In re DNick Holding plc

Eckerle and others *v* Wickeder Westfalenstahl GmbH and another

[2013] EWHC 68 (Ch)

2012 Nov 15;
2013 Jan 23

Norris J

Company — Shares — Rights attached to — Majority resolution to re-register public limited company as private company — Statutory provision allowing dissentient holders of company's issued share capital to make application for cancellation of resolution — Claimants having beneficial interest in shares but not registered shareholders — Whether "holders of . . . issued share capital" including those having ultimate economic interest in shares held by nominee — Whether enfranchisement provisions enabling claimants to exercise rights otherwise vested in members — Whether claimants having standing to make application — Companies Act 2006 (c 46), ss 98(1), 145

The claimants applied pursuant to section 98 of the Companies Act 2006[1] for relief in respect of a special resolution of the second defendant, a public limited company, for its re-registration as a private company. By subsection (1) such an application could only be made by the "holders" of not less than a specified proportion of the company's issued share capital. The claimants were not registered shareholders in the company but were the ultimate economic owners of certain beneficial interests in the ordinary shares. The first defendant, which was the largest shareholder in the company, applied for the claim to be stuck out or, in the alternative, for summary judgment, on the ground, inter alia, that since the claimants were not holders of the company's issued share capital they had no standing to make a claim for relief under section 98.

On the application and the question whether the enfranchisement provisions in section 145 of the 2006 Act should be construed so as to enable the holder of the ultimate economic interest to exercise rights otherwise vested in a member to protect the economic value of the shares—

Held, giving summary judgment for the defendants, that, for the purposes of section 98 of the Companies Act 2006, "the holders" of a company's issued share capital were those who were registered as the members holding them, not the persons who owned the ultimate economic interest in shares registered in somebody else's name; that the modest protection for indirect investors afforded by section 145 of the 2006 Act did not extend to conferring rights enforceable against the company by anyone other than the registered shareholders; and that, accordingly, since the claimants had no standing under section 98(1) to apply for the cancellation of the resolution, their claim had no real prospect of success (post, paras 15–16, 19, 26, 30, 31, 33).

Dicta of Lord Templeman in *National Westminster Bank plc v Inland Revenue Comrs* [1995] 1 AC 119, 126, HL(E) and of Lord Collins of Mapesbury JSC in *Enviroco Ltd v Farstad Supply A/S* [2011] 1 WLR 921, paras 37–39, SC(E) applied.

Per curiam. Although the decision deprives the claimants as indirect investors of the sort of protection which those who formulated the 2006 Act thought ought to be extended to minority shareholders, to reach any other conclusion would require an impermissible form of judicial legislation (post, para 31).

[1] Companies Act 2006, s 98: see post, para 10.
S 145: see post, para 25.

A The following cases are referred to in the judgment:

Astec (BSR) plc, In re [1998] 2 BCLC 556
Enviroco Ltd v Farstad Supply A/S [2011] UKSC 16; [2011] 1 WLR 921; [2011] Bus LR 1108; [2011] 3 All ER 451; [2011] 2 All ER (Comm) 269; [2011] 2 Lloyd's Rep 72, SC(E)
National Westminster Bank plc v Inland Revenue Comrs [1995] 1 AC 119; [1994] 3 WLR 159; [1994] 3 All ER 1, HL(E)
B

The following additional case was cited in argument:

Company (No 005685 of 1988), In re A, Ex p Schwarz (No 2) [1989] BCLC 427

APPLICATION

By a Part 8 claim form dated 22 August 2012 the claimants, Peter Eckerle, C Willem Bertheux and Stephen Hallensleben, claiming to be minority shareholders of the second defendant, DNick Holding plc, by virtue of their 6% aggregate holdings in dematerialised shares in the second defendant so as to give them standing pursuant to section 98(1) of the Companies Act 2006 to apply for the cancellation of a resolution of the second defendant for its re-registration as a private company, sought an order, inter alia, that (1) the D resolution be cancelled unless the first defendant, Wickeder Westfalenstahl GmbH, which was the largest shareholder in the second defendant, offered to purchase their shares at a fair price; or, in the alternative, (2) the second defendant purchased their shares at a fair price and its share capital were reduced accordingly.

By an application notice dated 25 September 2012 the first defendant applied for the claim to be struck out pursuant to CPR r 3.4(2)(a) or, in the E alternative, summary judgment pursuant to CPR Pt 24 on the grounds that (1) the claimants had no locus standi to bring the claim because they did not hold at least 5% of the aggregate issued share capital or any class of issued share capital in the second defendant within the meaning of section 98(1)(a) of the 2006 Act so as to enable them to apply to the court for relief under section 98(1); and (2) the court lacked jurisdiction to exercise its power to F adjourn the proceedings under section 98(4)(b) of the Act or make a share purchase order in favour of the claimants pursuant to section 98(5)(a) of the Act because the claimants were neither "dissentient members" of the second defendant within the meaning of section 98(4)(b) of the Act nor "members" of it within the meaning of section 98(5)(a) of the Act.

The facts are stated in the judgment.

G *Daniel Lightman* (instructed by *Orrick Herrington & Sutcliffe (Europe) LLP*) for the first defendant.

The claimants are not members of the company for the purposes of section 112 of the Companies Act 2006, or holders of issued share capital in it, and cannot bring an application under section 98(1) of the Act. The wording "the holders of not less in the aggregate than 5% in nominal value of the company's issued share capital" in section 98(1)(a) does not include H holders of beneficial interests in, or rights over, shares in a company. That wording refers only to the registered holders of 5% or more of the company's issued share capital for a number of reasons.

The two other scenarios in section 98(1) for making an application are confined to applications by registered shareholders in a company. It would

be anomalous if the class of potential applicants under paragraph (a) were significantly wider than under paragraphs (b) and (c): see *Enviroco Ltd v Farstad Supply A/S* [2011] 1 WLR 921, 930–931.

There is no special provision to apply section 98 to persons not on a company's register of members. The language of sections 97 and 98 is consistent with section 98(1)(a) of the Act being confined to registered members.

There is no jurisdiction under section 98(4)(b) to adjourn the proceedings or to make a share purchase order in favour of any or all of the claimants under section 98(5)(a) because the claimants are not registered holders of issued share capital in the company and are therefore neither "dissentient members" within the meaning of section 98(4)(b) nor "members" within the meaning of section 98(5)(a). It would be surprising if the court could make a share purchase order in respect of shares of persons who had neither sought themselves any such relief under section 98 nor appointed the applicant to do so on their behalf under section 98(2), or, as in the present proceedings, make an order for the purchase of shares held by a member who was not a party to the litigation.

The word "person" in the limitation in section 98(1) means "member". Section 97 provides that a company may be re-registered as a private limited company if a special resolution is passed to that effect, the relevant documents are delivered to the registrar of companies and the specified conditions in section 97(2) are met. It is plain from paragraph 208 of the Explanatory Notes to the Act that section 97(2)(a)(i) is intended to paraphrase and reflect the limitation in section 98(1).

The wording in sections 113, 286 and 370 of the Act, similar to that employed in section 98(1)(a), refers to members of the company. That wording should not mean something different from "the holders of not less in the aggregate than 5% in nominal value of the company's issued share capital" in section 98(1)(a).

The "holder" of a share means the registered shareholder: see *National Westminster Bank plc v Inland Revenue Comrs* [1995] 1 AC 119, 124, 126.

It is reasonable to infer on the ground of certainty that Parliament intended to confine section 98(1)(a) to a company's registered shareholders: see the *National Westminster Bank plc* case, at p 147.

The Act made new provisions that expressly concern and confer rights on holders of beneficial interests. Section 145 of the Act allows for indirect investors to enjoy membership rights where, as in the present case, a company's articles so provide. It is clear from section 145(4) that only a registered shareholder can enforce any of those rights against a company. Only a registered shareholder has the right to transfer shares. It would be anomalous if section 98 granted holders of beneficial interests in shares a right to issue proceedings against a company where they are unable to enforce the rights given to them by section 145 against the company.

The exercise which the claimants require from the court would be "an impermissible form of judicial legislation": see *Enviroco Ltd v Farstad Supply A/S* [2011] 1 WLR 921, para 49. The claimants' construction, aside from creating considerable uncertainty as to who has standing to apply under section 98, would have the wholly undesirable consequence that both the legal and beneficial owners of a share could theoretically issue separate applications in respect of the same interest. The claimants' understanding

A that they always considered themselves to be shareholders in the company has no bearing on whether they have standing under section 98(1): see *In re Astec (BSR) plc* [1998] 2 BCLC 556, 589.

Stephen Horan (instructed by *asb Law LLP, Crawley*) for the claimants.

No beneficial shareholder could ever bring an application under section 98 if only a registered shareholder could do so. The claimants are
B not permitted to call for the transfer from the nominee of the legal title to the shares and cannot be registered as their legal owners. The nominee is prohibited from bringing an application because it nominee voted for and against the resolution on behalf of shareholders and, pursuant to section 98(1), is therefore "a person who has consented to or voted in favour of the resolution". Section 633 of the Companies Act 2006 contains an
C identical provision restricting those persons who have consented to or voted in favour of a resolution from objecting to a variation of class rights. Not allowing non-registered members to make an application under section 98 would have the effect of permitting the company to contract out unilaterally of a mandatory statutory protection. The court should be wary of depriving dissenting shareholders of their statutory right to object under section 98.

It does not follow from the language of section 98 that the only persons
D entitled to make an application are "members" within the meaning of section 112 of the Act. Section 98(1)(a) refers to "holders" whereas paragraphs (b) and (c) refer to "members". Sections 303, 314, 338 and 476 use the formulation "members representing". The draftsman could have used that formulation if intending to restrict section 98(1)(a) to members. The use of the word "person" in section 98(1) is indicative of a broader pool
E of applicants than simply "members". Similarly, sections 98(2) and 153(2)(c)(d) refer to "persons".

Section 633 uses the formulation "holders" and, like section 98, also limits nominees' ability to bring an application. The use of "holders" in both sections might therefore be justified on the basis that nominees would sometimes be unable to bring an application on behalf of beneficially interested holders and in some exceptional circumstances there may be a
F need to depart from the strict requirement of being on the register to get standing. A finding that the claimants are "holders" will not necessarily have an application wider than sections 98 and 633, which use the same linguistic formulation. [Reference was made to *In re A Company (No 005685 of 1988), Ex p Schwarz (No 2)* [1989] BCLC 427.]

Section 98(4) gives the court the widest discretion to make an order "on
G such terms and conditions as it thinks fit". The breadth of that wide discretion is not limited by the specific powers in section 98(4)(b)(5)(a) relating to the purchase of the shares of dissentient members.

The claimants, as beneficial shareholders, are enfranchised by section 145 of the Act and article 79 of the company's articles to enjoy and exercise the rights of the nominee as if they were members of the company voting on the special resolution under section 97 of the Act and to use the consequent
H rights as dissentient voters to object to the special resolution under section 98. Article 79 expressly acknowledges that the voting of shares by beneficial shareholders is entirely independent of the nominees. Applying section 145(1), it would be a perverse reading of article 79 if the enfranchised shareholders permitted to vote on a section 97 resolution were

to be excluded from section 98 but that it was the company's intention that the nominee could instead be able to make a section 98 application.

Section 145(2) provides that *anything* required or authorised by any provision of the Act to be done by or in relation to a member may instead be done by a nominee. This must encompass the ability to make an application under section 98 as if the claimants were members of the company. Section 145(4)(a) only restricts an enfranchised person from enforcing its rights *against a company*. The ability to object under section 98 is not a right enforceable against the company. It is a statutory right of a dissenting shareholder to make an application to cancel a shareholders' resolution as contemplated by section 145(2).

Lightman in reply.

The corporate structure of the company is not unusual one and so it cannot be said that the present circumstances are unique or that any determination of the present application would have no ramifications for other English registered public limited companies. Section 98 is not merely a statutory entitlement which inexorably follows on from a right to vote at a general meeting of a company's members. Rather, it is a right against the company enabling an application to be made to the court for an order reducing the company's share capital, altering its articles and unpicking the change from a public limited company to a private company. That is not something which section 145(4) is intended to empower a nominee to do.

The second defendant company did not appear and was not represented.

The court took time for consideration.

23 January 2013. **NORRIS J** handed down the following judgment.

1 DNick Holding plc ("DNick") was incorporated in England as a public company: but it was managed and operated from Germany and its shares were only listed for trading on German exchanges. Under the rules of those exchanges all transactions were in dematerialised form.

2 In April 2011 DNick sold one of its subsidiaries and shortly thereafter announced its intention to make a dividend distribution to DNick's shareholders.

3 However, at the annual general meeting ("AGM") held on 30 June 2011 the proposed dividend distribution was rejected by a majority of the shareholders' votes. The majority votes were cast by Wickeder Westfalenstahl GmbH ("Wickeder") (which exercised 24·89% of the votes) and by Lustre Beteiligungs UG ("Lustre") (which exercised 25·88% of the votes). Lustre was owned by the chief executive officer of Wickeder ("Dr Platt") and acted in concert. Acting in concert, Wickeder and Lustre also removed all of the incumbent directors of DNick and installed their own team.

4 Shortly thereafter Wickeder acquired from third parties or had transferred to it by Lustre sufficient shares to be able to exercise 75·005% of the votes, enough to secure the passing of a special resolution.

5 On 31 May 2012 the new board announced its intention to propose at the AGM the cancellation of the listing of DNick's shares on all German exchanges and the company's re-registration as a private limited company. The intimation of such a proposal had an impact upon the marketability of

A DNick's shares (and the implementation of that proposal is likely to make that impact permanent). On 30 May 2012 DNick's shares had been quoted on German exchanges at €9 per share: but following the announcement they fell to €7·69 and have since fallen to €7·60.

6 The AGM on 26 July 2012 was attended by those holding 83·71% of the votes. Wickeder (holding 75·005% of the votes) secured the implementation of the board's proposals.

B **7** Mr Eckerle, Mr Bertheux and Mr Hallensleben ("the claimants") claim to be minority shareholders of DNick (holding between themselves some 6% of DNick's issued shares). It is their account of events which I have set out above and which (for the purpose of this application) I take to be true.

8 In August 2012 the claimants commenced Part 8 proceedings in the C Companies Court alleging that their aggregate holding of DNick's shares gave them standing to apply under section 98 of the Companies Act 2006 for the cancellation of the resolution for the re-registration of DNick as a private company. In those proceedings they seek (amongst other relief): (a) an order for the cancellation of the resolution unless Wickeder offers to purchase their shares at a fair price; alternatively (b) an order that DNick should purchase their shares at a fair price and for its share capital to be reduced accordingly.

D **9** Section 97 of the 2006 Act provides:

> "(1) A public company may be re-registered as a private limited company if— (a) a special resolution that it should be so re-registered is passed, (b) the conditions specified below are met . . .
>
> "(2) The conditions are that— (a) where no application under section 98 for cancellation of the resolution has been made— (i) having E regard to the number of members who consented to or voted in favour of the resolution, no such application may be made, or (ii) the period within which such an application could be made has expired . . ."

10 Section 98 of the 2006 Act provides:

> "(1) Where a special resolution by a public company to be re-registered F as a private limited company has been passed, an application to the court for the cancellation of the resolution may be made— (a) by the holders of not less in the aggregate than 5% in nominal value of the company's issued share capital . . . (b) if the company is not limited by shares, by not less than 5% of its members; or (c) by not less than 50 of the company's members; but not by a person who has consented to or voted in favour of the resolution."
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> G "(3) On the hearing of the application the court shall make an order either cancelling or confirming the resolution.
>
> "(4) The court may . . . (b) if it thinks fit adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient members . . .
>
> "(5) The court's order may, if the court thinks fit— (a) provide for the H purchase by the company of the shares of any of its members and for the reduction accordingly of the company's [share] capital . . ."

11 Wickeder applies to strike out the claim form pursuant to CPR r 3.4(2)(a) as disclosing no reasonable grounds for bringing the claim; or alternatively for summary judgment under CPR Pt 24. CPR r 3.4(2) requires

the court to consider whether "the statement of case" discloses any reasonable ground for bringing or defending the claim. CPR Pt 24 requires the court to consider not only "the statement of case" but also the evidence that has been or may be adduced to prove the facts asserted in the statement of case, in order to assess whether "that claimant has no real prospect of succeeding on the claim". A

12 In my judgment the summary disposal of this case must be approached by reference to the considerations set out in CPR Pt 24 as elucidated by the well known authorities. This is a straightforward exercise in the instant case since there is no substantial dispute on the facts: the dispute is about the construction of the provisions of section 98 that I have cited. B

13 Wickeder advances two arguments: (a) the claimants do not qualify as "holders of not less in the aggregate than 5% . . . of the company's issued share capital" and so have no standing to apply and no capacity to be "dissentient members"; and (b) the entity in whose name their interests are registered in fact voted in favour of the resolution and is therefore itself disqualified from seeking the relief which the claimants now seek. C

14 The following may be taken as common ground (or correct in law) for the purposes of this application:

(a) There are 5,671,318 issued ordinary shares in DNick. D

(b) DNick's share register records only two registered shareholders: Dr Platt holding one share and the Bank of New York Depository (Nominees) Ltd ("BNY") holding the balance.

(c) BNY acts as the common depository agent of the issued shares in DNick, holding those shares on trust for the holders of accounts with Clearstream according to their respective holdings of "Clearstream Interests" ("CIs"). E

(d) Clearstream is the clearing and settlement division of Deutsche Börse, through which trades on the relevant exchange between Clearstream account holders are transacted electronically. The Clearstream account holders must themselves be banks or financial institutions and cannot be individuals. F

(e) What is actually traded on Deutsche Börse are not the shares in DNick but CIs (representing the underlying ownership rights in DNick shares).

(f) The actual trades themselves are trades between the registered Clearstream account holders and are conducted on behalf of the customers of those account holders, who are the end investors.

(g) When para 2 of the claim form pleads that the claimants "have an aggregate shareholding of 7·2% in nominal value of the issued shares in [DNick]" that is not literally true. The literal truth is that the claimants hold the ultimate economic interests in underlying securities amounting to a specified percentage of the shares held by BNY on trust for the Clearstream account holders whose customers the claimants are. G

(h) Under article 79.2 of DNick's articles "each person who is a CI holder at the relevant CI record date" can either direct the registered holder of the share how to exercise the vote attaching to the relevant underlying share or to appoint a proxy to do so (who might be the end investor). For this purpose it is important to be able to identify the CI holder: this is done by DNick recognising the electronic register operated by Clearstream to record the results of transactions on the Deutsche Börse between Clearstream H

A account holders: see article 60.3. (I should record that Mr Horan ran a primary case that the reference to "CI holder" was a reference to the owner of the ultimate economic interest in the relevant DNick shares i e the claimants. But I do not consider that to be a sustainable position. Reading the definitions of "CI" and "CI Holder" (used in the articles) together, a "CI holder" means "the holder of [an interest in the shares in the capital of the
B company traded and settled through Clearstream]": they are identified (according to the definition of "CI register") on "the electronic register of CI holders . . . maintained by Clearstream". The only interests traded and settled through Clearstream are the interests of Clearstream account holders. Only the banks and financial institutions which are Clearstream account holders, and between whom those trades are conducted and settled on the exchange, and whose trades are recorded on the electronic register, fit
C this description).

(i) This recognition of the identity of the account holders (not the identity of the ultimate holders of the economic interests) does not, however, mean that DNick recognises beneficial interests. Article 10 provides:

> "Except as required by law or pursuant to the provisions of these articles, no person shall be recognised by the company as holding any
D shares upon trust, and except only as by these articles or by law otherwise provided . . . the company shall not be bound by or be compelled in any way to recognise even when having notice thereof, any equitable . . . interest in any share . . . or any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder."

E (j) Thus when DNick pays a dividend it pays it to BNY which then in turn transfers the payment to Clearstream which then credits the accounts of the relevant account holders in accordance with their CIs, and those account holders then in turn account to their customers (such as the claimants). The articles provide (in article 60.3(c)) that DNick may at its election short circuit the first step in that process and credit the Clearstream account holder directly.

F (k) Sometimes in practice there was an informal short circuiting of the process for voting. Thus at the 2007 and 2008 AGMs Mr Hallensleben was permitted to exercise votes attaching to shares upon producing a statement from Citibank (one of the Clearstream account holders that he used) showing an entitlement to an interest in some DNick shares (instead of producing a document from BNY appointing him proxy).

G (l) Sometimes the holders of the ultimate economic interests were loosely referred to as "shareholders". The press release relating to Wickeder's acquisition of its interest in DNick referred to an acquisition of a "shareholding": and this usage was also employed by Wickeder in shareholder presentations. In a letter summoning an extraordinary general meeting in February 2012 Wickeder and Lustre were said to be "currently" listed in the company's register as being the beneficial owners of 24·89% and
H 25·88% respectively of the company's shares (notwithstanding the company maintained no such register and Wickeder and Lustre owned no such shares). The letter was addressed "Dear Shareholder" although obviously directed to someone other than BNY (since it advised contacting "your depository bank").

(m) The summoning of the relevant AGM was reported by the chief executive officer of DNick as resulting from a requisition from BNY "on behalf of Wickeder (being a shareholder of the company holding not less than one tenth of the paid up share capital of the company)". Once the meeting was summoned Mr Hallensleben then had to request a voting notice from the bank or financial institution of which he was a customer. He contacted Postbank AG (another institution that he used) and he was in due course informed by them that his intention to attend and vote at the AGM had been registered. The admittance card in due course recorded that: "Stephan Hallensleben holding 13,544 shares is entitled to attend the 2012 annual general meeting of DNick . . ."

(n) The position of DNick and its shareholders is probably not unique. In closing Mr Lightman said on instructions that on the Frankfurt exchange (one of those on which DNick's shares traded) as at June 2012 there were 78 English public limited companies whose shares were listed for trading. At the time Mr Horan did not challenge this; but in commenting on the draft judgment which I circulated Mr Horan says that this material is not in evidence and that it is not established that the other listed companies have the same structure as DNick. But I shall proceed on the footing that Mr Lightman is right. If DNick's position is unique or virtually unique then it might be possible to view it as a "hard case" which ought not overly to influence the meaning of the section. But if the problem is more widespread, then Mr Horan's submission that there is a serious loophole in the protection afforded to minority shareholders gains some traction.

15 For the claimants, Mr Horan submitted that DNick had, in order to secure a listing on the German market, established a structure that (in consequence of having to use the Clearstream settlement system) had only one substantial shareholder. To construe the provisions of section 98 of the 2006 Act without one eye on its purpose would be to disenfranchise those who were, in all but name, DNick's shareholders. To avoid that consequence: (a) section 98 should be construed with particular regard to its deliberate use of the terms "holder" and "person" in relation to those by whom an application to cancel the resolution may be made (rather than employing the term "member"); (b) alternatively, the enfranchisement provisions in section 145 of the 2006 Act should be approached purposively so as to enable the holder of the ultimate economic interest to exercise rights otherwise vested in a member to protect the economic value of the shares; (c) alternatively, the common treatment of the holder of the ultimate economic interest as if he were a shareholder (by both Wickeder and DNick) should mean in the present case that the prospects of the claimants showing that they were entitled to the relief they claimed cannot be dismissed as fanciful.

16 In my judgment, attractively as these arguments were presented, they are not sound: and the submissions of Mr Lightman are correct in law.

17 First, the architecture of company law employs the concept of "member" or "shareholder" as a key element. Lord Templeman put the matter crisply in *National Westminster Bank plc v Inland Revenue Comrs* [1995] 1 AC 119, 126 when (speaking of the distinction between allotment and issue of shares) he said:

> "The [Companies Act 1985] preserves the distinction in English law between an enforceable contract for the issue of shares (which contract is

A constituted by an allotment) and the issue of shares which is completed by registration. Allotment confers a right to be registered. Registration confers title. Without registration, an applicant is not the holder of a share or a member of the company: the share has not been issued to him . . . No person can be a shareholder until he is registered. A person who is not a shareholder by registration cannot claim that the share has been issued to him . . ."

B

18 So a "shareholder" or "the holder of a share" (the terms are interchangeable) is one (and only one) whose name is registered in the register of members. There would in my view have to be an extremely strong reason to read the expression "the holders of not less in the aggregate than 5% in nominal value of the company's issued share capital" in a sense different from that indicated by the orthodox understanding of company law.

C

19 Second, the 2006 Act proceeds entirely upon this basis. The definition of "member" is to be found in section 112. Under section 112(1) every subscriber to the company's memorandum becomes, upon its registration, a member and must be entered as such in the register of members. By section 112(2) every other person who agrees to become a member "and whose name is entered in its register of members" is a member

D of the company. There must (by section 113(3)(a)) be entered not only the name of the member but also "a statement of . . . the shares held by each member". So that person is properly described as "a holder" of the shares: and joint holders are specifically so described in section 113(5) of the 2006 Act. Again, in section 122 the 2006 Act provides that where a share warrant is issued the company must amend the register "so that no person is named on the register as the holder of the shares specified in the warrant".

E Again, by section 124 of the 2006 Act, where a company purchases its own shares as treasury shares "the company must be entered in the register as the member holding those shares". So when section 98 refers to "the holders of not less in the aggregate than 5% in nominal value of the company's issued share capital" the "holders" it is referring to are those who are registered as the members holding those shares: not to the persons who own the ultimate

F economic interest in shares registered in somebody else's name.

20 Thirdly, this is apparent from the internal logic of section 98 itself. Section 98(1) of the 2006 Act identifies who may make the application. They are (a) "the holders" of a specified proportion of the issued share capital; or (b) (if the company is not limited by shares) a specified proportion of its "members"; or (c) not less than 50 "members". It does not make sense that two of the criteria should refer to "members" but the third should

G disregard membership and look to economic interest.

21 Neither would it make sense for certain sorts of relief only to be available to certain sorts of applicant. Thus the court can only adjourn the proceedings so that an arrangement can be made "for the purchase of the interests of dissentient members"; so membership (not ownership of an economic interest) defines the class from whom interests may be acquired. The court might alternatively "provide for the purchase by the company of

H the shares of any of its members". But if the "holder" of an ultimate economic interest in shares (but who is not a "member" and not someone whom the register records as holding shares) were to make an application how could such relief be granted? The section constitutes a coherent whole if each of those able to apply is able to be granted any of the relief that is available.

22 Fourthly, the structure of the 2006 Act is such that where a right is directly enforceable by a non-member then specific provision is made. So in section 260 it is provided that a "derivative claim" may be brought by a "member of a company": and it is then provided by section 260(5)(c) that references to "a member" include "a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law". Similar provisions are to be found in section 367 and section 994(2) of the 2006 Act. The position was summarised in these terms by Lord Collins of Mapesbury JSC in *Enviroco Ltd v Farstad Supply A/S* [2011] 1 WLR 921, paras 37–39:

> "37. The starting point is that the definition of 'member' in what is now section 112 of the 2006 Act . . . reflects a fundamental principle of United Kingdom company law, namely that, except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person . . .
>
> "38. Ever since the Companies Clauses Consolidation Act 1845 (8 & 9 Vict c 16) and the Companies Act 1862 (25 & 26 Vict c 89) membership has been determined by entry on the register of members. The companies legislation proceeds on that basis and would be unworkable if that were not so . . .
>
> "39. For those and other purposes the legislation makes it clear that the member is the person on the register, and where it is necessary to apply the legislation to persons who are not on the register, special provision is made . . ."

Neither the reference to "the holders of not less in the aggregate than 5% in nominal value of the company's issued share capital" nor that to "a person who has consented to or voted in favour of the resolution" is a provision which applies section 98 to persons who are not on the register.

23 Fifthly, the Explanatory Notes to the 2006 Act and the commentators are clear on the point. Para 210 of the Explanatory Notes says:

> "where a public company has passed a special resolution to re-register as a private limited company, the requisite majority of the company's members (see subsection (1)) may apply to the court for the cancellation of this resolution."

The editors of *Annotated Companies Legislation*, 2nd ed (2012), ed Professor John Birds, comment on section 98, at p 130, para 7.98.02:

> "This section replaces section 54(1) to (3), (5) to (6) and (8) of the 1985 Act. As under the 1985 Act, members who, in terms of their number or the percentage of shares they hold, exceed a certain threshold may apply to the court for the cancellation of a resolution to re-register the company as a private company. This is an important protection for shareholders, particularly if the company was previously listed, since as a result of becoming a private company, there will no longer be a liquid market for the company's shares and transferability of shares may be restricted."

No commentator suggests that on its true construction section 98 applies not to the holders of shares but to the holders of economic interests in shares.

24 Sixthly, Part 9 of the 2006 Act does not avail the claimants. The articles of DNick provide that the holder of a CI may exercise rights conferred by article 79.2, receive a voting notice under article 79.3 and may be the direct recipient of dividends. The "holder" of the CI is the entity that appears on the electronic register maintained by Clearstream (i e the bank or financial institution which is the account holder). For ease of exposition of the articles I will refer to the holder of the CI as "the account holder" in order to distinguish that entity from the claimants (who are the customers of that account holder). Article 79.2 enables the account holder to direct BNY as to how votes shall be cast; and to facilitate that, DNick is required to instruct BNY to provide a CI voting notice to each account holder who appears on the Clearstream register at the record date. The account holder can then direct BNY how to cast the relevant votes; or require BNY to appoint the account holder as proxy; or require BNY to appoint the account holder's nominee (who may be the ultimate customer or anybody else) to be BNY's proxy. In this way the articles confer certain rights on the account holder to direct how BNY's voting rights as member shall be exercised. These articles are the means by which BNY nominates the account holder as entitled to enjoy or exercise BNY's voting rights attaching to the shares in which the account holder holds the beneficial (but not legal) interest. The articles confer no rights on the customers of the account holders (such as the claimants). If the claimants have any rights it is because of the terms of their contract with the account holder.

25 Section 145(1) of the 2006 Act applies

> "where provision is made by a company's articles enabling a member to nominate another person or persons as entitled to enjoy or exercise all or any specified rights of the member in relation to the company."

Section 145(2) then provides:

> "So far as is necessary to give effect to that provision, anything required or authorised by any provision of the Companies Acts to be done by or in relation to the member shall instead be done or (as the case may be) may instead be done, by or in relation to the nominated person . . . as if he were a member of the company."

But according to section 145(4)(a) the section itself and the provision in the articles do not "confer rights enforceable against the company by anyone other than the member".

26 These provisions were introduced in recognition of the fact that investors increasingly hold their shares through intermediaries (though the Clearstream system operated in Germany is markedly different from the Crest system operating in this country). As explained in *Hanningan*, *Company Law*, 3rd ed (2012), para 5-60:

> "It is often argued that shareholder engagement demands some mechanism whereby the indirect investor, the actual provider of the capital, can engage with and be recognised by, the company . . . The idea of enfranchising or involving the indirect investor seems attractive, but in practice it is difficult to devise a workable, cost-effective, mechanism . . . Traded companies with large numbers of registered shareholders and unquantifiable numbers of beneficial interests behind them are concerned that a liberal approach to enfranchising those beneficial interests could

lead to administrative chaos and dramatically increase the costs of maintaining and operating their share registers. The Companies Act 2006 Part 9 is therefore a modest step forward, reflecting the numerous compromises necessary to gain parliamentary approval, rather than a radical departure from the general rule that the company looks to the registered shareholder."

The "modest step" as opposed to the "radical departure" is achieved through the mechanism of section 145(4). That section does not confer rights enforceable against DNick by anyone other than BNY and Dr Platt.

27 Mr Horan submitted that the "rights" that were not enforceable against the company were rights arising under the articles, and the prohibition did not relate to statutory rights that were exercisable against the company. On his argument the account holders (he would say the claimants directly) may enforce statutory rights against DNick. He referred to the commentary in *Buckley on the Companies Acts*, looseleaf ed, vol I, Division 2 (Members), para 1675 which is in these terms:

"Consistently with the statutory contract between the company and its members, created by section 14 of the Companies Act 1985 . . . paragraph (a) provides that the rights conferred pursuant to this section and provision in the company's articles are not enforceable against the company by anyone other than the member. So if the company fails to give notice of a general meeting to a nominated person or refuses to accept the votes of a person appointed as proxy by a nominated person, any challenge to that would have to be by the member rather than by the nominated person. However, it appears that, if directors fail duly to call a general meeting of a company required under section 303 of the Companies Act 2006 by nominated persons, the nominated persons will be able themselves to call a general meeting pursuant to sections 305 and 145(2) of the Companies Act 2006."

He suggested that this paragraph demonstrated a distinction being drawn between rights arising under the articles and statutory rights.

28 He made a similar point about a passage in *Gower & Davies*, *Principles of Modern Company Law*, 9th ed (2012), para 15-36:

"where rights under the articles are transferred to a nominated person, so are the linked statutory rights. A good example is the right to vote. As we have seen above, voting rights in a company are not allocated by the statute but by the company, normally through its articles. If the articles permit or require those voting rights to be transferred to a nominated person and the right to vote is so transferred by a particular member, then section 145(3)(f) ensures that the statutory right to appoint a proxy to vote at the meeting on behalf of the voter is also transferred to the nominated person.

"Precisely which statutory rights are transferred under the section to a nominated person will depend on which contractual rights have been transferred to the nominated person under the articles. The section potentially transfers eight statutory rights, but operates only 'so far as necessary to give effect to' a transfer of rights effected under the company's articles. Where the right to vote is transferred, it seems that most of the listed statutory rights will also be transferred . . . Thus, there

A is a genuine transfer of statutory powers and rights to the nominated person and away from the member, not the creation of a parallel set of provisions. However, no rights enforceable against the company by anyone other than the member are so created by the section *or* by the provisions in the articles creating the transfer system."

29 But in my judgment neither of the passages supports the distinction B for which Mr Horan contends and neither leads to the conclusion that the account holders (let alone the claimants) can commence proceedings under section 98 of the 2006 Act against DNick (or, for that matter, Wickeder). These passages simply mean that the statutory rights that are directly exercisable by the nominated person are those which enable the right conferred and transferred by the articles to be effectively exercised. That is why section 145(2) operates "So far as is necessary to give effect" to the C provision in the company's articles enabling a member to nominate another person as entitled to enjoy or exercise any specified rights of the member in relation to the company. They do not mean that if the effective exercise of the transferred right produces a result that is not to the taste of the nominated person then the nominated person can, in order to bring about his desired outcome, himself use any of the provisions of the 2006 Act available to the D transferring member, whether that provision be section 98 or section 994.

30 I am therefore not persuaded either (a) that upon the true construction of section 98 the claimants are persons who are "holders" of shares of the relevant value so as to entitle them to bring the claim; or (b) that section 145 enables them to bring the claim. I am also not persuaded that the practice of Wickeder in relation to its press releases or the terms of its correspondence, or the practice of DNick in relation to admittance to AGMs or the terms in which E it writes to its shareholders can affect the legal right to obtain the relief sought. Entitlement to that relief depends on the terms of the statute, not upon the expectations which the claimants may have had when they acquired the CIs or which have been raised by expressions subsequently used in communications. I would apply the principle summarised by Jonathan Parker J in *In re Astec (BSR) plc* [1998] 2 BCLC 556, 589:

F "the concept of 'legitimate expectation' . . . can have no place in the context of public listed companies . . . its introduction in that context would, as it seems to me, in all probability prove to be a recipe for chaos. If the market in a company's shares is to have any credibility members of the public dealing in that market must it seems to me be entitled to proceed on the footing that the constitution of the company is as it G appears in the company's public documents, unaffected by any extraneous equitable considerations and constraints."

Those who acquired interests in DNick have their rights and obligations determined according to the articles and the 2006 Act, not according to some indulgence that may have been extended to an individual investor, or the terms of correspondence sent by other investors or by the company itself.

31 I accordingly am persuaded that the proceedings commenced by the H claim form have no real prospect of success. I am conscious that my reading of the Act does deprive the claimants as indirect investors of the sort of protection which those who formulated the 2006 Act thought ought to be extended to minority shareholders. That is not a particularly comfortable conclusion at which to arrive: but I consider that I would have to embark

upon what Lord Collins of Mapesbury JSC called in *Enviroco Ltd v Farstad Supply A/S* [2011] Bus LR 1108, para 49 "an impermissible form of judicial legislation" to reach any other conclusion.

32 I have considered whether the proceedings might be saved by amendment (by adding BNY as a party at the direction of the account holders or on the instructions of the claimants). This course is not open because an application under section 98 of the 2006 Act is not open to "a person who has consented to or voted in favour of the resolution". While section 152(1) enables BNY to exercise (through the appointment of proxies) votes attaching the various of its shares both for and against the resolution to re-register DNick as a private company, this does not overcome the difficulty that for the purposes of section 98 BNY was a "person" which did vote in favour of resolution. This was pointed out (in relation to an earlier provision) in the report of the Jenkins Committee in 1962 (*Report of the Company Law Committee* (Cmnd 1749) which said, in para 193:

> "Under section 72 a shareholder who has assented to a variation of the special rights attached to his shares cannot apply to the court for the variation to be cancelled. This can cause difficulty to a nominee who holds shares on behalf of a number of persons, for the fact that he has assented to a variation as the nominee of one of those persons deprives him of the right to apply, as the nominee of the other, for the variation to be cancelled. While we recognise that the condition is reasonable where a member holds all his shares beneficially or on behalf of one other person we do not think that there is a substantial likelihood of such persons applying to the court, and we think that the difficulty of the nominee holding for different interests could best be met by repealing the condition."

But the committee's recommendation was not adopted. As a result, commentators upon the 2006 Act are clear. In the *Annotated Companies Legislation* the editors state of section 98(2), at p 130, para 7.98.04:

> "If a nominee holding shares for a number of different shareholders has voted for the resolution on behalf of some shareholders and against the resolution on behalf of others, it will be unable to participate in the application as it will be a 'person' who has consented to or voted in favour of the resolution."

33 In the result I give summary judgment for the defendants. I will confirm the resolution.

34 I will hand down this judgment at 10.30 a m on 23 January 2013. I do not expect attendance of legal representatives. Any applications arising out of this judgment will be dealt with at a hearing to be arranged through the usual channels at the earliest convenience of those legal representatives.

Application granted.
Judgment for defendants.

Scott McGlinchey, Barrister