members of any part of the property of RACI. That clause is not the same as an object of the company, which may be changed by special resolution. As a matter of construction of clause 4 of the memorandum, that expenditure on the formulation and implementation of the proposal for the sole purpose of demutualisation was ultra vires RACI. That purpose was prohibited.

[48] The directors were in breach of fiduciary duty in committing the company to that ultra vires expenditure and in not disclosing that conduct to the members. The members should have been consulted. The directors should have sought the approval of the members in general meeting about the proposals to investigate and prepare a scheme for demutualisation before assets were expended on that prohibited purpose. Had the claimants been consulted, they would have known about it. They would have decided to remain full members of the club. They could have obtained an injunction under s 35(2) of the 1985 Act; or they could have ratified the expenditure under s 35(3) of the 1985 Act, so as to benefit from the demutualisation. As it was, they made their decision to retire from the club in ignorance of the commitment of the directors to impermissible and significant actual and intended expenditure in pursuing and achieving an expressly prohibited object.

[49] In my judgment, this flight of fancy does not, on the pleaded facts, even make it to the point of take off and should be grounded immediately under CPR Pt 24.

[50] It is not even alleged that the directors caused any distribution of the assets of RACI to be made to members in breach of clause 4 of the memorandum before 8 July 1998, when that clause was cancelled under the scheme of arrangement. It was not ultra vires for the directors to authorise the expenditure of the company's money on investigating proposals to sell RACMS, or on proposals to demutualise the company and distribute assets to the members and, for that purpose, to amend the memorandum. That expenditure was not caught by clause 4. The prohibition in clause 4 did not extend to attempts to change the law of the company by altering the clause or cancelling it from the memorandum, so as to permit what was previously prohibited. Even if it did, such as by a prohibition of the kind to be found in clause 5 of the memorandum of RACMS, the entrenching provision could also be lawfully removed by a scheme of arrangement.

[51] In substance the expenditure complained of in this case is no different from expenditure, which Mr Vos accepts may be permitted, on changing the objects in the memorandum, so as to allow the company to carry on a different business, which is impliedly prohibited until the objects are changed. It is lawful for a company to change its objects and to amend its memorandum by means of the appropriate procedures: s 4 of the 1985 Act (special resolution altering the memorandum with respect to the statement of the company's objects) and s 17 (special resolution altering a condition in the company's memorandum which could have been lawfully contained in the articles of association and cancellation of the condition so far as it is confirmed by the court).

[52] It must follow that it is lawful for the directors to authorise the expenditure of company's money for the purpose of the cancellation of clause 4. That expenditure is reasonably incidental to the attainment or pursuit of the lawful purpose of the cancellation of clause 4 from the

memorandum in the context of giving effect to the overall object permitted in clause 3(m) of selling or disposing of RACMS. I do not agree with Mr Vos's contention that the demutualisation was completely unrelated and irrelevant so far as the sale of RACMS was concerned. The expenditure was not made to achieve a prohibited object. There was no wrongdoing on the part of the directors in relation to the expenditure, which it was their duty to disclose either to the company or to the individual shareholders in RACL.

THE SPECIAL CIRCUMSTANCES POINT

[53] Quite apart from the alleged fiduciary duty of directors to disclose their own and each others' intended and actual ultra vires acts to the members, Mr Vos submitted that there was a free-standing fiduciary duty of full disclosure of the demutualisation and demerger plans, discussions and proposals to the members, as well as to the company, by reason of special circumstances Had all the members been made aware of these matters, they would not have resigned their membership of the club.

[54] It was pleaded in the draft amended statement of claim that the duty of the directors was not to withhold from the members of the club or the company any information, which they obtained as members of the committee or the board and which they knew, or ought to have known, would be, or might be, material to their decisions each year whether or not to renew their membership of the club or to dispose of their interests in the company. Further, in the event that the committee or the board were considering plans for and/or were in the course of conducting negotiations with third parties concerning the disposal of substantial assets of the company, there was a duty to disclose all matters relevant to the interests of the members of the club, or the company, who were contemplating retirement from the club (and thereby a disposal of their interests in the company) in circumstances where they knew, or had reason to believe, that such retiring members were inadequately informed. The directors were in exclusive possession of information, which they had acquired by virtue of their office, affecting the potential financial value of membership of the club and of RACL. The members would not have had that information In their state of knowledge (or ignorance), the members could only have placed a nil value on their membership.

[55] It was also alleged that, for a period of at least 18 months prior to March 1998, the committee had been actively considering taking professional advice concerning and discussing the sale and disposal of RACMS and the possibility of demutualisation of the club and the potential demerger of RACMS. At a meeting in about October 1996 the committee and/or the board is alleged to have considered and rejected a scheme for demutualisation and/or demerger of RACMS, but still continued to seek to formulate a workable plan to that end

[56] As already indicated in the submissions on the ultra vires point, it is alleged that the committee had, in relation to those matters, incurred a liability on behalf of the club and RACL for professional fees, mergers, expenses and disbursements, including a liability in respect of the retainer of Messrs Slaughter and May to prepare a scheme for demutualisation and /or demerger of RACMS.

[57] Mr Vos submitted that this duty of disclosure to the members fell within an exception to the general rule laid down in *Percival v Wright* (above). The special facts from which it is contended that this fiduciary duty to the members emerges are that knowledge of the proposal by the directors was inside information of which the directors had exclusive possession; that they had acquired the information by virtue of their office; that the information provided knowledge to the directors of the potential financial value of membership of the club and RACL, which was not known to the members; that that knowledge was, contrary to their expectations, that their membership (which could not have been sold or transferred) could have any value; that, by resigning membership, the claimants had given up any right to participate in the substantial assets of RACL; and that they had done so in ignorance of the directors' plans to allow members to benefit from a distribution.

[58] I agree with the judge that these factors are insufficient to found a claim for the existence and breach of a fiduciary duty to disclose to the claimants the proposals and plans for demutualisation

[59] There was nothing special in the factual relationship between the directors and the members in this case to give rise to a fiduciary duty of disclosure. In particular there were no relevant dealings, negotiations, communications or other contact directly between the directors and the members; the actions of the directors had not caused the members to retire when they did; and, probably most important of all, prior to March 1998 there was nothing sufficiently concrete and specific, either in existence or in contemplation, for the directors to disclose to the members

THE BENEFITS TO DIRECTORS AND ASSOCIATES POINT

[60] The third area of alleged fiduciary duty to the members is that the directors failed to disclose to the members of the club that they had committed breaches of duty to RACL, in that they personally and their associates stood to benefit, and had in fact benefited, from the proposed demerger and demutualisation and that, had they made disclosure of these matters to all the members, as they should have done, the claimants would have chosen to remain members and would have benefited from the distribution of the proceeds of sale of RACMS

[61] In particular, the draft amended statement of claim pleaded that the members of the committee were under a duty to treat all the members of the club fairly; not to disclose to a third party any information which they had obtained as members of the committee or the board of RACL and which was material to the interests of the members of the club and the company, without first informing all of the members; and not to disclose any such information to some members and not others.

[62] An assortment of personal benefits constituting breaches of the duty to disclose are alleged, though it has to be said that the pleading is short on particulars and the evidence is exiguous. The claimants contend that this is almost bound to be the case in advance of disclosure of documents by the defendants and, indeed, they rely on that as a factor relevant to the court's discretion under CPR Pt 24.

[63] The allegations in the draft amended statement of claim may be summarised as follows: there was a conflict of interest between, on the one hand, the interests of the members of the committee and of the board and, on the other hand, the interests of the members, who were ignorant of these material matters; the directors stood to benefit as more existing members retired and gave up their shares in the company; under the Cendant proposal some directors were to receive substantial additional personal benefits in the form of shared bonuses and, in the case of Mr Neil Johnson (the fifth defendant), office as chief executive in the new group; under the sale to Lex Service the directors received undisclosed bonuses and one (Mr Ian Mavor – the twelfth defendant) was to be appointed to a consultancy; some directors were able to, and did, fast track friends into full membership of the club before March 1998, in the knowledge of the intended disposal of RACMS and the distribution of the proceeds; the directors were in a position to, and did, slow down the waiting list for full membership of the club (eg the case of a Mr Malcolm Bissiker) and that would increase the value of their own membership on demutualisation.

[64] At the end of the day, however, these additional allegations add nothing of substance to the arguments already deployed and rejected. The points made on directors' benefits are essentially the same as the other arguments; ie, that it was the duty of the directors to disclose to the members that they were committing, or intending to commit, ultra vires acts (eg by benefiting, or intending to benefit, personally from the distribution of the sale proceeds to the members) and in circumstances which justified an exception to the general rule that the directors' fiduciary duties are owed only to the company. For the above reasons and for the reasons given by the judge, the facts pleaded are insufficient to support the existence of a duty of disclosure to the members.

[65] Even if the allegations were established (and they are strongly disputed by the defendants), the duty to disclose the ultra vires acts in this case would be owed by the directors to the company and not, in the absence of special circumstances, to the individuals members of the club.

[66] I would add that these alleged breaches of duty do not appear to impact on the alleged duty to disclose to the members, before their decision to resign, the plans and proposals to demutualise the club and to demerge RACMS. It was non-disclosure at an earlier stage of those plans and of the alleged ultra vires commitment to expenditure on them, rather than non-disclosure of the personal benefits for directors and associates, that would have affected the opportunity of the members to make an informed decision on membership.

[67] It is also contended that there was a breach of fiduciary duty to shareholders by one of the directors (Mr Johnson), who frequented a Warwickshire shooting club. It was alleged that, in consequence of the disclosure of inside information, about ten members of the shooting club were fast tracked into full membership of the club early in 1998, shortly before demutualisation. The claim was that this involved unfairness between shareholders, as the inside information should have been shared with all the members of the club. That allegation would not, however, justify claims for

breach of fiduciary against all the members of the committee. For the reasons already stated, however, this claim does not, in any event, have any real prospect of succeeding against any of the defendants.

CONCLUSION

[68] In my judgment, the claims, as pleaded and as proposed to be amended or reamended, have no real prospect of succeeding at trial against the personal defendants or against the company. The judge was right to make an order under CPR Pt 24. I would dismiss the appeal.

LATHAM LJ. I agree with both judgments.

SIMON BROWN LJ.

[69] The club has over 12,000 members. All those who were full members on 8 July 1998 received windfall payments of some £34,000 following the sale of the RAC motor services business. It was for them a happy and unexpected event: until March that year they had had no reason to suppose that their membership was of any financial value whatever.

[70] The appellants represent 355 retired members of the club who resigned (or in a few cases failed to pay their annual subscription) in the three years prior to this payout. To them, understandably, it seemed a less happy event: their chagrin is not difficult to imagine.

[71] The appellants' complaint in these proceedings is against the committee (strictly the board of the company of which all full members of the club were members) and is to the effect that the committee kept from them the various discussions and investigations which led to this payout. Had they known it was in the offing, they would never, of course, have resigned.

[72] They cannot complain simpliciter that the committee should have kept them in the picture: Mr Vos was constrained to recognise that no such general duty is cast upon directors. He has therefore had to argue a more circuitous case. What he asserts is first that the board acted ultra vires and therefore in breach of their fiduciary duty, and secondly that they thereby came under a further duty to disclose their ultra vires conduct to the members. Thus would the members have discovered the financial value of their membership.

[73] The conduct which principally Mr Vos contends to have been ultra vires was the defendants' expenditure of company funds on preparing for the sale of the motor services business and, more particularly, for the scheme of demutualisation which was a necessary precondition of any payment to members. Clause 4 of the memorandum is central to the argument. Let me read only the most material part:

> '4. 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 to or distributed among Members of the Company, but shall be given, paid or transferred to such public museum or such institution or institutions connected with engineering, or with the objects of the Company as the Directors of the Company shall determine ...'

The objects of the company most relevant to this appeal are:

'3(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 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.

3(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.

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

[74] As I understand the appellants' argument with regard to these clauses it runs essentially as follows: (1) Clause 4 constituted a fundamental prohibition against any form of payment out to members. Any scheme for demutualisation clearly, therefore, required its removal. (2) Demutualisation was distinct from the sale of the motor services business and did not itself fall within any of the objects clauses. In particular it was not to be regarded (within clause 3(p)) as 'incidental or conducive to the attainment of' the sale of the motor services business (within clause 3(m)). (3) The defendants were, therefore, forbidden to apply any company funds towards demutualisation.

[75] The difficulty with this argument is that it appears to overlook the plain fact that, by the same token as a company may seek to change its objects, so too it may seek to change its other rules such as the prohibition constituted by clause 4 in the present case. And if a company can seek to change its rules, then in my judgment it must also be entitled to expend such sums (for example by way of legal fees) as are reasonably incurred in exploring the need for and effecting such change. This, we kept suggesting to Mr Vos in argument, was the complete answer to his case. Not so, he repeatedly submitted, but, I confess, I never came to understand why not. All I can do is to quote verbatim from the last of the relevant passages in the transcript of the argument before us to indicate my difficulty:

'Mr Vos QC: It is, of course, not illegal to change the law of the company. But the question is, whether on the facts ... that expenditure ... was in fact directly spent for the purpose, not just of changing the law of the company, but for the purpose of ensuring that monies were paid to members in violation of the memorandum ... The scheme was not directed at just changing, that was just one small part of the scheme. The scheme was directed at distributing the money to the members indirectly

> ... Let us assume that in order to transfer to the members of the company you have to expend £1m, and let us assume that the assets of the company are £10m, and that the object of the scheme and the proposal is to get the £10m to the members, that is what is intended and that is what is alleged. In order to achieve it, you have to spend £1m and therefore the distribution is only £9m; it can only be. It would be, because you have spent £1m of the £10m of the assets of the company on achieving the purpose ... Assume that is all right, can it really be said that you have not expended that £1m for this prohibited purpose? In our respectful submission, you have obviously expended it for that purpose and it is not an answer to say that the mechanics, the way in which you achieved it, was by changing this provision ...
>
> Mummery LJ: It is spent for the purposes of removing the prohibition.
>
> Mr Vos QC: That is the dispute, with respect Your Lordship says it is spent just for the purpose of removing the prohibition, and I say it is spent for achieving the prohibited object . It is an obvious wrong to go about doing something before you change the provision. You have to change it first. That is why s 35(3) says so ... You go to the general meeting, under s 35(3), which assumes you do, and say: "We want to spend money on this *ultra vires* act, may we do so?", and you can have it approved.'

[76] For the life of me, I remain unable to see how payments (say to solicitors) expended to remove a prohibition against making payments to members can themselves be characterised as payments to members in violation of the prohibition, and nor can I see how s 35(2) of the 1985 Act advances the appellants' argument. Section 35(3) provides:

> '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
>
> A resolution ratifying such action shall not affect any liability incurred by the directors or any other persons; relief from any such liability must be agreed to separately by special resolution.'

Section 35(1) prevents third parties from calling into question the validity of an act done by a company on the ground of lack of capacity by reason of anything in the company's memorandum.

[77] Mr Vos's submission on s 35(3) begs rather than answers the question at issue. If, as I think, it is lawful to spend money changing the company's rules, then there can be no occasion to seek ratification of such expenditure from the company (even assuming, which I doubt, that s 35(3) contemplates advance rather than retrospective ratification).

[78] I referred earlier to Mr Vos having acknowledged that directors (at least of private companies) are under no general duty to inform shareholders of developments or proposals which may increase the value of their shareholding. Were it otherwise, I for my part would regard this as a prime case for asserting a breach of such duty. After all, nothing could more fundamentally affect the value of club memberships than the demutualisation

scheme here devised which overnight transformed a worthless membership into one worth £34,000. But the same surely is true of a company which strikes a rich vein or contemplates takeover; or a building society which contemplates demutualisation. And yet no one suggests that those unlucky enough to miss out on these bonanzas have any claim in law.

[79] The RAC's ex-members' cri de coeur is, as I began by saying, understandable. Given, however, that they cannot frontally attack their directors for not keeping them informed – and thereby giving them an opportunity to prolong a membership they had not otherwise thought worth maintaining – it seems to me not merely contrived but unattractive to criticise, not demutualisation itself (the necessary foundation of their damages' claim), but rather the inevitable expense of demutualising. And the same can be said too of their further complaints about the directors gaining personal advantages from the eventual scheme – complaints which might more logically come from members who remained than those who resigned (certainly absent any shred of evidence that the directors were allowing numbers to dwindle to enhance the value of their own individual memberships).

[80] Although agreeing with all that Mummery LJ has said I have been anxious in addition to indicate my own basic reasoning for rejecting this claim. One way or another I have no doubt that it is worthless and must fail. I too would dismiss the appeal.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Kenneth Dow Esq Barrister