BAMFORD v HARVEY

Chancery Division

Roth J.: October 18, 2012

[2012] EWHC 2858 (Ch); [2013] B.C.C. 311

H1. *Derivative claims—Permission to continue derivative claim—Application for permission—Equal shareholders—No wrongdoer in control—Director failed to repay loan from company—Shareholder agreement—Agreement authorised director to pursue claim on behalf of company for director's breach of obligation—Quorum—Articles required quorum of two members—Whether agreement overrode quorum requirements—Whether permission to continue derivative claim to be granted—Whether wrongdoer in control a necessary condition for derivative claim—Whether right for company to bring direct claim via director under shareholder agreement to prevail—Whether derivative claim only allowed in exceptional circumstances—Civil Procedure Rules 1998 (SI 1998/3132) Pt 7—Companies Act 2006 s.261, 263.*

H2. This was the second stage of an application by a 50 per cent shareholder-director in a company for permission to bring derivative proceedings in the name of the company under Pt 11 of the Companies Act 2006 against the other 50 per cent shareholder-director in the company.

H3. The company was incorporated on September 6, 2010, for the purpose of purchasing a site in Cheshire from "BAE" for the purpose of redevelopment. In December 2011 the company entered into a contract to purchase the site from BAE for a total price of £40.35 million plus VAT. Under the contract, the price was payable in stages of a deposit, a first-stage payment and a second-stage payment. At the same time the company entered into an agreement with another party to sell 80 acres of the site to that party for the total price of £41 million (plus VAT) with instalments payable coinciding with the original contract between the company and BAE. The company paid the deposit and first-stage payment to BAE in December 2011. The sum of £3.5 million VAT payable on the second-stage payment was payable by January 27, 2012. The company received the slightly higher equivalent sums from its contract with the third party on time. The company had two 50 per cent shareholder-directors, "B" and "H". B was a party to the purchase as personal guarantor of the company's obligations to pay the £3.5 million and the second stage payment. B alleged that in late January 2012, following a meeting which H had with representatives of BAE and discussions on the possibility of the company becoming involved in a larger deal involving other BAE sites, H told him that BAE had agreed to defer the company's obligation to pay the £3.5 million to the end of February 2012, and following another meeting with BAE that BAE had agreed to a further deferral of the obligation to pay the £3.5 million until December 30, 2012. B further alleged that H told him that he was in financial difficulties in completing a property purchase and asked if the company could lend him £3.5 million on a short-term basis which he would repay at least one month before the company was obliged to pay that sum to BAE. B agreed to this and because of the urgency the sum was advanced to H before the execution of loan documentation. In early April 2012 B became aware that BAE had not in fact agreed

to the deferral of the £3.5 million payment to December 30, 2012, but remained entitled to call on the company to make that payment at any time. H failed to repay the £3.5 million loan and still had not signed the loan documents. B was very concerned and requested H to repay the loan but H failed to respond to emails from B and a letter from B's solicitor stating that B intended to issue a derivative claim under Pt 11 of the Companies Act 2006 on behalf of the company against H (B considered that as the company was deadlocked H would block any board resolution for the company to issue proceedings against H). B personally paid some of the sum owing to BAE and on June 13, 2012, applied for permission under s.261 of the Companies Act 2006 to bring a derivative claim on behalf of the company against H. The court gave permission for the first stage of the permission application to proceed and it reached the second stage.

H4. H opposed the proceedings and contended that the company could indeed have brought proceedings against him and he could not have prevented it from doing so as under a shareholders agreement dated November 25, 2011, between B, H and the company, cl.11.1 of the agreement provided that if a director was in breach of an obligation to the company then any decision as to the right of action of the company in respect thereof should be dealt with by the other director who would have full authority on behalf of the company to litigate the claim to the exclusion of the rights of the director in breach. B submitted that cl.11 did not alter the quorum requirements for a directors' meeting in the articles of two directors, so that without the participation of H, there could not be an effective board meeting to take the steps necessary to pursue proceedings him and that would preclude the company borrowing the necessary moneys to fund the derivative proceedings.

H5. Held, refusing the application for permission:

H6. 1. It was clear under the shareholders agreement that B was expressly given "full authority" on behalf of the company to litigate the claim against H. If the company needed to borrow money to fund such litigation, on any sensible construction of cl.11, B had the authority to do so and H was bound to "take all steps within [his] power" to assist. In any event, there was no evidence before the court that such borrowing was required. Alternatively, there was no evidence that B on behalf of the company could not negotiate a conditional fee agreement with the company's solicitors or any necessary borrowing facilities with the company's bank.

H7. 2. As to whether permission to continue the derivative claim should be granted, "wrongdoer control" was not an absolute condition for a derivative claim: if it were, it would be specified as such in s.263(2). (*Wishart v Castlecroft Securities Ltd* [2009] CSIH 65; [2010] B.C.C. 161 considered.) The potential for the company itself to commence proceedings was a relevant consideration in the exercise of the court's discretion and if there were real uncertainty as to whether B was able to avail himself of the provisions of cl.11 the flexible approach referred in *Wishart* (above) could justify a derivative claim. It was however impossible to avoid the conclusion that the mechanism of instituting a claim by the company against H through cl.11 of the shareholders agreement was simply overlooked.

H8. 3. Similarly, if B had indicated an intention to proceed under cl.11 and H had objected, that might have justified a derivative claim. However, those features did not apply in the instant case. There was nothing in the point that H had not responded to B pointing out the availability of the procedure under cl.11; it was not for H to tell B how to bring the action he threatened. Nor was there any significance in H's failure to take the point in his initial response to service of proceedings.

H9. 4. Since the proceedings always could have been brought in the name of the company and there was expressly no objection to them proceeding in the name of the company, that was the correct way forward. It was not elevating "wrongdoer control" to a preclusive condition for the court to hold that when proceedings clearly could be brought in the name of the company and there was no objection raised on that ground, they should be brought in the name of the company. The first guiding principle

that normally a company should be the only party entitled to enforce a cause of action belonging to it, and that a member should be able to maintain proceedings in relation to alleged wrongs done to the company only in exceptional circumstances, meant that permission for the action to continue as a derivative claim must be refused. The appropriate course was to reconstitute the proceedings as an ordinary CPR Pt 7 claim. (*Cinematic Finance Ltd v Ryder* [2010] EWHC 3387 (Ch); [2012] B.C.C. 797 considered.)

H10. Cases referred to:
Cinematic Finance Ltd v Ryder [2010] EWHC 3387 (Ch); [2012] B.C.C. 797
Stimpson v Southern Private Landlords Assoc [2009] EWHC 2072 (Ch); [2010] B.C.C. 387
Wishart v Castlecroft Securities Ltd [2009] CSIH 65; [2010] B.C.C. 161

H11. *Daniel Lightman* (instructed by DWF LLP) for the claimant.
David Casement QC (instructed by Nexus Solicitors Ltd) for the first defendant.

JUDGMENT

ROTH J.:

Introduction

1. This is an application for permission to bring derivative proceedings in the name of Avro Heritage Ltd ("the company") under Pt 11 of the Companies Act 2006 (all statutory references are to this Act, save as otherwise stated). Mr Joseph (Jo) Bamford and Mr J H (Harry) Harvey are the sole directors of, and each is a 50 per cent shareholder in, the company. Mr Bamford is the claimant and Mr Harvey is the only substantive defendant, although in the usual way the company has been joined as second defendant.

2. Statutory derivative claims are governed by the provisions in ss.260–264 (and ss.265–269 in Scotland). Those provisions establish a two-stage procedure for obtaining permission to bring such a claim. The first stage, as set out in s.261(2), is essentially an ex parte procedure, although by CPR r.19.9A(4) copies of the application notice, with the claim form and evidence relied on for the permission application, must be sent to the company. By order of June 19, 2012, Vos J. allowed the claim to proceed to the second stage. Accordingly, he found that the application and evidence in support disclosed a prima facie case: see s.261(2)(a). This is the second stage of the permission application, determined after Mr Harvey has served his evidence and a hearing at which both sides were represented.

The statutory provisions

3. Section 263 sets out the approach to be applied in determining the grant or refusal of permission. Sub-sections 263(2)–(4) provide:

> (2) "Permission … must be refused if the court is satisfied–
>
> (a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or
>
> (b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or

(c) where the cause of action arises from an act or omission that has already occurred, that the act or omission–

(i) was authorised by the company before it occurred, or

(ii) has been ratified by the company since it occurred.

(3) In considering whether to give permission … the court must take into account, in particular–

(a) whether the member is acting in good faith in seeking to continue the claim;

(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;

(c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be–

(i) authorised by the company before it occurs, or

(ii) ratified by the company after it occurs;

(d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

(e) whether the company has decided not to pursue the claim;

(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.

(4) In considering whether to give permission the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter."

4. Section 268 sets out equivalent provisions as regards the granting of leave to raise derivative proceedings in Scotland.

5. Accordingly, there are three grounds specified in the statute on any of which permission must be refused: s.263(2). If they do not apply then, in considering whether to give permission, there are set out six factors which the court "must take into account": s.263(3). In addition, the court must have "particular regard" to the additional matter set out in s.263(4). However, the s.263(4) consideration has no application in the present case since there are no members of the company who have no personal interest in the matter.

The nature of the dispute

6. Unusually, in this case the strenuous objection to this action proceeding by way of derivative claim is not based on any of the grounds in s.263(2) or (3). Instead, for Mr Harvey it was submitted that the bringing of a derivative claim against him is inappropriate as a matter of principle since there is a mechanism whereby Mr Bamford could procure that the company brings ordinary proceedings against him. While Mr Harvey contends that he would have a good defence to such proceedings (although the basis of that defence was not explained), on his behalf it was argued by Mr Casement QC that permission to bring the particular form of proceedings by way of derivative claim should be refused and that the claim can be reconstituted as an ordinary action in the name of the company. However, it was submitted that Mr Bamford should pay all the costs incurred to date by reason of his mistaken commencement of a derivative action.

7. Although Mr Casement submits that an important principle is here involved as to when derivative proceedings can be employed, in reality I consider that the dispute in that regard between the parties has been driven by tactical manoeuvring seeking to impose a cost burden by the one upon the other.

The facts

8. The underlying facts giving rise to the claim against Mr Harvey are relatively simple. The company was incorporated on September 6, 2010, for the express purpose of purchasing a site at Woodford Aerodrome in Cheshire ("the Woodford Site") from BAE Systems for the purpose of redevelopment. In December 2011, the company entered into a contract to purchase the Woodford Site from BAE for a total price of £40.35 million plus VAT ("the Woodford transaction").

9. Under the contract, the price was payable in stages: a deposit and the first stage payment, amounting together to £20 million (plus VAT), were duly paid by the company in December 2011. Thereafter, £3.5 million (being the VAT on the relevant part of the second stage payment) was payable by January 27, 2012; and the second stage payment itself of £20.35 million is payable by November 15, 2012, although there is provision for possible postponement to December 31, 2012.

10. Mr Bamford is a party to the Woodford transaction as personal guarantor of the company's obligations to pay the £3.5 million and the second stage payment of £20.35 million.

11. On the same date as the Woodford transaction, the company entered into an agreement with Redrow Homes Ltd ("Redrow") and Harrow and Estates Plc ("the Redrow agreement") to sell 80 acres of the Woodford Site to Redrow for the total price of £41 million (plus VAT). That price was also payable by instalments: £21 million (plus VAT) was due on completion; £4 million (being VAT on the second stage payment) was payable by January 3, 2012; and the second stage payment of £20 million by December 31, 2012. From the particulars of claim served by Mr Bamford, it appears that Redrow has duly paid the instalment due on completion and further, on about January 2, 2012, the sum of £4 million.

12. Mr Bamford alleges that in late January 2012, following a meeting which Mr Harvey had with representatives of BAE and discussions on the possibility of the company becoming involved in a larger deal involving other BAE sites, Mr Harvey told him that BAE had agreed to defer the company's obligation to pay the £3.5 million VAT to the end of February 2012. Then, on about February 23, 2012, following another meeting with BAE's representative, Mr Harvey told Mr Bamford that BAE had agreed to a further deferral of the obligation to pay the £3.5 million until December 30, 2012.

13. In telephone conversations over the next few days, Mr Harvey told Mr Bamford that he was in financial difficulties in completing the purchase of the property where his family lived and asked if the company could lend him £3.5 million on a short-term basis, which he would repay at least one month before the company was obliged to pay that sum to BAE. Mr Bamford says that in reliance on Mr Harvey's representations about what BAE had agreed, he agreed to that loan and, because of the urgency, that the money could be advanced prior to the execution of loan documents. There is no dispute, as I understand it, that the sum of £3.5 million was then transferred to Mr Harvey on about February 28, 2012. Further, by email on March 21, the company's solicitor sent draft loan documents covering the loan to Mr Bamford and Mr Harvey.

14. Subsequently, on about April 4, 2012, Mr Bamford became aware that BAE had not in fact agreed to the deferral of the £3.5 million payment to December 30, 2012, but remained entitled to call on the company to make that payment at any time. Further, in two separate emails sent on April 4, 2012, Mr Harvey stated that he would repay the £3.5 million loan by May 31. However, he still had not signed the loan documents and Mr Bamford had by this stage become very concerned. He set out his concerns in a long email of May 3, noting that there was accordingly a very substantial unsecured loan to Mr Harvey with no document to support it. Since the £3.5 million could be demanded by BAE at any time, in the absence of repayment by Mr Harvey of the loan the company would be

unable to meet that demand and would therefore be insolvent. He accordingly requested Mr Harvey to repay the loan by May 11.

15. Mr Harvey did not reply to that email, and Mr Bamford's solicitors accordingly sent Mr Harvey a letter of claim on May 14. That letter states as follows:

> "Since at Board level the Company is deadlocked, and you would be able to (and undoubtedly would in fact) block any board resolution Mr Bamford might propose authorising the company to issue proceedings against you to compel you to repay the Loan, Mr Bamford intends to issue a derivative claim against you under Part 11 of the 2006 Act seeking an order that you repay the Loan to the Company unless you repay the sum of £3.5 million to the Company in cleared funds by 4.00 pm on 1 June 2012.
>
> Please note that if Mr Bamford is compelled to take this step, he will, when applying for permission under section 261 of the 2006 Act to continue the derivative claim, also seek a costs indemnity order whereby the company will indemnify him against any liability in respect of costs he may incur either in the permission application or in the derivative claim generally."

16. Mr Harvey did not respond to that letter, nor did he make any repayment by June 1. He also failed to respond to an email from Mr Bamford sent on June 12, asking whether he would be repaying the £3.5 million loan that week to enable the company to pay BAE on June 15.

17. Meanwhile, BAE agreed to an extension of time for payment provided that £2 million would be paid by June 15 and the balance of £1.5 million by July 27. Since without the repayment from Mr Harvey the company could pay only £500,000, Mr Bamford paid the additional £1.5 million so that BAE could receive the £2 million it had required on June 15. The further £1.5 million, I was told, that fell to be paid to BAE two days after the hearing of this application would similarly be funded by Mr Bamford since the company did not have funds of that order.

18. It was in these circumstances that the derivative claim was issued on June 13.

The proceedings

19. In his witness statement filed in support of the application, Mr Bamford stated:

> "It is plain that Harry would not permit [the company] itself to bring any proceedings to enforce its rights against him and would exercise his powers as a director to prevent it from doing so."

20. The opposition by Mr Harvey to these proceedings rests on the proposition that the company could indeed bring proceedings against him and that he could not have prevented it from doing so. The argument is based on the shareholders agreement made between Mr Bamford, Mr Harvey and the company on November 25, 2011, the same date as that on which the company adopted its present articles of association.

21. Clause 11 of the shareholders agreement provides, in so far as material:

> "11.1 Notwithstanding any other provision of this agreement, if a Shareholder (the "First Shareholder") or any person connected with the First Shareholder:
>
> (a) is, or is alleged to be, in breach of any obligation owed to the Company (whether under this agreement, the Articles or otherwise);
>
> …
>
> then it is agreed that any decision in relation to the prosecution of any right of action of the Company in respect thereof shall be passed to and dealt with by the Directors other than any Director appointed by the First Shareholder. Such

Directors shall have full authority on behalf of the Company to negotiate, litigate and settle any claim arising in relation to any such matter to the exclusion of the rights and powers … of the First Shareholder (and any Director appointed by it). The First Shareholder shall take all steps within its power to give effect to the provisions of this clause 11.1.

11.2 A Director appointed by the First Shareholder shall be excluded from that part of any Board meeting at which a matter referred to in clause 11.1 is considered and such Director and the First Shareholder shall not receive, or have access to, the Board papers, minutes or documents relating to, or any action taken in connection with, that matter to the extent that any information of a confidential nature relating to a dispute with the First Shareholder (or any person connected with the First Shareholder) would otherwise be required to be disclosed to such Director or the First Shareholder."

The reference to directors (in the plural) includes a single director: see cl.1.4.

22. Accordingly, submitted Mr Casement, since this claim concerns the alleged breach of an obligation of Mr Harvey to repay his personal loan to the company, it is abundantly clear hat Mr Bamford would have "full authority on behalf of the Company to … litigate" that claim to the exclusion of the rights of Mr Harvey.

23. Faced with this argument, Mr Lightman submitted that cl.11 was prima facie exclusionary, cutting back the rights which the First Shareholder or his nominee director would otherwise have. He pointed to cl.18.2 of the shareholders agreement, which provides that the agreement does not constitute an agreement to alter the articles. I note that cl.18.2 also states that in the event of any conflict between the agreement and the articles, then as between the shareholders the provisions of the agreement shall prevail. Mr Lightman submitted that the provisions of cl.11 do not alter the quorum requirements for a directors' meeting set out in the articles. Since the articles incorporate (by para.1.2) the Model Articles contained in Sch.1 to the Companies (Model Articles) Regulations 2008)SI 2008/3229), a quorum is required for a directors' meeting to be effective (except for a proposal to call another meeting). Under cl.11.1 of the Articles, the quorum for a directors' meeting is two directors. On that basis, Mr Lightman submitted that although cl.11 of the shareholders agreement excluded the right of the director appointed by the First Shareholder to be involved in a board meeting, it did not operate so as to reduce the quorum for an effective meeting. Thus, without the participation of Mr Harvey, there could not be an effective board meeting to take the steps necessary to pursue proceedings against Mr Harvey. That would preclude the company borrowing the necessary moneys to fund those proceedings.

24. Despite the valiant attempts of Mr Lightman, I find this argument, as regards the pursuit by the company of proceedings against Mr Harvey, wholly unsustainable. It seems to me clear that, in the circumstances here, Mr Bamford is expressly given "full authority" on behalf of the company to litigate the claim against Mr Harvey. If the company needed to borrow money to fund such litigation, I consider that on any sensible construction of cl.11, Mr Bamford had the authority to do so and Mr Harvey was bound to "take all steps within [his] power" to assist. But in any event, there is no evidence before the court that such borrowing was required. The fact that the company could not pay more than £500,000 towards the £3.5 million due to BAE cannot establish that it would be unable to pay the very much lower sums required to bring proceedings for this debt against Mr Harvey. There is no reason, on the evidence, to suppose that the company did not receive the £4 million due under the Redrow agreement on January 3 and that insufficient moneys remain out of that payment to fund this litigation. Alternatively, there is no evidence that Mr Bamford on behalf of the company could not

negotiate a conditional fee agreement with the company's solicitors or any necessary borrowing facilities with the company's bank.

25. Since I therefore find that Mr Bamford could have arranged for the company to commence proceedings in its own right against Mr Harvey, should this application be refused? In *Cinematic Finance Ltd v Ryder* [2010] EWHC 3387 (Ch); [2012] B.C.C. 797, I refused permission for a derivative claim to continue that had been commenced by the owner of the overwhelming majority of shares in the relevant companies. I stated as follows:

> "11. … in my judgment the Act is not seeking to change the basic rule that a claim that lies in a company can be pursued only by the company or to disturb the fundamental distinction between a company and its shareholders. There is nothing to suggest that the Act intended such a radical reversal of long-standing and fundamental principles. It is relevant that this part of the Act has its genesis in the Report of the Law Commission on *Shareholder Remedies* (Law Com No.246 (1997)). That report states at the outset in paragraph 1.2:
>
> > 'The focus of the project was on the remedies available to a minority shareholder who is dissatisfied with the manner in which the company of which he is a member is run.'
>
> 12. The Report proceeded to set out `Guiding Principles' that the Law Commission applied as governing its proposals for reform of the law. The first of these is expressed as follows at para.1.9:
>
> > **'(i) Proper plaintiff**
> > Normally the company should be the only party entitled to enforce a cause of action belonging to it. Accordingly, a member should be able to maintain proceedings about wrongs done to the company only in exceptional circumstances."
>
> 13. Although this part of the Act does not completely mirror the approach to be found in a combination of the Law Commission's draft bill and draft procedure rules, it clearly reflects the overall approach in the Law Commission's proposal and, in my view, one would expect very different language in the Act if it were adopting such a radically different approach that involved discarding the Guiding Principle that I have quoted. Indeed, in the Act the governing provision for the grant of permission by the court to continue a derivative claim is s.261(4) which makes clear that this is a discretion resting in the court.
> 14. Whilst the discretion must, of course, be exercised in accordance with established principles, in my judgment this is one such principle. I would not go so far as to say that it could never be appropriate for a derivative claim to be brought by a shareholder holding the majority of the shares in a company. A judge must be cautious about using the word `never' when faced with a statutory discretion and when this is not one of the enumerated circumstances in s.263(2) in which permission must be refused … But in my judgment, only in very exceptional circumstances could it be appropriate to permit a derivative claim brought by a shareholder in control of the company. For my part, I find it difficult to envisage what those exceptional circumstances might be."

26. In *Stimpson v Southern Private Landlords Assoc* [2009] EWHC 2072 (Ch); [2010] B.C.C. 387, H.H. Judge Pelling QC (sitting as a judge of the High Court) refused permission to continue a derivative claim on a number of grounds. Near the conclusion of his judgment, he said this (at [46]):

> "There remains one final factor that is significant. Under the old law if there was no wrongdoer control of the company, permission would be refused for the obvious reason that in the

circumstances there was no need for derivative proceedings to be commenced. It was submitted on behalf of the claimant that these principles do not appear in the statute and therefore are no longer relevant. I am doubtful if that is correct. If the statute is followed strictly, the court is required to consider whether a prima facie case is established—see s.261(2). In considering that question, the court is bound to have regard, not merely to the factors identified in s.263(3) and (4), but to any other relevant consideration since s.263(3) and (4) are not exhaustive. It is open to the first claimant to requisition an EGM, obtain if he can a replacement board and that board can if it judges it appropriate to do so, applying the duties imposed upon them by s.172, authorise the litigation. This factor is at least a powerful one that negatives the giving of permission and may be overwhelming."

27. Subsequent to the judgment in *Stimpson* but before the judgment in *Cinematic Finance*, the Inner House of the Court of Session delivered its judgment in *Wishart v Castlecroft Securities Ltd* [2009] CSIH 65; [2010] B.C.C. 161. At first instance, the Lord Ordinary had considered that unless those responsible for the act or omission complained of remained in majority control, permission to bring a derivative claim must be refused under the analogous provisions of the Act concerning Scotland. On a reclaiming motion, the Inner House disagreed with that view. In the opinion, Lord Reed made detailed reference to the Law Commission report and noted that it had recommended that the new derivative procedure should involve "more modern, flexible and accessible criteria for determining whether a shareholder can pursue the action". After considering the statutory provisions, Lord Reed stated specifically as regards the views of the Lord Ordinary (at [38]):

"Nor … can we endorse a rule that leave can only be granted where the directors whose breach of duty is in issue were and remain in majority control: in practice, that is likely to be the position in many cases where leave is appropriately granted, but, as we have explained, one of the objects of the 2006 Act was to introduce more flexible criteria than the former "fraud on the minority" exception to the rule in *Foss v Harbottle*. The common law requirement of "wrongdoer control", in particular, had given rise to difficulty in a number of cases … and is not repeated in s.268."

28. *Wishart* (above) was not cited to this court in *Cinematic Finance* (above). On that basis, Mr Lightman submitted that the fact that Mr Harvey is not in control of the company and that cl.11 of the shareholders agreement might enable a claim to be brought in the name of the company should not be held to preclude a derivative claim. He argued that Mr Harvey would surely have sought to object to the use of cl.11 to bring proceedings if it had been adopted; and he pointed out that on receipt of the letter before action which expressly indicated that a derivative claim would be brought, Mr Harvey had not responded by asserting that this was an inappropriate way of proceeding.

29. I accept that "wrongdoer control" is not an absolute condition for a derivative claim: if it were, it would be specified as such in s.263(2) (or, in Scotland, s.268(1)). Although *Wishart* is not technically binding upon me, it is of very strong persuasive authority and I respectfully follow it. It is clearly desirable that the interpretation of the statutory provisions (or their equivalents) should be the same in England as in Scotland. But I do not see anything in the opinion in *Wishart* to suggest that the potential for the company itself to commence proceedings is not a relevant consideration in the exercise of the court's discretion. Moreover, the copious reference by the Inner House to the Law Commission report seems to me consistent with the approach I adopted in *Cinematic Finance*. The latter was indeed an extreme case, where those seeking to bring a derivative claim were in overall control of the company. Here, if there were real uncertainty as to whether Mr Bamford was able to avail himself of the provisions of cl.11, I think that the flexible approach to which Lord Reed referred

could justify a derivative claim. Similarly, if his solicitors had in the letter before claim stated that he was going to proceed under cl.11 by procuring the company to start proceedings and Mr Harvey (or his solicitors) had responded asserting that this was inappropriate, that might have been a ground justifying derivative proceedings. Mr Bamford is not compelled to launch the company into litigation that would become embroiled in difficult arguments as to whether the company was entitled to institute the proceedings. However, none of those particular features apply. It is impossible to avoid the conclusion that the mechanism of instituting a claim by the company against Mr Harvey through cl.11 of the shareholders agreement was simply overlooked. There can be no other justifiable explanation for the complete absence of any reference to it in Mr Bamford's first witness statement or indeed the terms of his solicitors' letter before claim to Mr Harvey.

30. I do not consider that there is any relevance in the fact that Mr Harvey did not respond to that solicitors' letter by pointing out the availability of cl.11. It was not for him to tell Mr Bamford how to bring the threatened action against him. Further, I do not attach any significance to the failure to take this point in the initial response from Mr Harvey's solicitors to the service of proceedings in their letter of June 26, 2012. The proceedings were served on Mr Harvey by letter of June 20, 2012, and I accept that his solicitors were instructed only on June 25.

31. Mr Harvey evidently appreciated the point soon afterwards, although I note that his solicitors did not write to Mr Bamford's solicitors pointing out that they considered that the proceedings were therefore incorrectly brought before he made his witness statement on July 6. In that witness statement he makes this point, as well as taking another point that is of little relevance.

32. In his skeleton argument for this hearing, Mr Casement submitted that the appropriate course, to which Mr Harvey would not object, is for the proceedings to be reconstituted as an ordinary CPR Pt 7 claim. Since the proceedings, in my judgment, always could have been brought in the name of the company and there is expressly no objection to them proceeding in the name of the company, I consider that is the correct way forward. It is not elevating "wrongdoer control" to a preclusive condition for the court to hold that when proceedings clearly can be brought in the name of the company and there is no objection raised on that ground, they should be brought in the name of the company. The first "guiding principle" set out by the Law Commission that is quoted in *Cinematic Finance* remains applicable. I shall therefore refuse permission for this action to continue as a derivative claim and order that it be reconstituted. I shall hear counsel as to the appropriate and most efficient directions to be given so that the action can continue accordingly.

(Order accordingly)