Peskin & Anor v Anderson & Ors.

Chancery Division.
Neuberger J.
Judgment delivered 7 December 1999.

Directors' duties – Fiduciary duties – Club operated companies – Directors negotiated to sell business of company – Members unaware of negotiations – Some club members resigned – Companies sold – Whether directors' failure to inform resigned members of proposed sale a breach of contract – Whether failure in breach of fiduciary duty.

This was an application by the claimants to an action to amend their statement of claim to allege breach of fiduciary duty by the directors of a company to its members, and applications by the defendants to strike out the statement of claim and for summary determination of points of law.

The RAC Club was owned by 'RACL'. The club's motoring services business was run by 'RACMS', which was also owned by RACL. RACMS and RACL were in effect sold on 9 July 1998 and the members of RACL realised over £34,000 each for their respective shares and acquisition of their interests in RACMS. The claimants were former members of the club and former shareholders of RACL. They sued on behalf of themselves and 207 other former members and by proposed amendments to the statement of claim proposed to add another 140 former members to the class they represented. The claimants had all resigned from the club between the end of 1995 and the end of 1997 apart from four whose membership had ceased for non-payment of their 1998 subscriptions. Cessation of membership of the club meant that they automatically ceased to be members of RACL pursuant to its articles of association. Since the claimants had all ceased to be members of RACL by 8 July 1998 none of them was eligible to participate in the proceeds of sale of RACMS.

Under r. 56 of the club's rules any member who resigned and re-applied for membership within three years of resignation might if the committee so decided be re-elected to membership without being proposed or seconded as required by another rule. Rule 19 required the club's committee to submit 'a report of the work done by the club' in the preceding period to the annual general meeting. The claimants alleged that in considering the sale of RACMS and taking legal and other advice in relation thereto the committee (the defendants) in that capacity were in breach of contract in not informing the claimants as they were required to under r. 19 and were liable in damages and for other relief. The claimants applied to amend the statement of claim to seek damages against those members of the committee in their alternative capacity as directors of RACL as being in breach of fiduciary duty for not informing the claimants of the sale considerations etc. The defendants applied to strike out the statement of claim and for summary determination of a number of points of law.

***Held*, dismissing the statement of claim and refusing leave to amend it:**

1. When a member joined the club he was bound by contract embodied in the rules of the club and the memorandum and articles of RACL. Under its rules the club was a proprietory club, rather than a members' club, and the rules (including r. 19) did not represent the terms of the contract between the members and, in particular, as between the individual claimants and the members of the committee, but between the members and the proprietor of the club, namely RACL. In those circumstances, quite apart from whether the question of whether a contractual right could be made out against anybody, the defendants, in their capacity as members of the committee of the club, were not the appropriate defendants and a contract could not be implied between the members of the club inter se.

A **2. There was a contract between the members of the club and the proprietor, RACL, but RACL was not in breach of r. 19 in not informing the members of the sale considerations etc. Rule 19 required a report of the work done by the club, but the pre-sale considerations, discussions, taking of advice etc. did not fall within the concept of 'work done' and the committee had been entitled to take the view of what was work done for the purposes of reporting under r. 19. In any event, it was not work done 'for the club' as the sale was of RACMS, an asset of RACL, and as such did not have anything to do with the club.**

B **3. Both as a matter of principle and in light of the authorities the principle in Percival v Wright [1902] 2 Ch 421 that a director of a company has no general fiduciary duty to shareholders was good law. A director's primary fiduciary duty was to the company, although in appropriate and specific circumstances a director could be under a fiduciary duty to a shareholder. To hold that directors have a general fiduciary duty to shareholders would place an unfair, unrealistic and uncertain burden on directors and would present them**

C **frequently with conflicting duties between the company and the shareholders. In the instant case there was nothing special in the relationship between the directors of RACL and the members which could of itself have given rise to a fiduciary relationship or made its existence more likely.**

4. The claimants had resigned their membership of the club, and therefore given up their shares in RACL, of their own motion and there was no suggestion of their having sought out

D **the views of the directors of RACL. At that time no specific transaction was in contemplation, rather the directors were seeking to formulate a workable plan for the disposal of the assets of RACL. It was not the case that the directors in their capacity as directors would benefit from the claimants ceasing to be members (in that a reduction in membership of RACL meant that the price paid for RACMS would be distributed between fewer people, including the directors) in that until shortly before the sale resignations and membership applications were dealt with as they always had been and there was a balancing**

E **out.**

5. By promoting and investigating a de-mutualisation the directors were not pursuing an unauthorised and improper object. Directors frequently have to consider propositions (including taking over or being taken over) for the financial benefit of the shareholders and to the general benefit of the company, which would involve varying the memorandum and articles. It was of the nature of a company that it was desirable and often essential for a

F **board of directors to keep their considerations confidential for all sorts of reasons and the court should be very careful before it stipulated that directors were positively in breach of duty if they did not inform members what was going on, particularly when the considerations were at a comparatively primitive stage. If the directors were under a duty to divulge that type of information they would be in the unfortunate position of being liable to be blamed if they did and blamed if they did not.**

G **6. The claimants had no automatic right to be re-elected under r. 56 which merely gave a discretion to the committee to go straight to former members being considered for re-election without having to go through the procedure of their being proposed and seconded.**

7. The claim (whether in its original form or its proposed amended form) had no real prospect of success and the statement of claim should be dismissed and leave to amend it refused.

H The following cases were referred to in the judgment:

Bristol and West Building Society v Mothew [1998] Ch 1.
Brunninghausen v Glavanics (1999) 17 ACLC 1247.
Chez Nico Restaurants Ltd, Re [1991] BCC 736.
Coleman v Myers [1977] 2 NZLR 225.
Percival v Wright [1902] 2 Ch 421.
Platt v Platt [1999] All ER (D) 818.

Stuart Isaacs QC, Tom Lowe and Daniel Lightman (instructed by Class Law) for the claimants.

Lord Grabiner QC and Craig Orr (instructed by Slaughter and May) for the defendants.

JUDGMENT

Neuberger J: Introduction

In these proceedings there are three applications before the court: an application by the claimants, Mr Bruce Peskin and Mr Kevin Milner, to amend the statement of claim; an application by the defendants, Mr John Anderson and 16 others, to strike out the statement of claim; and an application by the defendants for summary determination of certain points of law under Pt. 24 of the *Civil Procedure Rules* 1998 (SI 1998/3132). The background to these applications (which I substantially take from the skeleton argument prepared on behalf of the defendants by Lord Grabiner QC and Mr Craig Orr) are as follows.

The action arises out of the disposal by the Royal Automobile Club Ltd ('RACL') of the Motoring Services business of RAC Motoring Services Ltd ('RACMS'). Before 8 July 1998 RACL owned the RAC Club ('the club') as well as RACMS. On 8 July 1998 the court sanctioned two schemes of arrangement of RACMS and RACL respectively. These schemes were designed to enable members, or shareholders as I will call them, of RACL to realise their indirect interest in RACMS. Under the second of these two schemes of arrangement, persons who were shareholders in RACL at the close of business on 8 July 1998 ceased to be full shareholders, and each became entitled to issued shares in RAC Holdings Ltd ('RACH') the following day, while RACH became the holding company of RACL.

It was originally proposed that the shares in RACH issued to those persons would be purchased by a company called Cendant Corporation. However, that purchase did not proceed for reasons not relevant to these proceedings. Subsequently, a sale to Lex Services plc ('Lex') was proposed, and Lex made an offer to the RACH shareholders to purchase their shares. This became unconditional on 9 July 1999, and Lex is now the holding company of RACH, RACL and RACMS. By disposing of their shares in RACH, the shareholders in RACH realised value, over £34,000 each, for their respective shares and, thus, for the indirect acquisition of their interest in RACMS, when control and membership of RACH was acquired by Lex.

The two claimants are former members of the club and indeed former shareholders of RACL. On the statement of claim in its current form they sue on behalf of themselves and 207 other former members. By their proposed amendments they seek, inter alia, to add another 140 former members to the class of persons on behalf of whom they sue. Each of the claimants resigned from the club with effect from the end of one of the years 1995 to 1997 inclusive, apart from about four, whose membership ceased for nonpayment of their 1998 subscriptions. Those who were full members were also shareholders in RACL but upon resigning from, or otherwise ceasing to be members of, the club, they ipso facto ceased to be shareholders in RACL pursuant to the articles of association of the company ('the articles').

Since the claimants had all resigned and ceased to be shareholders in the company before 8 July 1998, when the scheme took effect, none of them was eligible for shares in RACH. Accordingly, none of them was entitled to participate in the proceeds of the disposal of RACMS. The claimants, in their present statement of claim, seek damages and declaratory and other relief against 16 individuals who are former and current members of the committee of the club ('the committee'). By way of proposed amendment,

A they wish to seek relief against those individuals in their capacity as directors or former directors of RACL, and also against RACL and RACH.

The rules and memorandum

In order to understand the arguments, it is necessary to set out some of the rules of the club ('the rules') and extracts from the memorandum of association of the company ('the memorandum'). I refer first to the rules of the club.

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> '7. The Club shall be governed by a Committee. The Board of Directors for the time being of RAC Limited shall constitute The Committee of The Club.
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> 19. The Committee shall submit to the Annual General Meeting a report of the work done by The Club and a statement of accounts audited or certified by a Chartered Accountant(s) from the period since the preceding report . . .
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> C 21. Subject as provided in these Rules, every candidate for membership of The Club shall be proposed by one Member and seconded by another . . .
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> The candidate's name, usual place of residence, his rank, profession or other description, and the place where he exercises his profession or carries on his business shall be stated on the proposal form. The names, addresses and descriptions of Candidates, with the names of their proposers and seconders, shall be posted on Notice Boards at the Club House . . .
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> D
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> The election of Members shall be by The Committee, who shall decide by ballot if necessary; one black ball shall exclude.
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> 50. The name of any Member who has omitted to pay his subscription within one month of the due date may be posted on notice boards at the Club House . . . if his subscription still remains unpaid after a further month he shall cease to be a Member. The Committee shall have power to restore his membership on receiving
>
> E a satisfactory explanation of the delay.'

Rule 56 has two paragraphs. I set out only the latter paragraph, as the former paragraph deals with the mechanics for resignation of a member.

> 'A Member who has resigned (without being required by The Committee to resign) and who re-applies for membership within 3 years of his resignation . . . may if the Committee so decides, be re-elected to membership without being proposed and
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> F seconded pursuant to Rule 21.'

Finally, I refer to r. 68 and 69.

> '68. The Club is the property of RAC Limited, a company limited by guarantee, and every Life Member, and Full Member of The Club, on his election as such a Member becomes also a Member of RAC Limited and assumes liability limited to pay £1 should RAC Limited be dissolved and wound up.
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> G 69. Members as such incur no responsibility whatever beyond their subscriptions and entrance fee, if any.'

So far as the memorandum and articles of association of RACL are concerned I have already referred to the fact that art. 4 reflects in effect r. 68. It is right to refer to para. 4 of the memorandum which is in these terms:

> 'The income and property of the Company, whensoever derived, shall be applied
>
> H 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.'

The paragraph then goes on to deal with the distribution of the surplus assets, if any, when and if the company is wound up; it provides that they:

'shall not be paid to or distributed among Members of the Company, but shall be given, paid or transferred to such public museum or to such institution or institutions as connected with engineering, or with the objects of the Company as the Directors of the Company shall determine'.

Subsequent events relied on

As I have mentioned, with one or two exceptions, the claimants were members of the club who resigned their membership in the period 1995 to 1998. During that time, according to what is to be pleaded in the amended statement of claim:

'22. For a period of at least 18 months prior to March 1998 (and probably longer) the Committee of the Club (in its capacity as such and/or in its capacity as directors of the Company) had been actively considering taking professional advice concerning (and in relation thereto the Club and/or the Company had thereby incurred a liability for the professional fees, expenses and/or disbursements) and discussing the sale and disposal of Motoring Services and its business and the possibility of demutualisation of the Club and demerger of Motoring Services.

PARTICULARS

Pending disclosure herein, the following are the best particulars which the Claimants can presently give of these matters:

(a) at intermittent intervals over several years prior to 1988 the Board and the Committee considered the possibility of an acquisition which would involve demutualisation and demerger;

(b) in about the autumn of 1996 the 5th Defendant, the Chief Executive of the Club, asked the 11th and 14th Defendants to join the Committee and the Board because (as he told the 14th Defendant) "some kind of major commercial initiative was afoot";

(c) for some time prior to March 1998 the Board and the Committee had been secretly working on a demerger plan, and had been taking professional advice about a potential demerger for at least 18 months. In particular, in about 1996 the Club and/or the Company, acting by the 5th and/or 12th and/or 13th Defendants retained Messrs Slaughter and May to prepare a scheme for demutualisation and/or demerger of Motoring Services, the costs of such retainer to be paid by the Club and/or the Company;

(d) pursuant to such retainer, Messrs Slaughter and May prepared a scheme for demutualisation and/or demerger of Motoring Services, and were paid professional fees, expenses and/or disbursements by the Club and/or the Company for such work; and

(e) at a meeting held in about October 1996, the Board and/or the Committee considered, but rejected, the scheme for demutualisation and/or demerger of Motoring Services which Messrs Slaughter and May had prepared pursuant to their aforesaid retainer, but continued thereafter to seek to formulate a workable plan for disposal of the assets of the Company and/or demutualisation.

23. In retaining Messrs Slaughter and May, at the expense of the Club and/or the Company, to prepare a scheme for demutualisation and/or demerger of Motoring Services, and in considering such scheme, the Board and/or the Committee were acting in a manner which was not authorised by the Company or the Club and contrary to the objects of the club and the interests of the Members of the Club and/or the Company.

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> 24. In about March 1998 the Committee of the Club/directors of the Company agreed to dispose of Motoring Services and/or the business of Motoring Services, alternatively the beneficial interest in the business of Motoring Services, to Cendant Corporation ("Cendant") in return for the payment of £450 million, or thereabouts.'

On 27 March 1998 Mr Jeffrey Rose (who, I think, was Secretary of RACL) made
B public the fact that the board of RACL was considering a scheme along the lines described in para. 22(e) and 23 of the amended statement of claim. Once that happened, the possibility of members of the club in their capacity as shareholders of RACL being able in the near future to capitalise on a realisation of the value of RACMS, was in the public domain.

The committee then decided to freeze any membership applications while deciding how
C to deal with such applications by men who wished to be full members of the club. There was obviously a fear that there would be many such applications by individuals whose real purpose, or one of whose main purposes, was not so much to become a member of the club but more to become a shareholder in RACL and to participate in the possible benefits of the sale of the RACMS business. After a period of some two months the committee decided to accept applications for membership by men who were otherwise acceptable, only on terms that they became members of the club and did not become
D shareholders in RACL; in other words the committee resolved to accept applications of persons who were only interested in becoming members of the club, but who were what is often called 'carpetbaggers'.

The claimants' claims

The claimants' claim in the existing statement of claim is for damages against the
E defendants in their capacity as members of the committee for breach of contract in not informing the claimants, in accordance with their alleged obligation, of their discussions, instructions, proposals and thoughts as set out in para. 22 and 23 of the amended statement of claim. This contractual duty is said to arise out of the rules, and expressly under r. 19.

The proposed amendment to the statement of claim would involve the claimants
F seeking damages against those members of the committee (who I will call 'the defendants') in their alternative capacity as directors of RACL for not informing them of these discussions, instructions, proposals and thoughts.

The claimants also seek damages for breach of r. 56 of the rules and, in this connection, they derive support, they say, from a letter each of them received on resigning. In the case of Mr Peskin, this was a letter dated 4 December 1997 from the club Secretary, in
G these terms:

> 'I am sorry to hear that you have decided to resign your membership. On behalf of the club I thank you for your support and wish you well for the future.
>
> Should you wish to re-join within three years of your date of resignation, you may do so without undergoing the formalities of election procedure . . .'

H By their proposed amendments the claimants also seek to be entered on the register of members of RACL and RACH.

The issues

It appears to me that the issues raised by the statement of claim, as proposed to be amended, are as follows:

(1) Did the defendants in their capacity as members of the committee owe a contractual duty to give the claimants the information which they are alleged to be under a duty to have given them in the amended statement of claim? A

(2) Did RACL owe such a duty?

(3) Did the defendants in their capacity as directors of RACL owe the claimants a duty to inform them of these discussions, instructions, proposals and thoughts prior to their respective resignations? B

(4) Is there a claim against RACL or the defendants for breach of r. 56?

(5) Subsidiary issues, by which I mean whether certain defendants are in any event inappropriate and whether claims brought by the four individuals can be maintained in light of the fact that they did not resign from membership under r. 56 but they lost their membership under r. 50.

It is right to mention that claims based on breach of implied duty and on tort are also pleaded in the statement of claim, and that these have not been proceeded with before me by Mr Stuart Isaacs QC, who appears on behalf of the defendants with Mr Tom Lowe and Mr Daniel Lightman. C

In relation to the four main issues which I have identified, it appears to me – and I understand it to be common ground – that all the claimants need establish is a real prospect of establishing their case. To the extent that that is pleaded in the statement of claim, the claimants should be entitled to proceed to trial in the normal way if I am satisfied that there is a real prospect of that case being established. To the extent that that case is contained in the amended statement of claim, permission to amend should be given if I am satisfied that there is a real prospect of the case succeeding. D

Did the committee owe a contractual duty as alleged?

I turn, then, to the question: did the defendants as members of the committee owe the duty in contract as alleged in the statement of claim? In connection with that point Lord Grabiner's first argument is that it is clear from r. 68 that the club is a proprietary club, and not a members' club, and that therefore the rules (including r. 19) do not represent the terms of the contract between the members and, in particular, as between individual claimants and members of the committee. He says that any contract is between individual members and the proprietor of the club, namely RACL and that, in those circumstances, quite apart from the question of whether a contractual right can be made out against anybody, the defendants, in their capacity as members of the committee of the club, are not appropriate defendants. E F

It seems to me that that argument is correct. The law is, to my mind, succinctly and accurately, summarised in para. 216 of *Halsbury's Laws of England* (4th edn, 1991 Reissue, Butterworths), vol. 6 in the following terms:

> 'The rules form part of the contract between the members in the case of a members' club, and between the members on the one hand and the proprietor on the other in the case of a proprietary club.' G

See also *Josling and Alexander on the Law of Clubs* at pp. 11 and 89–90.

In the latter passage the contract as between each member of the club and the proprietor is described as being a contract whereby, in consideration of payment of each member's subscription, the proprietor agrees to allow him to use and enjoy the facilities of the club under the terms and the rules of the club. H

In those circumstances, it is submitted on behalf of the defendants, that the contract between the members and the club proprietor gives a member all the protection he needs to enforce his rights, and that there is no need for the implication of a further contract between him and the other members as between each other.

A The only argument raised against this by Mr Isaacs is that, on the unusual facts of this case, one has to look at the position in a more global and realistic manner. He points out that, although if one takes r. 68 on its own, Lord Grabiner's point appears to be unassailable, if one looks at the reality, the proprietor of the club is a company which is owned by the members in equal shares. In those circumstances, he contends, that on the very unusual facts of this case, it is at least arguable that there is a contractual arrangement between the members inter se.

B I cannot accept that argument. It seems to me that the parties have provided by contract what their arrangement is to be. That contract is embodied in the rules of the club and in the memorandum and articles of association of RACL. When a member joins the club he agrees to be bound by the rules and, in particular, agrees that the club is a proprietary club owned by RACL. He similarly agrees that his relationship with RACL is to be bound by the memorandum and articles of association of that company. Of C course, in each case, the contract is also governed by the general law and, in particular, the law of proprietary clubs in relation to the club and company law, largely embodied in statute, so far as the relationship with the company is concerned.

That is the structure the parties have agreed. I consider that the implication of a contract between members of the club inter se can only be justified if the normal rule relating to implication of terms is to be satisfied. Indeed, it may be said that to imply a D contract, rather than a term into a contract, is rather more difficult. However, it appears to me that, assuming in favour of the claimants that the test for implying a contract is no more stringent than that for implying a term into a contract, not merely is it unnecessary to imply a contract between the members, it is positively unreasonable to do so. I consider that it would muddy what is otherwise comparatively clear water.

I believe that this conclusion is supported by considering the position of a class of E members of the club to whom I have not so far referred, namely overseas members. They are members of the club but they are in a special category with a reduced subscription, and they did not have the benefit of a share in RACL. It seems to me that they raise a difficulty in relation to Mr Isaacs' point that overseas members only can have rights as members of the club against RACL because they were not shareholders in the ownership of the club. This is not a theoretical or incidental difficulty because the position of overseas members is specifically dealt with in the rules, and it is to the rules that one must F primarily look, in my judgment, to identify the contractual relationship between the parties so far as the club is concerned.

Was RACL arguably in breach of r. 19?

That brings me to the second issue which is, given that there was a contract between members of the club and the proprietor, RACL, can the claimants establish that, by not G informing them of the matters set out in para. 22 and 23 of the amended statement of claim, RACL was in breach of that contract? Such an allegation is currently only made against the defendants. It is not made against RACL even in the draft amended statement of claim. Lord Grabiner, however, realistically accepts that if the point is arguable, then the amended statement of claim, in its final form, could reflect this.

The claimants rely on r. 19, contending that the obligation on the committee to provide members of the club with 'a report of the work done by the club' carried with it an H obligation to inform the claimants of the discussions investigations and proposals under consideration summarised in para. 22 and 23 of the amended statement of claim.

I do not accept that submission. It appears to me that those negotiations were probably not 'work done' and they were certainly not work done 'by the club'. To my mind, as a matter of the practicalities and common sense, one would expect the committee to be the body that decides whether, if something was arguably 'work done', it fell within the

expression 'work done' in r. 19 for the purpose of being submitted to members. After all, if every activity of any nature had to be communicated to members, and that was the true interpretation of r. 19, it would be absurd. Rule 9 provides that the committee shall be the sole authority as to the interpretation of the rules. To my mind, when considering what 'work done' should be reported to members, there must be a degree of latitude allowed to the committee.

That argument assumes in the claimants' favour that the 'work done' includes, or at least can include, as a matter of language, the matters referred to in para. 22, 23 and 24 of the amended statement of claim. I do not believe that it does. The point is underscored by the fact that the selling off of RACMS would have involved selling an asset owned by RACL. It does not seem to me that it had anything to do with the club. It was therefore simply not contemplated by r. 19.

Accordingly, (1)(a) because I do not think that the matters relied on by the claimants fall within the concept of the 'work done' or (b) because I think that the committee was entitled to take the view that they were not within the concept of the expression 'work done' for the purposes of reporting under r. 19 and (2) in any event, because I consider that they would not have been work done 'by the club', I am satisfied that this argument is not a good one and cannot succeed.

Was there a breach of fiduciary duty?

The third argument to which I must turn is that which Mr Isaacs put in the forefront of his case. It is that the defendants, as directors of RACL, owed a fiduciary duty to the shareholders of the company to inform them of the matters set out in para. 22–24 of the amended statement of claim so as to enable them to make an informed decision in connection with their possible resignation from the club carrying with it, as it automatically did, the loss of their shareholdings in RACL, and their consequent inability to participate in the potentially valuable sale of RACMS.

In their skeleton argument, counsel for the claimants have helpfully summarised the basis for the alleged fiduciary obligation to make such disclosure to members of the company in four propositions as follows:

> 'The existence of a limited fiduciary obligation of disclosure to members of the company emerges from the following facts:
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> i. From the moment when consideration was given to Slaughter and May's proposal, the directors were in exclusive possession of insider information, which they had acquired solely by virtue of their office. The information provided a knowledge of the potential financial value of membership of the company which members would not have had. Indeed it was wholly contrary to their expectation that membership could have had value.
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> ii. Because of para. 4 of the memorandum, resigning members, who can to some extent be equated with selling shareholders, could not have placed anything other than a nil value on their membership of the company. Not only was membership un-tradeable but members had specifically given up any right to participate in what had become the very substantial assets of the company. They would have decided to abandon membership without knowing of the plans to allow the members to benefit from a distribution.
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> iii. The directors each stood to gain from resignations (as, without knowing it, did non-resigning members) since this would reduce the number of members between whom the proceeds would have to be distributed. Furthermore, by the time the Cendant deal was formulated at least three of the directors were expecting to make substantial personal profits form the sale in the form of

golden hellos and employment contracts. It is reasonable to suppose, as already suggested, that this possibility was part of the plan from the beginning (whether it was would be seen after disclosure).

iv. In order to promote/investigate demutualisation the board was pursuing an unauthorised and improper object. Paragraph 4 was fundamental to the operation of the club/company. Members gave up their ability to exercise rights of ownership of the assets because by doing so they could guarantee the future pursuit of the objects of the club (to promote the motorist) despite changes in membership over the years.'

The law relating to directors' fiduciary duties to shareholders is, as Mr Isaacs says, in a developing state perhaps, particularly, in this country. In those circumstances there is obvious force in his contention that I should be particularly astute and careful before accepting a submission that such a claim has no real prospect of success. In *Percival v Wright* [1902] 2 Ch 421, Swinfen-Eady J is summarised as having held as follows in the headnote:

> '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.'

That decision has not been without its critics particularly in modern times. In *Gower's Principles of Modern Company Law*, edited by Prof. Davies (sixth edn, 1997, Sweet & Maxwell), one finds this at pp. 599–600 after reference to *Percival v Wright*:

> 'This, however, does not mean that directors can never stand in a fiduciary relationship to the members; they well may if they are authorised by the latter to negotiate on their behalf with, for example, a potential takeover bidder. And something far less than the establishment of an agency relationship may suffice, particularly, as an important New Zealand decision illustrates, in the case of a family company, "depending upon all the surrounding circumstances and the nature of the responsibility which in a real and practical sense the director has assumed towards the shareholder". The courts are most likely to recognise a fiduciary duty owed by directors to individual shareholders in the context of advice given by the directors to the members as to whether they should sell their shares to a bidder, though such fiduciary duties are likely to be narrower than those owed to the company.
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> The *Percival v Wright* rule was severely criticised by the Cohen Committee, and forthrightly rejected by the Jenkins Committee in one of its bolder moods. After much vacillation, the 1980 Act provided criminal sanctions against directors (and other "insiders") who make use of price-sensitive information in dealings in their companies' securities but this in no way modified the general principle that it is to the company, and not to its members individually, or to anyone else, that the directors stand in a fiduciary relationship. It seems that directors of a holding company do not even owe duties to its subsidiary, at any rate when that has an independent board of directors.'

The editors go on to refer to a New Zealand decision, *Coleman v Myers* [1977] 2 NZLR 225. In that case the director of a company formed a new company to buy shares from family shareholders in circumstances where he knew that the assets of the company, as recorded in its books, were substantially undervalued. In the Supreme Court of Auckland at first instance, Mahon J refused to follow *Percival v Wright* and said this at p. 278:

> 'In the present case, which is the case of a private company with unlisted shares, it seems an untenable argument to suggest that the shareholders on an offer to buy their shares are not perforce constrained to repose a special confidence in the

directors that they will not be persuaded into a disadvantageous contract by non-disclosure of material facts. In my opinion, therefore, there is inherent in the process of negotiation for sale a fiduciary duty owing by the director to disclose to the purchaser any fact . . . which might reasonably and objectively control or influence the judgment of the shareholder in forming his decision in relation to the offer. The application of the rule so assumed to exist must necessarily be confined to private companies and to such transactions in public company shares . . . where the identity of the shareholder is known to the director at the time of sale.'

His decision was unanimously approved by the Court of Appeal in Wellington. Woodhouse J, having referred at p. 324 to the standard of conduct required from a director in relation to dealings with shareholders, said this at p. 325:

'In the one case there may be a need to provide an explicit warning and a great deal of information concerning the proposed transaction. In another there may be no need to speak at all. There will be intermediate situations. It is, however, an area of the law where the courts can and should find some practical means of giving effect to sensible and fair principles of commercial morality in the cases that come before them; and while it may not be possible to lay down any general test as to when the fiduciary duty will arise for a company director or to prescribe the exact conduct which will always discharge it when it does, there are nevertheless some factors that will usually have an influence upon a decision one way or the other. They include, I think, dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and, of course, the extent of any positive action taken by or on behalf of the director or directors to promote it.'

Cooke J said at p. 330:

'In the particular circumstances of this case it seems to me obvious that each of the respondent directors did owe a fiduciary duty to the individual shareholders. To that extent I fully agree with Mahon J. Broadly, the facts giving rise to the duty are the family character of this company; the positions of father and son in the company and the family; their high degree of inside knowledge; and the way in which they went about the takeover and the persuasion of shareholders.'

The reasons put forward by the third member of the court, Casey J, were to much the same effect.

Percival and *Coleman* have been considered in this country in two reported first instance cases. In *Re Chez Nico Restaurants Ltd* [1991] BCC 736 Sir Nicolas Browne-Wilkinson V-C said this at p. 750G:

'Like the Court of Appeal in New Zealand, I consider the law to be that, in general, directors do not owe fiduciary duties to shareholders but owe them to the company; however, in certain special circumstances fiduciary duties, carrying with them a duty of disclosure, can arise which place directors in a fiduciary capacity vis-à-vis the shareholders. *Coleman v Myers* itself shows that where directors are purchasing shares in the company from outside shareholders, such duty of disclosure may arise dependent on the circumstances of the case.'

He went on to say that it was unnecessary for him to decide in that case whether or not such a duty was owed or was breached. More recently in *Platt v Platt* [1999] All ER (D) 818, Mr David Mackie QC, sitting as a deputy judge of the High Court, effectively followed the reasoning in *Coleman* at least to the extent of holding that a fiduciary duty was owed and breached. The headnote, I think, accurately sets out his conclusion:

'The fact that the relationship between director and shareholder did not of itself give rise to a fiduciary duty did not prevent such an obligation arising when the

A circumstances required it. In the instant case, a fiduciary duty arose the nature of which obliged the first defendant to disclose matters which he knew or had reason to believe would be material to the claimants' decision to transfer the shares.'

The first defendant in that case was a director of a company who, by virtue of his position, had special information, and the transaction with which Mr Mackie was concerned was a transfer of shares from the claimant to the first defendant. *Coleman* has
B also been followed and approved in Australia, namely in *Brunninghausen v Glavanics* (1999) 17 ACLC 1,247 in the New South Wales Court of Appeal in June of this year.

Mr Isaacs makes two submissions. The first is that what appears, at least from the headnote, to be the absolute rule in *Percival v Wright* is subject to exceptions, and that, on the present case, the claimants' proposed pleaded case against the defendants in their capacity as directors of RACL in this case is at least arguably such an exception.
C Alternatively, he contends that *Percival v Wright* is wrong and ought not to be followed.

Lord Grabiner accepts the first part of the first point, to the effect that the rule in *Percival v Wright* as summarised in the headnote is subject to exceptions, but he contends that it is unarguable that, on the proposed pleaded facts in the present case (and assuming them all to be made out) the present case would not fall within any exception. Further, he contends that the general principle of *Percival v Wright*, if the claimants cannot bring
D themselves within any exception, is good law.

I am satisfied, both as a matter of principle and in light of the state of the authorities, that *Percival v Wright* is good law in the sense that a director of a company has no general fiduciary duty to shareholders. However, I am also satisfied that, in appropriate and specific circumstances, a director can be under a fiduciary duty to a shareholder. It seems to me that as a general proposition a director's primary fiduciary duty is to the company. To hold that he has some sort of general fiduciary duty to shareholders would
E involve (a) placing an unfair, unrealistic and uncertain burden on a director and (b) would present him frequently with a position where his two competing duties, namely his undoubted fiduciary duty to the company and his alleged fiduciary duty to shareholders, would be in conflict.

Quite apart from this, although it is true that *Percival v Wright* was disapproved by Mahon J, the appellate court in New Zealand appears to have taken the view that the
F decision in *Percival v Wright* represented, as it were, the general principle, but exceptional facts could justify a fiduciary duty of the sort alleged on behalf of the claimants in this case. (In fact the difference between Mahon J and the appellate court may be more apparent than real: Mahon J does not appear to have dissented from the general proposition on which *Percival* was based, but considered that *Percival* was wrongly decided on the facts, whereas the appellate court was not so much concerned with the
G facts of *Percival* and may well have been of opinion that it was in fact wrongly decided.) That certainly appears to have been the view of the Vice-Chancellor in *Chez Nico* and of Mr Mackie in *Platt* as I read their judgments. It also appears to be the opinion of the editor of *Gower*.

So far as the authorities to which I have referred are concerned, the decisions (*Coleman*, *Platt* and *Brunninghausen*) in which a duty was held to arise were cases where a director
H with special knowledge was buying shares (either directly or through a company) for his own benefit from shareholders, where the director had special knowledge, which he had obtained in his capacity as a director of the company, and which he did not impart to the shareholders, and where the special knowledge meant that he knew that he was paying a low price. The observations I have read, in particular in *Coleman* must, in my judgment, be read in that light. Indeed, this is a point which was made by Sir Nicolas Browne-Wilkinson V-C in the passage I have read from *Chez Nico*.

As Mr Isaacs says, if one is considering the question of a fiduciary duty, it is wrong to seek to compartmentalise a case and say because, for instance, this is not a family company case there can be no fiduciary duty. However, I note that of the three cases in which a fiduciary duty has been held to exist, two of them, *Coleman* and *Platt*, involved a family company, a point upon which some emphasis was put particularly in *Coleman*.

Deciding whether, on particular facts, a fiduciary duty exists can sometimes be difficult. Useful guidance is to be found in observations of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at p. 18A:

> 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations.'

Millett LJ then went on to make this observation which is, perhaps, of some relevance in light of what I have just said about the cases where a fiduciary relationship was held to exist between directors and shareholders:

> 'In this survey I have left out of account the situation where the fiduciary deals with his principal. In such a case he must prove affirmatively that the transaction is fair and that in the course of the negotiations he made full disclosure of all facts material to the transaction. Even inadvertent failure to disclose will entitle the principal to rescind the transaction.'

In this case it seems to me that the following points may be made. First, there is nothing special in the relationship of the board of directors and the members of RACL which could be said to give rise of itself to a fiduciary relationship or either to make the existence of a fiduciary relationship more likely. Thus there was no special fact which made it inherently more likely than usual that a relationship of confidence would arise. It is true that there is the unusual fact of the existence of the club, but, particularly given the detailed provisions of the rules, I do not see why that should make it more likely that the directors, should owe a fiduciary duty to the shareholders, of RACL.

Secondly, the claimants decided to resign their membership of the club, and therefore to give up their shares in RACL, of their own motion. It was an independent, unsolicited decision. It is not a case where there is any suggestion of any of the claimants having sought out the views of the directors or other representatives of RACL. Nor is it a case where the claimants can suggest that any information provided by the board of RACL influenced their decision.

Thirdly, there was at the time at which the various claimants resigned no specific transaction in contemplation. As the claimants' own proposed amended statement of claim alleges, even after 1996 what was done by the board of RACL was 'continu[ing] thereafter to seek to formulate a workable plan for disposal of the assets of RACL' and that thereafter Slaughter and May were instructed to prepare a scheme which was then considered by the board of RACL.

Fourthly, this is not a case where, in any real sense whatever, it can be said that the defendants in their capacity as directors of RACL (or as committee members) benefited from the claimants ceasing to be members. Obviously it is not a case, as in the three cases where breach of fiduciary duty has been found, where the directors have acquired shares from shareholders or encouraged shareholders to part with their shares, in circumstances where they, the directors, had special knowledge.

A Mr Isaacs suggests, however, as is plain from proposition (iii) of the four propositions I quoted, that the directors did gain indirectly by the claimants resigning as members, because, by their resignations, the claimants reduced the number of shareholders in RACL. The reduction in the membership of RACL meant, if I can put it loosely, that the price paid for RACMS would be distributed between fewer people, including the directors.

B Apart from being rather indirect, tenuous, and, I suspect, unrealistic in terms of what the directors thought, it appears to me that the point is, in any event, a bad one for the reason given by Lord Grabiner. As he points out, up to 27 March 1998, resignations and applications for membership were dealt with on the same basis as they had always been dealt with: any member who resigned did so without knowing about the contemplated negotiations and plans, because they only became public knowledge on 27 March 1998. That is the unhappy position of the claimants. On the other hand, anyone who applied C to join the club and whose application was determined before 27 March 1998 was also applying without knowing of any possible proposals for the sale of RACMS, and any such applicant whose application was accepted, would become not only a member of the club, but also, happily for him, a shareholder in the company.

Accordingly, it appears to me that there was a congruence between those who left the club, and therefore the company, and who failed to be able to participate in the sale of D the RACMS business and those who joined the club in the same period and were able, despite being new members, to join in and participate in the sale of RACMS.

Thus, I consider that there was a balancing out, so there is nothing to suggest that the directors were in fact better off. Indeed, there is a wholly unparticularised allegation in the amended statement of claim that the directors – to my mind, if it is true, very unattractively – fast-tracked friends into becoming members before 27 February 1998. Apart from being unparticularised, that allegation does cast doubt on the suggestion that E the directors were seeking, as it were, to increase their share of the proceeds of the sale of RACMS by minimising the number of members of the club or of RACL.

That deals with the first part of the claimants' proposition (iii).

Fifthly, it is right to say that I do not see any force in the other aspect of that proposition, namely, that the directors were expecting to make substantial profits from the sale in the form of 'golden hellos and employment contracts'. I do not understand F how that particular alleged interest of the directors can impinge, or can even reasonably be said to impinge, on whether or not they were under a duty to vouchsafe at an early stage the possibility of selling off the RACMS business.

Sixthly, as for proposition (iv), that by promoting and investigating de-mutualisation the defendants, as directors of RACL, were pursuing an unauthorised and improper object, I do not regard that as a realistic submission. As Lord Grabiner says, directors of G companies frequently have to consider propositions be it an approach to be taken over or an approach to take over or some other activity – which they anticipate will be to the financial benefit of the shareholders and to the general benefit of the company which, if it comes to fruition, would involve varying, possibly very considerably and fundamentally, the memorandum and/or articles of association of the company.

If directors would be acting illegally or improperly in investigating a proposal which H has been put to them or has occurred to them and which they believe may be for the benefit of the shareholders, in circumstances where implementation of the proposal would require a variation to the memorandum and articles of association, it strikes me that it would put directors in a ludicrous position. Either they would have to risk criticism, financial disadvantage and, possibly, worse for embarking on such an investigation even though as a matter of commercial common sense it is obviously desirable that they should be able to do so. Alternatively, before they even can investigate such a proposal,

they would have to put to the shareholders at an extraordinary general meeting a resolution varying the memorandum and articles of association, so that they could proceed with their proposed investigations. Both the shareholders and, if sanction was necessary, the court might well ask why the directors were incurring the costs and time of seeking such amendments if they had not even properly investigated the proposal to see if it was feasible or desirable.

It seems to me that it is inherent in the running of any business run through a company (as most substantial businesses are) that forward-looking, progressive directors will often have to contemplate transactions which would, if they were to proceed, involve altering, possibly fundamentally, certain features of the company, as contained in its memorandum and articles of association.

In this case it is perhaps a particularly unattractive submission given that as has been pointed out on behalf of the defendants, the court actually approved the scheme – the allegedly authorised and improper object – when it sanctioned the scheme and the amendments to RACL's memorandum of association which it involved.

Seventhly, consideration of how a board of directors operates provides another reason, to my mind, for rejecting the claimants' contention based on fiduciary duty in this case. It is of the nature of a company, particularly one with many disparate members, that its board will consider all sorts of proposals at different stages, and members of the board will often regard as highly desirable, even necessary, to keep their considerations confidential for all sorts of different reasons.

Given that people trade in shares, and given that members of clubs come and go, it seems to me that the court should be very careful before it stipulates that directors are positively in breach of duty if they do not inform shareholders or club members of what is going on, particularly if the duty to inform can arise when the considerations are at a comparatively primitive stage. Even if the contemplated arrangement or transaction has got near fruition, it is often highly desirable that the directors keep matters confidential. A beneficial potential merger or takeover may be destroyed if the directors have to go public about it. In relation to a company with many shareholders where the shareholders are free to resign or sell even if the company is not a publicly quoted company, it seems to me quite unreasonable for directors to be put in the sort of position which, to my mind, the claimants' contention in this case would necessarily involve.

Eighthly, it also seems to me that there is force in the point that, if directors are under a duty to divulge information of the sort alleged in para. 22–24 of the amended statement of claim, they are placed in the unfortunate position of being liable to be blamed if they do and blamed if they do not. If they were contemplating selling off RACMS and told their members about it but subsequently decided that it was, although initially very attractive, on analysis of not very great attraction, the directors might also find themselves at risk. They might be sued by people who had renewed their membership of the club over a number of years at some expense for the purpose of benefiting from the transaction, and would then claim that the directors had misled them into thinking this would happen. The court should, in my judgment, be very careful before imposing duties of the sort which the claimants' argument involves in the present case.

Although I accept that care has to be taken before finding at this stage that there is no real prospect of establishing a fiduciary duty of the sort alleged by the claimants in this case, I have reached the conclusion that the claimants have no real prospect of establishing such an allegation in this case.

The claim based on r. 56

That leads me to the fourth aspect which is based on r. 56. The claimants' contention in this connection is that by virtue of r. 56 and/or by virtue of the letter which I have

A quoted, they were entitled to be reinstated as members of the club and as shareholders in RACL at any time within three years of their date of resignation.

So far as r. 56 is concerned, it should not be construed on its own, and must be read in the context of the rules as a whole and, in particular, to my mind, it must be read together with r. 21. In my judgment, the provision that a person who has resigned 'may if the committee so decides, be re-elected to membership without being proposed and seconded
B pursuant to r. 21' means that a person in that position may go straight to being considered by the committee for re-election, without having to go through the procedure of being proposed and seconded and having his name and details posted on the notice board in the club. I draw particular support for that conclusion from the words 'may if the committee so decides' in r. 56. There are two points. One is the word 'may'. The second is that the committee is given the discretion to decide.

C To my mind, those two points, together with taking r. 56 and 21 together as a matter of good sense and how they would be expected to work in practice, show that r. 56 confers no right automatically to be reinstated, but a right to be considered by the committee for reinstatement, the committee being free to make such decision as it wants.

Once one arrives at that conclusion I do not read the letter of 4 December 1997 to Mr Peskin (which I have quoted) as assisting the claimants' case. The reference to the formalities of election procedure, to my mind, is a reference to the procedure leading up
D to election in r. 21. In any event, I am not at the moment persuaded that the contents of that letter cannot, as it were, be retracted by a decision of the committee subsequent to the letter. Mr Isaacs accepts, perfectly reasonably, that if, for instance, it was discovered that the recipient of such a letter had a criminal record unknown to the committee, the committee could withdraw the promise made in the letter even if the nature of the promise is as contended for by Mr Isaacs.

E It seems to me that if the events on and after 27 March 1998 justified it, the committee was entitled to reconsider the decision that it had communicated on 4 December 1997. There is no pleaded allegation of estoppel or change of position, on the part of any of the claimants based on what was in that letter. In my judgment, therefore, even if the letter of 4 December 1997 and similar letters had the meaning for which Mr Isaac contends, I do not consider that it would provide the basis for saying that the committee could not
F change its mind. I therefore reject the claim based on r. 56 as well.

The subsidiary matters

That leaves two outstanding matters. The first is whether certain claimants who failed to renew their subscriptions and then memberships under r. 50 can succeed. As I see it, it is an extremely unattractive contention to say that a member would have paid his
G subscription if he had known that there was a reasonably imminent possibility of selling the RACMS business, and did not do so because he was ignorant of that possibility, and in a better position than a member who resigned. In light of the decision I have reached, I do not have to consider that as a separate argument. Those claimants cannot be in a better position than the claimants who resigned because those claimants under r. 50 cannot take advantage of r. 56, and the closing part of r. 50 clearly gives the committee a discretion to restore membership if a satisfactory explanation of the delay in payment is
H given, but it imposes no obligation on the committee to grant such restorations.

As I have decided to strike out the claim, it also is unnecessary for me to consider whether the second, third, eleventh and fourteenth defendants would, in any event, be inappropriate defendants on the basis that they only became directors or committee members after 27 March 1998. At the moment, for what it is worth, I would have been minded to have removed them.

It is also unnecessary to consider whether it would have been appropriate to allow the applications to amend the registers of RACL and RACH to proceed. However, it is right to say that, assuming (and it is a point on which I have not heard much argument) there was jurisdiction to order amendment of the registers of RACL and RACH so as to record the claimants as shareholders in that company, it would have seemed to me that it would be more appropriate to have left the claimants to their claim for damages, given that Lex has purchased RACH and acquired all the shares in RACH. The right course might have been to leave the claimants' claim for rectification of the register in place so that only if the claimants failed to recover damages, that aspect of the claim could be considered. However, in light of the conclusions I have reached on the four main points that have been argued, that is an academic argument.

In those circumstances, I propose to dismiss the statement of claim in its original form and to refuse leave to amend the statement of claim in the proposed form, on the basis that the claim (whether in its original form or its proposed amended form) has no real prospect of success within the meaning of CPR, r. 24.2.

(*Order accordingly*)