IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MR JUSTICE NEUBERGER
CHANCERY DIVISION

No. A3/2000/0429/6326

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 14th December, 2000

B e f o r e:

LORD JUSTICE SIMON BROWN
LORD JUSTICE MUMMERY
AND
LORD JUSTICE LATHAM

– – – – – – –

(1) BRUCE PESKIN (2) KEVIN MILNER

Appellants

– v –

JOHN ANDERSON & ORS

Respondents

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Geoffrey Vos QC & Daniel Lightman (instructed by Class Law for the Appellants)
Lord Grabiner QC & Craig Orr (instructed by Slaughter and May for the Respondents)

J U D G M E N T
As Approved by the Court

Crown Copyright ©

LORD JUSTICE MUMMERY:

1. This is an appeal from the order of Neuberger J on 7 December 1999 under CPR Part 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 and against its holding company. His judgment is now reported in [2000] 2 BCLC 1.

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 de−mutualisation 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.

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.

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 Limited (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 of the Club. 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 Rule 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 Rule 56. If a member resigned and re−applied for membership within three years, he might be re−elected without being proposed and seconded, if the Committee so decided.

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 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

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

Clause 4 provided that

> " 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....."

Article 67 of the Articles of Association provided that

> " 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."

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."

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 section 425 of the Companies Act 1985.

The Sale of RACMS

A. The Negotiations for sale to Cendant

10. The defendants' case is that in March 1998 an approach was made to RACL by Cendant Corporation 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 de−mutualise the Club and to de−merge 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 RACL 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 RACL. 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 RACL under section 425 of the Companies Act 1985 : 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 RACL at the close of business on 8 July 1998. A new company named RAC Acquisitions became the sole member of RACL. RAC Acquisitions itself became a subsidiary of RAC Holdings Limited ( RACH). One share of £1 each in RACH was allotted to each person who was a member of RACL at the close of business on 8 July 1998. That share was later divided into 2 shares of 50p each.

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

15. The New Club Company, which became and remains the ultimate proprietor of the Club, was later re−named "The Royal Automobile Club Limited." RACL was re−named "RAC Limited" and was subsequently re−registered 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, RACL and RACMS and that the members, in their new capacity as shareholders in RACH, received about £34,000 each direct from Lex Sevice 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 RACL 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 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 Limited.

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

de−mutualisation of the Club and the de−merger of RACMS, in particular the expenditure by them of the assets of RACL on the proposed cancellation of clause 4 of the Memorandum of RACL, 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 Part 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 Re−amended Statement of Claim.

25. The judge rejected the claimants' contentions that the Rules of the Club, (including Rule 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 Rule 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 Rule 56 (which conferred a discretion on the Committee to re−elect a member who had resigned and re−applied for membership within 3 years of his resignation) entitled former members to be re−instated 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 ( e.g. they did not acquire shares from the members or encourage them to part with their shares) or indirectly ( e.g. 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 hellos 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 de−mutualisation 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 Limited, 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 over−exposed 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. For his part, Lord Grabiner QC accepted that the fiduciary duties owed by the directors to the company do not necessarily preclude, in special circumstances, the co−existence 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.

32. A duality of duties may exist. In Stein v. Blake [1998] 1 All ER 724 at 727d and 729g 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 (e.g. 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 (e.g. 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.

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.

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 pp.323−325,328−330) and of the Court of Appeal of New South Wales in Brunninghausen v. Glavanics [1999] 46 NSWLR 538 (especially pp. 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 p. 445 (directors making representations to secure options to purchase shares of shareholders and undertaking to sell shares of shareholders in agency capacity); Howard Smith Limited v. Ampol Petroleum Limited [1974] AC 821 at pp.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 [1987] 1BCLC 82 at pp.84−85; and Re Chez Nico [1992] BCLC 192 at p.208 were also cited. See also the discussion in Spencer Bower on Actionable Non−Disclosure (2nd Ed) 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 QC (who did not appear below) with a somewhat different emphasis than before the judge as indicated in a draft Re−amended 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 (supra). They are discussed later in this judgment.

42. Further, liability for non−disclosure to the shareholders is not abrogated by section 35 of the Companies Act 1985, as amended by section 108 (1) of the Companies Act 1989. It is true that subsection (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 subsection (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 subsection (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 of RACL. 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 section 35(2) would be sterilised. Disclosure was also required so that the members could consider whether to ratify under section 35 (3) 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 (e.g. 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 members of any part of the property of RACL. 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 de−mutualisation was ultra vires RACL. 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 de−mutualisation 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 section 35(2) of the Companies Act 1985; or they could have ratified the expenditure under section 35(3), so as to benefit from the de−mutualisation. 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 Part 24 .

50. It is not even alleged that the directors caused any distribution of the assets of RACL 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 de−mutualise 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: Companies Act 1985, section 4 (special resolution altering Memorandum with respect to the statement of the company's objects) and section 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 de−mutualisation 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 de−mutualisation and de−merger 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 de−mutualisation of the Club and the potential de−merger 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 de−mutualisation and/or de−merger 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, expenses and disbursements, including a liability in respect of the retainer of Messrs Slaughter and May to prepare a scheme for de−mutualisation and /or de−merger 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 (supra). 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 de−mutualisation.

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 de−merger and de−mutualisation 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 Part 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 5th 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 12th 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 (e.g the case of a Mr Malcolm Bissiker) and that would increase the value of their own membership on de−mutualisation.

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 i.e that it was the duty of the directors to disclose to the members that they were committing, or intending to commit, ultra vires acts (e.g. 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 de−mutualise the Club and to de−merge 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 10 members of the shooting club were fast tracked into full membership of the Club early in 1998, shortly before de−mutualisation. 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 re−amended, 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 Part 24. I would dismiss the appeal.

LORD JUSTICE LATHAM:

I agree with both judgments.

LORD JUSTICE SIMON BROWN:

69. The Royal Automobile 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 QC 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 pre−condition of any payment to members. Clause 4 of the company's Memorandum and Articles of Association 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: 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 £1 million, and let us assume that the assets of the company are £10 million, and that the object of the scheme and the proposal is to get the £10 million to the Members, that is what is intended and that is what is alleged. In order to achieve it, you have to spend £1 million and therefore the distribution is only £9 million; it can only be. It would be, because you have spent £1 million of the £10 million 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 £1 million 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. ...

Lord Justice Mummery: It is spent for the purposes of removing the prohibition.

Mr Vos: 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 Companies Act 1985 advances the appellants' argument. S.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 ss.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."

S.35(1) prevents third parties from calling in to 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 answer 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.

Order: Appeal dismissed with costs on the standard basis to be paid by the appellants and all the persons they represent. The appellants' solicitors to retain documentation which goes to names and addresses of those who have contributed to the claimants' case. Permission to appeal refused.

(This order does not form part of approved judgment)