Two aspects of the statutory derivative claim

*Daniel Lightman**

This article addresses two aspects of the statutory derivative claim introduced by the Companies Act 2006. The first is whether derivative claims which existed at common law but fall outside the definition of "derivative claim" in s 260(1) of the Act—notably, multiple derivative claims and derivative claims in respect of overseas companies—were abolished by the Act. It is argued that, contrary to the prevailing view, the common law derivative claim survives where it falls outside the s 260(1) definition. Secondly, the article summarises how British courts have to date controlled the conduct of derivative claims, and suggests that they should do more to control the settlement of such claims, by imposing a condition preventing their being settled or discontinued without the court's permission.

In this paper I address two aspects of the statutory derivative claim. First, I challenge the conventional wisdom that derivative claims which fall outside the definition of "derivative claim" in s 260(1) of the Companies Act 2006 ("CA 2006")—notably multiple derivative claims and derivative claims in respect of overseas companies—can no longer be brought. I suggest that, although this is what the Law Commission had recommended, in fact CA 2006 has not had the effect of abolishing common law derivative claims where such claims fall outside the s 260(1) definition. Secondly, I briefly summarise how English courts (and one Scottish court) have to date controlled the conduct of derivative claims, and suggest that they should do more to control the settlement of such claims, by imposing a condition that they may not be settled or discontinued without the permission of the court.

Claims which fall outside the Companies Act 2006, Part 11, Chapter 1

It was the Law Commission's firm recommendation that the statutory derivative claim procedure should replace the common law derivative action entirely.[1] The Law Commission noted[2] that it had been said[3] of the equivalent Canadian legislation (the Canadian Business Corporations Act 1985) that:

"It would only lead to confusion to allow both common law and statutory actions. A more orderly development of the law would result from one point of access to a derivative action and would allow a body of experience and precedent to build up to guide shareholders".

* Barrister, Serle Court.

1. Law Commission, *Shareholder Remedies* (Law Com No 246, 1997) (hereafter "Law Com 246"), [6.55].
2. *Ibid*, [6.52].
3. By S Beck, "The Shareholders' Derivative Action" (1974) 52 Can Bar Rev 159, 207.

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The Law Commission expressed a concern that diverging principles might develop between the new procedure and the procedure at common law, and that this would go against its aim of making the law simpler. "The only way to avoid this problem", it said,[4] "is for the new procedure to replace the common law derivative action entirely." It added:[5]

"There may be a few very rare cases which could have been brought as derivative actions under the common law but will not come within the terms of the new procedure. But we consider that if we are to put the derivative action on a new, simpler and more rational basis then this is something which cannot be avoided".

Were the Law Commission's recommendations in this regard implemented? The generally accepted view is that they were. A number of distinguished legal academics have expressed the view that CA 2006 has had the effect of abolishing the common law derivative claim. I give but three examples.[6] In his recent article "Multiple Derivative Actions",[7] Lord Millett stated: "In England, the Companies Act 2006 provides that a derivative claim 'may only be brought' pursuant to the statute, which thus entirely supersedes the common law action. This is in accordance with the Law Commission's recommendations . . . but it is most unfortunate, for the statutory provisions are drafted in terms that plainly exclude the multiple derivative action. Thus, such an action is not possible under the statute and cannot be developed at common law". Secondly, the recently published 18th edition of *Charlesworth's Company Law* states[8] that "it is unfortunately the case that a multiple derivative action could not be brought here because the statute does not permit them and common law derivative actions are abolished". Thirdly, Professor Prentice and Dr Reisberg, in their often cited *Law Quarterly Review* article, also entitled "Multiple Derivate Actions",[9] state[10] that "the reform of the derivative action . . . introduced by ch 1 of pt 11 of the Companies Act 2006 provides that a derivative claim 'may only be brought' pursuant to the statutory provisions and thus it supersedes the common law as the Law Commission recommended". They add[11] that "it

4. Law Com 246, [6.53].
5. *Ibid*, [6.55].
6. See, too, P Koh, "Derivative Actions 'Once Removed' " [2010] JBL 101, where she expresses regret that it would appear that the multiple derivative action "has been rendered extinct by the enactment of the statutory derivative action in the United Kingdom. The provisions governing the statutory derivative action . . . replace the common law action . . . And the UK provisions . . . clearly contemplate only direct derivative actions. Thus, while the option of resorting to common law is available to a shareholder in Hong Kong, the shareholder in the United Kingdom has no such choice". In addition, in "Multiple Derivative Action and Common Law Derivative Action Revisited: A Tale of Two Jurisdictions" (2010) 10 JCLS 255, 256, Sh Goo stated that "no provision was made under the Companies Act 2006 for multiple derivative actions; the new law only allows a simple derivative action, ie only a 'member of a company' can bring proceedings 'in respect of a cause of action vested in the company, and seeking relief on behalf of the company'. Furthermore, a derivative claim may be brought now only under s 260 or s 994 (unfair prejudice remedies) of the Companies Act 2006 but not common law. The common law derivative action was abolished and replaced by the new statutory derivative action . . . This article argues that the common law derivative action was rightly removed in England and should be abolished in Hong Kong, but that multiple derivative actions should be allowed in the new statutory procedure in both jurisdictions . . . ".
7. The *Gore-Browne Bulletin*, July 2010, 1 (hereafter "Millett").
8. 18th edn (2010), 518.
9. (2009) 125 LQR 209.
10. *Ibid*, 212.
11. *Ibid*, 213.

is clear that a multiple derivative claim is not statutorily possible and cannot be developed at common law".

The proponents of the view that CA 2006 has abolished the common law derivative claim place considerable reliance on the fact that CA 2006, s 260(2) provides that:

"A derivative claim may only be brought—
(a) under this Chapter [Chapter 1 of Part 11 of CA 2006], or
(b) in pursuance of an order of the court in proceedings under section 994".[12]

They also point out that the equivalent Hong Kong legislation expressly preserves the common law derivative claim[13]—the Hong Kong Companies Ordinance, s 168BC(4) provides that " . . . this Part shall not affect any common law right of a member of a specified corporation to bring proceedings on behalf of the specified corporation . . . "[14] —but that, in contrast, there is no similar express preservation of the common law position under CA 2006.

A multiple derivative claim is a claim by a shareholder in a parent company on behalf of a subsidiary whose shares are held by the parent company (a "double derivative claim") or a claim by a shareholder in the parent company on behalf of subsidiaries of the subsidiary (a "triple derivative claim"). In *Waddington Ltd* v. *Chan Chun Hoo Thomas*[15] the Hong Kong Court of Final Appeal held that a multiple derivative claim is available at common law. Whilst that decision has been the subject of academic criticism[16] as well as support,[17] were the English courts to follow it[18] then such a claim would fall outside the scope of the statutory derivative claim. This is because s 260(1) provides that CA 2006, Part 11, Chapter 1 "applies to proceedings . . . by a member[19] of a company—(a) in respect of a cause of action vested in the company, and (b) seeking relief on behalf of the company". A multiple derivative claim falls outside that definition.

If the conventional view is correct, then s 260(2) precludes the bringing of a multiple derivative claim. If that is the case, it is of some significance. This is because, as Rogers V-P pointed out in the Hong Kong Court of Appeal in *Waddington Ltd* v. *Chan Chun Hoo Thomas*,[20] in modern times large, and especially large public, companies often conduct their affairs through a multiplicity of subsidiaries, which are often no more than assets wholly controlled and, in practice, virtually indistinguishable from their holding company.

12. Under CA 2006, s 996(2)(c) the court may "authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct . . . ".

13. "This legislative quirk . . . astonishingly appears to have been deliberate": Millett, 2.

14. Indeed, the Hong Kong legislation goes on to provide, in the Companies Ordinance, s 168BC(5), that the court may dismiss an application for leave to continue a statutory derivative claim "if the applicant has, in the exercise of any common law right, (a) brought proceedings on behalf of the specified corporation in respect of the same cause or matter . . . ".

15. [2009] 2 BCLC 82.

16. V Joffe QC and J Mather, "The Multiple Derivative Action" (2009) 2 JIBFL 61 and 115.

17. See, eg, Reisberg & Prentice (2009) 125 LQR 209.

18. In the English cases which appear to support the availability of a multiple derivative claim, the question was either not discussed or it was conceded. See *Wallersteiner* v. *Moir* [1974] 1 WLR 991, 1013; *Halle* v. *Trax* [2000] BCC 1020, 1023D–E; *Airey* v. *Cordell* [2007] Bus LR 391.

19. Defined by CA 2006, s 112 (which as from 1 October 2009 replaced CA 1985, s 22 with minor amendments) as (i) the subscribers of a company's memorandum (who are deemed to have agreed to become members of the company) and (ii) every other person who agrees to become a member of the company and whose name is entered in its register of members.

20. [2006] 2 HKLRD 896, [20].

As Lord Millett has noted,[21] it is frequently the case that groups of companies trade through wholly-owned subsidiaries, and accordingly that the assets at risk of misappropriation are more likely to be situate in the trading subsidiaries than in the holding company.

The orthodox approach would also preclude the bringing of derivative claims in respect of overseas companies. This is because the word "company" is defined by s 1 of CA 2006[22] for the purposes of that Act as (i) a company formed and registered under CA 2006 after 1 October 2009, or (ii) a company that immediately before 1 October 2009 was formed and registered under the Companies Act 1985 ("CA 1985") or was "an existing company for the purposes of [CA 1985]"— CA 1985, s 735(b) defined "an existing company" as a company formed and registered under previous UK Companies Acts. Since this definition excludes overseas companies,[23] the definition of derivative claim in s 260(1) does not cover an overseas company. In Hong Kong, by contrast, the statutory derivative claim is not limited to companies incorporated in Hong Kong, but is extended to overseas companies.[24]

I suggest, however, that the better view is that s 260(2) does not have the effect of abolishing any derivative claims which do not fall within the definition of "derivative claim" in s 260(1), but simply prescribes the procedure to be followed in respect of any claim which falls within the s 260(1) definition of "derivative claim".

For the common law derivative claim to have been abolished by CA 2006, Part 11, express language should and could have been used to that effect. As Lord Browne-Wilkinson stated in *R* v. *Secretary of State for the Home Department,* ex p *Pierson*:[25]

21. Millet, 2.

22. Which came into effect on 1 October 2009.

23. Where provisions of CA 2006 are intended to apply to overseas companies, that fact is expressly stated in the relevant section: in the context of an unfair prejudice petition presented by the Secretary of State under s 995, s 995(4) provides: "In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, 'company' means any body corporate that is liable to be wound up under the Insolvency Act 1986 . . . or the Insolvency (Northern Ireland) Order 1989 . . . ", and accordingly the definition of "company" for that purpose includes an overseas company.

24. What has been described as a flexible concept of "specified corporation" has been defined by the Hong Kong Companies Ordinance, ss 2(1) and 2(12) for the purposes of ss 168BA–BK so that overseas companies are brought within the ambit of the statutory derivative claim: see R Cheung, "The new statutory derivative action in Hong Kong: a critical examination: Part 2" (2008) 29(10) Co Law 313.

25. [1998] AC 539, 573. See too *Bennion on Statutory Interpretation* (5th edn, 2008), 812–816. In *Child Poverty Action Group* v. *Secretary of State for Work and Pensions* [2010] UKSC 54, the Supreme Court decided that the right to recovery of overpaid social security payments provided for in the Social Security Administration Act 1992, s 71 was intended to be an exhaustive code for recovery of overpayments by the Secretary of State and precluded a common law right to recovery of the same.

Sir John Dyson SCJ stated (at [33–34]): "If the two remedies cover precisely the same ground and are inconsistent with each other, then the common law remedy will almost certainly have been excluded by necessary implication. To do otherwise would circumvent the intention of Parliament . . . The question is not whether there are any differences between the common law remedy and the statutory scheme. There may well be differences. The question is whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme. The court should not be too ready to find that a common law remedy has been displaced by a statutory one, not least because it is always open to Parliament to make the position clear by stating explicitly whether the statute is intended to be exhaustive. The mere fact that there are some differences between the common law and the statutory provisions is unlikely to be sufficient unless they are substantial . . . The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended to co-exist with it."

It is suggested that (i) the common law derivative claim would not cover precisely the same ground as, but rather would cover ground (multiple derivative claims and derivative claims in respect of overseas companies)

"Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication".

In both Australia and New Zealand the legislation introducing the statutory derivative claim expressly abolished the common law derivative claim.[26] The Australian Corporations Act 2001, s 236(3) provides that "The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished". The New Zealand Companies Act 1993, s 165(6) provides: "Except as provided in this section, a shareholder is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or a related company".

By contrast, CA 2006, s 260(2) does not expressly abolish the common law derivative claim. As noted above, s 260(1) provides that CA 2006, Part 11, Chapter 1 "applies to proceedings . . . by a member of a company—(a) in respect of a cause of action vested in the company, and (b) seeking relief on behalf of the company". It goes on to state: "This is referred to in this Chapter as a 'derivative claim'". Accordingly, when the expression "derivative claim" is used in s 260(2), it bears the meaning given to it in the preceding sub-paragraph. Seen in that context, s 260(2) merely provides that derivative claims which fall within the s 260(1) definition of a derivative claim can only be brought under CA 2006, Part 11, Chapter 1 or in pursuance of an order under s 996(2(c). It cannot sensibly be maintained from the wording of CA 2006, s 260 that Parliament expressly or by necessary implication indicated that it intended to abolish the common law derivative claim entirely.[27]

It may be instructive to note two matters which are consistent with the view which I am putting forward.

First, the Law Commission, when considering the question of multiple derivative claims stated:[28]

"We consider that the question of multiple derivative claims is best left to the courts to resolve, *if necessary* using the power under s 461(2)(e) of [CA 1985] to bring a derivative action".

It may be that, by using the words "if necessary", the Law Commission intended that the common law should be preserved to deal with multiple derivative claims, and that the unfair prejudice procedure was only there as back up, since otherwise the words "if necessary" would not have been necessary. This passage from the Law Commission's

which is not covered by, the statutory derivative claim, (ii) there is no inconsistency between the statutory derivative claim and the survival of the common law derivative claim in those limited circumstances, (iii) since Parliament did not take the opportunity to make the position clear by stating explicitly that the derivative claim under CA 2006 was intended to be exhaustive, the court should be slow to find that a limited common law derivative claim has been abolished, and (iv) it cannot be said that, looked at as a whole, the survival of a limited common law derivative claim would be incompatible with the statutory scheme under CA 2006 and therefore could not have been intended to co-exist with it.

26. It should be noted that in both the Australian and New Zealand legislation, the definition of the statutory derivative claim expressly includes multiple derivative claims. Section 236(1)(a)(i) of the Australian Corporations Act 2001 gives *locus standi* to a person to bring a derivative claim if he or she is "a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate". Section 165(1) of the New Zealand Companies Act 1993 provides that the court may give leave to a director or shareholder to "bring proceedings in the name and on behalf of the company or any related company".

27. See too, in the context of the then proposed Companies Act of British Columbia, Theodor A Zacks, "Companies Act—Bill 16—Whether the Common Law Derivative Action Survives the Statutory Extension of the Shareholder's Right to Sue: *Farnham Et Al* v. *Fingold Et Al*" (1973) 8 UBCLR 191.

28. Law Com 246, [6.110] (emphasis added).

report may cast a different light on the recommendation in the following paragraph of that report that the right to bring a derivative action at common law should be replaced: since it follows immediately after the comments on multiple derivative claims, it may well be that, having just drawn a distinction between derivative claims and multiple derivative claims, in the following paragraph the Law Commission was not referring to multiple derivative claims.

Secondly, CA 2006 itself provides for the bringing of a further form of derivative claim not under Part 11, Chapter 1 of the Act. CA 2006, s 370(1) provides that any liability of a director under s 369 where a company has made a political donation or incurred political expenditure without the authorisation required by Part 14

"is enforceable (a) in the case of a liability of a director of a company to that company, by proceedings brought under [s 370] in the name of the company by an authorised group of its members; (b) in the case of a liability of a director of a holding company to a subsidiary, by proceedings brought under [s 370] in the name of the subsidiary by—(i) an authorised group of members of the subsidiary, or (ii) an authorised group of members of the holding company".

The procedure in respect of such proceedings is set out in CA 2006, s 371.

Accordingly, CA 2006, Part 14 provides for a quite distinct procedure to be followed in respect of two species of derivative claim, neither of which needs to be brought under Part 11 or in pursuance of an order of the court in proceedings under CA 2006, s 994 and one of which—the multiple derivative claim provided for by s 370(1)(b)—falls outside the s 260(1) definition of a derivative claim. This suggests that s 260(2) does not have the effect of precluding the bringing of any claims which fall outside its purview.

It appears that Practice Direction 19C—Derivative Claims supplementing CPR Pt 19 ("PD 19C") applies—and is intended to apply—to those common law derivative claims which survived the coming into force of CA 2006, since by para 1(a) it applies to "derivative claims, whether under Chapter 1 of Part 11 of the Companies Act 2006 or otherwise . . . ".[29]

If the above analysis is correct, then in respect of overseas companies[30] and multiple derivative claims the common law derivative claim survives, and the procedure laid down by PD 19C applies to such claims, albeit that the action will fall outside the statutory framework under CA 2006 and will be governed purely by common law principles. Whilst this may lead to some confusion and complication,[31] it is, I suggest, the inevitable consequence of how CA 2006, s 260 has been drafted.

29. The similarly worded CPR r 19.9(1)(a) also applies to such claims. By contrast, CPR r 19.9A and r 19.9B expressly only apply to derivative claims under CA 2006, Part 11, Chapter 1. In *Konamaneni* v. *Rolls-Royce Industrial Power (India) Ltd* [2002] 1 BCLC 336, [44], Lawrence Collins J stated, with respect to the then (pre-CA 2006) provisions of CPR Part 19: "In my judgment, there is no basis for restricting r 19.9 to English companies, and in any event to do so would not have the effect of depriving the court of jurisdiction to entertain a derivative claim."

30. Albeit that the circumstances in which it would be appropriate for a derivative claim to be brought in relation to an overseas company in the England courts rather than the courts of the place of the company's incorporation are likely to be rare: see *Konamaneni* v. *Rolls-Royce Industrial Power (India) Ltd* [2002] 1 BCLC 336 and *Reeves* v. *Sprecher* [2007] 2 BCLC 614.

31. See the concerns expressed, with respect to the Hong Kong Companies Ordinance, in *Waddington Ltd* v. *Chan Chun Hoo Thomas* [2009] 2 BCLC 82, [29–32] by Ribeiro J and [80] by Lord Millett.

Judicial control of the conduct and settlement of derivative claims

The Law Commission recommended that the statutory derivative claim procedure be "subject to tight judicial control at all stages".[32] In the House of Lords Lord Goldsmith stated:[33]

"we do not expect there to be a significant increase in the number of derivative claims as a result of putting derivative action on a statutory footing—and the Law Commission did not expect that, either. There will continue to be tight judicial control of such cases and we would expect the judiciary to be circumspect when reaching decisions about applications; in particular, we would expect the judiciary to continue to take the view that a disagreement between members should usually be resolved under the company's constitution without recourse to the courts. The procedure that we have set out provides proper safeguards in that respect".

The statutory derivative claim came into existence in October 2007. In its first three and a bit years of life, have the courts indeed subjected it to tight judicial control? The answer is: for the most part, yes. But in one important respect the courts have to date failed to do so.

The courts have been sparing in granting permission to continue derivative claims. Often permission has simply been refused.[34] On occasion the courts have utilised their express power under CA 2006, s 261(4) to adjourn the application for permission to continue the derivative claim and give directions. In *Iesini* v. *Westrip Holdings Ltd*,[35] instead of granting permission to continue one aspect of the derivative claim, Lewison J directed the company's board to reconsider its defence to a claim which had been brought against it. In *Fanmailuk.com Ltd* v. *Cooper*[36] Robert Englehart QC (sitting as a Deputy High Court Judge) as a matter of case management directed a trial of the claimant's personal claim by way of preliminary issue in the action and adjourned the permission application until after the conclusion of that preliminary issue.[37]

Whilst the court has the power to grant permission to proceed with a derivative claim to trial, in the only two reported English cases[38] in which permission to continue a derivative claim has been granted under s 261(4), permission has been granted only until after disclosure, at which stage the claimant, if so advised, must apply for further permission.

32. Law Com 246, [6.6].
33. 27 February 2006, *Hansard*, col GC5.
34. Most recently in *Cinematic Finance Ltd* v. *Ryder* [2010] EWHC 3387 (Ch), where Roth J held, at [14], that whilst it could not be said that it would never be appropriate for a derivative claim to be brought by a majority shareholder in control of a company, permission to do so would be given only in very exceptional circumstances, and it was difficult to envisage what such exceptional circumstances might be.
35. [2010] BCC 420, [108].
36. [2008] BCC 877.
37. At [24] Mr Englehart QC stated that he would not have adjourned the permission application had he thought that its resolution was a straightforward matter.
38. *Kiani* v. *Cooper* [2010] BCC 463, [46]; *Stainer* v. *Lee* [2010] EWHC 1539 (Ch), [55], where Roth J noted that by that stage the facts and strength of the case would be much clearer. At [37], Roth J stated: "Where a Company has what appears to be a very strong case of breach of duty but it is unclear whether all the resulting loss has now been repaid, it is in my judgment appropriate for that case to proceed at least as far as disclosure so that a more accurate view can be reached as to the quantum of loss". Permission was also granted, and the grant of permission upheld on appeal, in the Scottish case of *Wishart* v. *Castlecroft Securities Ltd* [2010] BCC 161.

Furthermore, in those two English cases where permission has been granted, only very limited costs indemnity orders have been made: the courts have been acutely conscious of the danger of imposing a potentially significant (and potentially uncapped and disproportionate) financial obligation on the company. In *Stainer* v. *Lee*[39] Roth J noted that, where the amount of likely recovery is presently uncertain, there is concern that the claimant's costs could become disproportionate. Roth J accordingly placed a ceiling on the costs for which he granted an indemnity for the future (excluding the costs of the permission application) at £40,000, but gave the derivative claimant liberty to apply to extend the scope of that indemnity.

An even more limited costs indemnity order was made by Proudman J in *Kiani* v. *Cooper*,[40] where she stated that where, as in that case, the dispute is one between the company's only two directors and shareholders, the court ought to take a realistic view, adding:[41]

> "There are no significant unsecured creditors of which Mrs Kiani is aware whose interests come into the equation. There is some analogy with the trustee beneficiary who brings a Beddoe summons for directions to sue his fellow trustee beneficiary and asks for his costs of doing so out of the fund. In such circumstances the court is likely to refuse to force the defendant to fund proceedings against him. The claimant must take the risk as to costs.
>
> On that basis I am prepared to make an order that Mrs Kiani's costs should be borne by the company, but I am not prepared to grant her an indemnity in respect of any adverse costs order, that is to say, any order that Mr Cooper or DPM should be entitled to costs. It seems to me that she should be required to assume part of the risk of the litigation. However, that part of the order will be subject to review after disclosure."

However, in one area, the courts have failed to date to exercise sufficient control. CA 2006, s 371(5) expressly provides, with respect to derivative claims brought under Part 14 in respect of unauthorised donations or expenditure, that "Proceedings brought under section 370 may not be discontinued or settled by the group except with the permission of the court, which may be given on such terms as the court thinks fit". In contrast, Part 11 contains no requirement for the derivative claimant to obtain the permission of the court to settle or discontinue a derivative claim. In failing to include any such requirement, CA 2006 failed to implement the recommendation of the Law Commission, which pointed out[42] that "the absence of such a provision could give rise to serious possibilities of collusion, with the directors buying off the plaintiff in disregard of the rights of the company and its members". This lacuna left open the possibility that the derivative claimant could settle with the person against whom the relief is sought (or the company) without regard to the best interests of the company (or its other shareholders). Especially where the court has ordered the company to indemnify the derivative claimant against liability for costs incurred in a derivative claim, it would be inappropriate for the member pursuing the claim to settle or discontinue it without reference to the company or the court.[43]

39. [2010] EWHC 1539 (Ch), [56].
40. [2010] BCC 463.
41. *Ibid*, [48–49].
42. Law Com 246, [6.107].
43. *Cf* Australia, where the Corporations Act 2001, Part 2F.1A, s 240 provides that proceedings brought with leave must not be discontinued, compromised, or settled without the leave of the court.

However, the court rules make provision for a possible judge-made solution to this difficulty. The court has an express general power under CA 2006, s 261(4)(a) to "give permission . . . to continue the claim on such terms as it thinks fit". Further, CPR 19.9F specifically provides that, when the court has given permission to continue a derivative claim, it may order that the claim may not be discontinued or settled without the permission of the court.

Courts would have to take a proactive stance in imposing this condition, as parties to the claim who are contemplating a collusive arrangement would be most unlikely to request the imposition of such a condition.[44] It does not appear that this condition has been imposed in any of the cases in which permission has been granted to continue a derivative claim.

Furthermore, in the Scottish case of *Wishart* v. *Castlecroft Securities Ltd*[45] Lord Reed noted that it had not been suggested that leave should be granted on terms which would enable the court to exercise a continuing supervision over the conduct of the derivative proceedings. Disappointingly, Lord Reed did not go on himself to impose such a condition on the grant of leave.

It is suggested that courts should adopt a proactive stance in this regard. First, at an early stage at the hearing of the application for permission to continue the derivative claim they should draw to the attention of the derivative claimant that, if he volunteers to submit to an order that the claim may not be discontinued or settled without the permission of the court, this may help to establish that he is acting in good faith in seeking to bring the derivative claim.[46] Secondly, they should only grant permission to continue a derivative claim on condition that the claim may not be discontinued or settled without the permission of the court.