the members of the club.

[47] This was not simply a case of proposing to change the objects of a company, so that it could sell an existing business or engage in a new business. The proposal was for the distribution of the company's property in the face of an express absolute prohibition in clause 4 on the distribution to