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Claim No HC -2015-002010

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

10th November 2016

Before :

MR JOHN BALDWIN QC
(sitting as a Deputy Judge of the Court)

Between :

1. MOHAMED FAIZEEN ZAVAHIR
2. ARUSHA ZAVAHIR — Claimants

- and –

3. MARTIN SHANKLEMAN
4. JUDITH SHANKLEMAN
5. CARMEL ARMSTRONG
6. PANAGIOTIS PARISIS
7. 89/93 YORK STREET LIMITED — Defendants

Spencer Keen (instructed by Howard Kennedy LLP) for the Claimants
Simon Harding (instructed by direct access) for the Defendants

Hearing dates: 25th, 26th and 27th October 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

1. This is an application for permission to continue a derivative claim brought under section 260(3) of the Companies Act 2006 by the Claimants (Dr and Mrs Zavahir) pursuant to their 25% shareholding in the fifth Defendant (YSL), which is the relevant company. At the material times the first and second defendants (Mr and Mrs Shankleman) also owned a 25% shareholding, as did the third Defendant (Ms Armstrong) and the fourth Defendant (Mr Parisis). Both Dr Zavahir and Mr Shankleman were directors of YSL at the material time.

2. The subject matter of the dispute is a block of flats at 89/93 York Street, London, W1 (the Property). The Property comprises 11 flats and in 1998 the freeholder offered the opportunity to the leasehold owners to purchase the freehold. The then owners of the leasehold interests in four of the flats took that opportunity, and on 16 September 1998 YSL was incorporated for the purposes of owning and managing the freehold of the Property. One share of £1 was allotted to each of the four participating flat owners. There is no contemporary evidence as to the source of the money used by YSL to make the purchase or as to any agreement between the original shareholders amongst themselves. It is common ground that the purchase was not pursuant to any statutory rights but was an ordinary transaction between buyer and seller.

3. The Memorandum of Association of YSL provides, in summary, that its objects are to acquire, hold, manage, maintain, administer and deal with the Property and to look after the same, arrange for utilities, collect rents, set up and maintain management funds to pay expenses and a host of other things to do with managing a block of flats, as well as to distribute any property of YSL in kind amongst the Members. Thus the business of YSL was concerned with its freehold ownership of the Property and it has no other business.

4. At various times subsequent to 1998 the original shareholders in YSL have sold their respective leasehold interests in their flats and at the same time they transferred their respective shareholding in YSL to their purchaser. Thus Dr and Mrs Zavahir are the successors in title to one of the original shareholders and Mr and Mrs Shankleman, Ms Armstrong and Mr Parisis likewise.

5. In 2007 there were discussions amongst the then current four shareholders (being the individuals party to this action) about extending each of their leases for a

significant period in return for nominal consideration. There was a director's meeting on 17 January 2007 and the minutes record that 'the four shareholders of the Freehold have agreed to issue themselves with a lease extension of 999 years' and that 'The Directors agreed that the 4 current shareholders should first extend their own leases'. No mention is made of any consideration which might be exchanged for these lease extensions. There is a now a dispute about what, if anything, was in fact agreed in 2007 but it is common ground that nothing was done in respect of the grant of any lease extensions.

6. Also during 2007 Dr and Mrs Zavahir procured YSL to add 35 square feet to the GIA of their flat (with a value of about £26,000), a roof terrace (with a value of about £900) and some loft space (with a value of about £900). It appears that such was done with the consent of all concerned (and, in particular, the other shareholders) and for nil consideration. The significance of this is, so the Defendants contend, that it illustrates that all the shareholders believed that YSL owned the freehold of the Property as nominee for their benefit. The values given for these additions were estimated by a chartered valuation surveyor, Mr Rose, whose report was commissioned in 2015 by a Mr Guest acting as a director of YSL. Mr Guest was nominated by Ms Armstrong.

7. In about October 2012 each of the leasehold owners of flats at the Property, except the Shanklemans, Ms Armstrong and Mr Parisis (i.e. the individual defendants and the shareholders other than the claimants), served notices on YSL to purchase the freehold of the Property under the Leasehold Reform, Housing and Urban Development Act 1993, and a new company, 89/93 York Street Freehold Limited (NewYSL) was formed to make this purchase. Dr Zavahir is a director of NewYSL (as well as YSL). Contracts were exchanged between YSL and NewYSL on 4th August 2013, completion took place on 11th August 2013 and the consideration paid to YSL was £224,000.

8. Meanwhile and prior to August 2013 (but otherwise, recently) there were further discussions between the four shareholders of YSL (i.e. the parties to this action apart from YSL) as to whether or not YSL should offer 999 year leases to each of them for nominal consideration.

9. The Defendants have produced evidence to the effect that Dr Zavahir agreed to such lease extensions by YSL although he strongly denies it and there is evidence that a document alleged to prove Dr Zavahir's assent is a forgery. It was about this time that there was a complete breakdown in civil relations between Dr Zavahir and Mr Shankleman and subsequent correspondence shows that this breakdown persists and is and has been bitter.

10. Dr Zavahir's evidence is that he would never agree to the grant of a long lease by YSL for nominal consideration since such would involve an attempt to defraud HMRC, a course of conduct which he says he would never contemplate. Mr Shankleman, on the other hand, contends that there is no fraud on HMRC since such a grant was always contemplated by the original shareholders and, in any event, YSL owns the Property on bare trust for the shareholders.

11. In the event, what happened was that in 2014, but before August, Mr Shankleman, as a director of YSL, arranged for the extension to 999 years of the leases held by each of his wife and himself, Ms Armstrong and Mr Parisis for the consideration by each of £1. Accordingly, and despite Dr Zavahir's professed dissent, these long lease extensions were granted and the freehold owned by YSL fettered by reason thereof. It is common ground that at the time of the lease extensions, YSL had no sufficient profits available for distribution (within the meaning of the Companies Act) and all parties knew that to be the case.

12. On 7th June 2013 a firm of Chartered Surveyors (Messrs Lamberts) valued the lease extensions as follows: £65,000 in respect of the extension to the Shankleman's flat, £42,000 in respect of the extension to Ms Armstrong's flat and £29,000 in respect of the extension to Mr Parisis' flat. There has been no challenge to these figures and thus I approach this application for permission on the basis of a diminution in the value of the freehold in the Property in the sum of £136,500 by reason of the conduct complained of.

13. As already mentioned, the freehold of the Property was sold to NewYSL in August 2014. With that sale the raison d'être of YSL fell away. It is now a company with, I was told, about £20,000 in cash assets and no business to carry on. It is not clear where the £224,000 received from the sale of its main asset has gone and what was received in respect thereof, although I was told that substantial

monies have been incurred in professional fees. There is a spread sheet of expenditure in evidence and I have little doubt that some explanation is called for in respect of what appear to be a number of extravagant items but now is neither the time nor place for that.

14. It is in these circumstances that Dr and Mrs Zavahir seek permission to bring a derivative action. Their complaint is against Mr Shankleman in his capacity as director of YSL and against the Shanklemans, Ms Armstrong and Mr Parisis in their capacity as shareholders in YSL. With respect to the complaint against Mr Shankleman as director, the complaint is his procurement of the grant of long lease extensions by YSL to the defendant shareholders for nominal consideration at a time when YSL had no profits available for distribution. The complaint against the defendant shareholders arises out of their knowledge of the grant of valuable lease extensions to themselves when there were no profits available for distribution. It is common ground that they had such knowledge although not of the legal consequences thereof.

15. The claim is brought pursuant to section 260 (in particular 260(3)) of the Companies Act 2006 which is in these terms:

> Derivative claims
>
> (1) This Chapter applies to proceedings in England and Wales or Northern Ireland 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.
>
> This is referred to in this Chapter as a "derivative claim".
>
> (2) A derivative claim may only be brought—
>
> (a) under this Chapter, or
>
> (b) in pursuance of an order of the court in proceedings under section 994 (proceedings for protection of members against unfair prejudice).
>
> (3) A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
>
> The cause of action may be against the director or another person (or both).
>
> (4) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.
>
> (5) For the purposes of this Chapter—
>
> (a) "director" includes a former director;
>
> (b) a shadow director is treated as a director; and
>
> (c) references to a member of a company include a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

16. The cause of action relied upon against Mr Shankleman as director is an alleged breach of duty under section 830 of the Act which is these terms:

> Distributions to be made only out of profits available for the purpose.
>
> (1) A company may only make a distribution out of profits available for the purpose.
>
> (2) A company's profits available for distribution are its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made.
>
> (3) Subsection (2) has effect subject to sections 832 and 835 (investment companies etc: distributions out of accumulated revenue profits).

17. The cause of action relied upon against the defendants in their capacity as shareholders arises under section 847 of the Act (in particular 847(2)(b)) which is in these terms:

> Consequences of unlawful distribution
>
> (1) This section applies where a distribution, or part of one, made by a company to one of its members is made in contravention of this Part.
>
> (2) If at the time of the distribution the member knows or has reasonable grounds for believing that it is so made, he is liable—
>
> (a) to repay it (or that part of it, as the case may be) to the company, or
>
> (b) in the case of a distribution made otherwise than in cash, to pay the company a sum equal to the value of the distribution (or part) at that time.
>
> (3) This is without prejudice to any obligation imposed apart from this section on a member of a company to repay a distribution unlawfully made to him.
>
> (4) This section does not apply in relation to—
>
> (a) financial assistance given by a company in contravention of section 678 or 679, or
>
> (b) any payment made by a company in respect of the redemption or purchase by the company of shares in itself.

18. Section 261 of the Act provides that permission is required to continue a derivative action. It is in these terms:

> Application for permission to continue derivative claim.
>
> (1) A member of a company who brings a derivative claim under this Chapter must apply to the court for permission (in Northern Ireland, leave) to continue it.
>
> (2) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission (or leave), the court—
>
> (a) must dismiss the application, and
>
> (b) may make any consequential order it considers appropriate.
>
> (3) If the application is not dismissed under subsection (2), the court—
>
> (a) may give directions as to the evidence to be provided by the company, and
>
> (b) may adjourn the proceedings to enable the evidence to be obtained.
>
> (4) On hearing the application, the court may—
>
> (a) give permission (or leave) to continue the claim on such terms as it thinks fit,
>
> (b) refuse permission (or leave) and dismiss the claim, or

(c) adjourn the proceedings on the application and give such directions as it thinks fit.

19. Section 263 of the Act provides for the giving of permission in these terms:

> Whether permission to be given.
>
> (1) The following provisions have effect where a member of a company applies for permission (in Northern Ireland, leave) under section 261 or 262.
>
> (2) Permission (or leave) 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 (or leave) 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 (or leave) 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.
>
> (5) The Secretary of State may by regulations ...

It is common ground that since YSL had no distributable profits at the relevant time, the acts complained of, if they were in breach of section 830, could not be lawfully ratified.

20. Since section 172 of the Act plays an important role in the considerations the court must take into account, it is convenient to set it out:

> Duty to promote the success of the company.
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

21. On 21 May 2015 the Claimants made an application on paper for permission to continue their derivative action on behalf of YSL and sought an order that they be indemnified out of YSL's assets in respect of their legal costs. On 25 August 2015 Snowden J made an order, inter alia, for a listing for directions and subsequently (it is not clear whether pursuant to an order or not) evidence was filed by both parties prior to the hearing of this application.

22. I was told that the Claimants' costs to date are in the order of £156,000, a figure somewhat larger than the sum which it is sought on behalf of YSL to recover in the action. The Defendants have also incurred significant legal costs to date but I was not given actual figures.

23. It was drawn to my attention that the costs order the Claimants seek, which provides for YSL to indemnify them for their costs, is the normal order in a derivative action (*Wallersteiner v Moir (No 2)* [1975] QB 73). That this is so is a reminder that the action is brought seeking relief for and on behalf of the company and that an important consideration is the benefit of the company as a whole and not any particular shareholder or group of shareholders in particular (see also *Iesini v Westrip* [2009] EWHC 2526 (Ch) at [125]).

24. The Claimants' case is straightforward. Mr Keen on their behalf contended that there is a clear breach of section 830 of the Companies Act by reason of the grant for nominal consideration of lease extensions of substantial value in circumstances where it is common ground there were no profits available for any distribution and that the personal defendants knew of these facts.

25. Relying on *Holland v HMRC* [2010] UKSC 51 Mr Keen contended that liability of a director in respect of acts which breach section 830 is strict; and relying on *It's a Wrap (UK) Ltd v Gula* [2006] EWCA Civ 544 he contended that the shareholders will be liable if they knew or ought to have known of the facts which mean that a distribution contravened the requirements of the Act (and that such is the case here). Accordingly, and given the requisite knowledge, liability of the shareholders to reimburse is also strict.

26. As for the shareholder defendants' contention that YSL owned the freehold interest in the Property as nominee for their benefit, Mr Keen dismissed the suggestion as being mere wishful thinking devoid of any evidential basis.

27. He pointed out that there was no evidence of the creation of any express trust (which would require writing – see section 53(1)(b) Law of Property Act) when YSL acquired the freehold, or of the disposition of any equitable interest in that trust to the present shareholders (which would also require writing, see section 53(1)(c) LPA) when they acquired their interests in the leasehold title. Neither is there any evidence to support a resulting or constructive trust. Mr Keen contended that it was not open to the court to make up the possible existence of such a trust for the purposes of providing a defence to the section 263 claim, the evidential burden being on the defendants to make their case arguably good on real rather than made up facts. He also submitted that even if there had been some sort of an agreement between the shareholders at the outset, this was irrelevant to the position between the present parties – citing *Chong v Alexander* [2016] EWHC 735.

28. Moreover, submits Mr Keen, the defendant shareholders have been asked to explain why they assert YSL was a nominee purchaser holding the freehold on trust for its shareholders from time to time and no documentary evidence or other satisfactory explanations have been provided.

29. In relation to whether or not permission to proceed with the derivative action should be granted, the Claimants rely on *Iesini v Westrip* [2009] EWHC 2526 (Ch) and, in particular, [78] and [79] *per* Lewison J:

> 78 The Act now provides for a two-stage procedure where it is the member himself who brings the proceedings. At the first stage, the applicant is required to make a *prima facie* case for permission to continue a derivative claim, and the court considers the question on the basis of the evidence filed by the applicant only, without requiring evidence from the defendant or

> the company. The court must dismiss the application if the applicant cannot establish a *prima facie* case. The *prima facie* case to which section 261 (1) refers is a *prima facie* case "for giving permission". This necessarily entails a decision that there is a *prima facie* case both that the company has a good cause of action and that the cause of action arises out of a directors' default, breach of duty (etc.). This is precisely the decision that the Court of Appeal required in Prudential . As mentioned, Norris J considered the application on paper, and considered that there was a *prima facie* case. Hence the hearing before me.
> 79 However, in order for a claim to qualify under Part 11 Chapter 1 as a derivative claim at all (whether the cause of action is against a director, a third party or both) the court must, as it seems to me, be in a position to find that the cause of action relied on in the claim arises from an act or omission involving default or breach of duty (etc.) by a director. I do not consider that at the second stage this is simply a matter of establishing a *prima facie* case (at least in the case of an application under section 260) as was the case under the old law, because that forms the first stage of the procedure. At the second stage something more must be needed. In *Fanmailuk.com v Cooper* [2008] EWHC 2198 (Ch) Mr Robert Englehart QC said that on an application under section 261 it would be "quite wrong … to embark on anything like a mini-trial of the action". No doubt that is correct; but on the other hand not only is something more than a *prima facie* case required, but the court will have to form a view on the strength of the claim in order properly to consider the requirements of section 263 (2)(a) and 263 (3)(b) . Of course any view can only be provisional where the action has yet to be tried; but the court must, I think, do the best it can on the material before it.

30. In the present case Mr Keen contends that there is strong *prima facie* case of wrong doing and that, in the circumstances where the main asset of the company and its main raison d'être has fallen away (with the sale of the freehold to NewYSL), the prime consideration in section 172 is that in (f), the need to act fairly as between the shareholders. He submitted that the majority shareholders have enriched themselves at the expense of YSL to the tune of £136,500 and that his clients are entitled to or, should have some recourse to, 25% of that, i.e. £34,125 or the benefit of it via their shareholding.

31. The Claimants dismiss the suggestion that their proper recourse is an unfair prejudice petition under section 994 of the Act primarily on the grounds that such a course would be far more complicated and that a derivative action is a more proportionate approach. Mr Keen cited the Scottish case of *Wishart v Castlecroft* [2009 CSIH 65] P385/08 for the proposition that the availability of alternative remedies is not necessarily conclusive on the question as to whether or not permission to proceed be granted, and *Bhullar v Bhullar* [2015] EWHC 1943 (Ch) as an example of a case in which the court concluded that a derivative action was the more appropriate way forward than an unfair prejudice petition (which on the facts of that case was likely to be slow and expensive).

32. Mr Harding on behalf of the director/shareholder defendants put forward a different approach. He submitted that this was a case in which Dr Zavahir was

pursuing his vendetta against Mr Shankleman and that the action itself made no economic sense. In this respect he pointed to the fact that YSL has no further function and should be wound up as cheaply and as quickly as possible, that YSL would certainly not engage in difficult High Court litigation for the possible recovery of £136,000 of which 75% would be likely to be distributed back to those who paid it, with only 25% at maximum going to the Claimants, and that permission to proceed should be refused. He submitted that if Dr Zavahir were truly aggrieved, he should present an unfair prejudice petition and then the court would be able to consider, amongst other things, Dr Zavahir's own behaviour in extending his own property interests for nil consideration in 2007 when considering what was the just solution.

33. With respect to the merits of the case, Mr Harding submitted it was reasonably clear that there was, at least, a common intention constructive trust and that YSL owned the freehold in the Property as nominee for all the shareholders. He pointed to the fact that the only reasonable inference from the original purchase by four of the eleven flat owners is that they believed they were buying an interest in the freehold which they could use for their own benefit and that this was the explanation for them transferring their respective shares in YSL when they sold on their flats. He submitted it was the only reasonable inference to be drawn from the fact that estate agents had advertised the sale of the relevant flats by reference to the language "share of freehold" and that this evidenced the common understanding of all the parties. He also pointed to Dr Zavahir's behaviour in extending his demise in 2007 as being consistent only with a shared belief that the freehold was held in a bare trust. He accepted that his clients had no written instruments which complied with section 53(1) of the Law of Property Act but submitted that such did not matter since he would be able to prove at trial the existence of a constructive trust.

34. Mr Harding also pointed to various advices which had been given by various persons (including solicitors and tax advisers) to the effect that the shareholders were beneficiaries of a trust in relation to the freehold. The difficulty with these advices, however, is that the instructions to the advisers have not been produced and, in relation to at least one of them (JPC Law), those instructions included an

assertion of facts which predicate the existence of a trust (thus rendering the advice as to whether or not there was a trust of no value).

35. I do not have to decide this case on the merits. I have to decide whether or not to give permission to the Claimants to proceed with their action. I am satisfied that the Claimants have a *prima facie* case and, indeed, something more than that as referred to by Lewison J in *Iesini.*

36. However, I am far from satisfied that that this is an action which the court should grant permission to proceed. In the context of section 263(2)(a) and whether a person acting in accordance with section 172 would not seek to continue the claim, I was reminded that the test is whether *no* such person would seek to continue the claim and, if some would and some would not, the matter should be looked at under s 263(3)(b) (*Iesini*, [86]).

37. I think this matter can be tested quite easily. YSL currently has about £20,000 and it has no property to manage, no business to conduct. The Claimants' costs to date of the action are about £156,000 and pleadings are not closed, i.e. the action has barely started. A wholly successful outcome will yield £136,500 plus some interest thereon plus, probably, a favorable order for costs. A fairly optimistic estimate of recoverable costs is about 80% of the monies spent. Once the action is over, if any monies are left they are likely to be distributed amongst the shareholders, 25% each. If the action fails it will be a complete disaster. If the action settles on a walk away basis, it again looks like a complete disaster as far as YSL is concerned.

38. Mr Keen submits that the high costs already incurred by the Claimants are largely the consequence of the uncooperative and aggressive stance taken by the defendants and that his clients should not suffer as a consequence. I was shown some of the correspondence between the parties and there is no doubt that some of it may well be difficult to justify. But I am not in the position to form any real view of how much of the £156,000 would have been avoided if the defendants had acted differently. And the fact remains that the Claimants are or will probably be looking to YSL for reimbursement in respect of these costs.

39. In my judgment, any prudent director carrying out a normal risk/benefit analysis would not seek to continue this claim. In the circumstances of a company such as

YSL in the position it finds itself in with few assets and no future prospects, the downsides and costs of losing far outweigh the benefits of winning even if there is factored in a significantly greater chance of winning than losing.

40. Even if I am wrong in my conclusion that the Claimants do not pass the section 263(2) gateway, I think a consideration of the matters in section 263(3) leads to the same conclusion. Given the inherent risks of litigation and the availability of an alternative remedy, I do not think a prudent director would attach great importance to continuing the litigation and with the costs being so high in relation to the potential reward and what might be done with the money, he/she would not be keen to pursue it. These are additional reasons for the court refusing permission to continue.

41. Mr Harding submitted that an additional reason for the court refusing permission was that Dr Zavahir was not acting in good faith in seeking to continue the claim (cf section 263(3)(a)). He pointed to the evident conflict of interest in his role as director of YSL and also NewYSL in connection with the sale of the freehold of the Property as well as the events in 2007 when Dr Zavahir extended his demise and appeared to treat YSL as nominee owner of the freehold. I have not found it necessary to reach any conclusions on the good faith or otherwise of any of the parties to this action and have assumed for the purposes of section 263(3) that the Claimants are in good faith in making this application.

42. Mr Keen urged upon me that the only relevant factor within section 172 in the case of a company which no longer has a business purpose was the need to act fairly as between the members of the company; and that it would be mistaken to consider the case as if it were a normal commercial case with an ongoing business to take into account. However, fairness between members of the company means fairness between all members. Even though the remaining assets are small, there is no justification for frittering them away or risking them foolishly.

43. Mr Keen also submitted that if I were not persuaded that it was fair to make an order that YSL indemnify his clients against their cost liability, then his clients would be willing to continue with costs reserved to the trial judge. But that is not a complete answer to the point. If any costs order were made against YSL it is

likely to impinge on any fruits it may garner from a successful outcome to the action and that should not be ignored, in my view.

44. Nor am I satisfied that the action will be as clean and straight forward as Mr Keen contends. The papers before me on this application show that both sides can be resourceful when it comes to taking positions and when that happens in litigation the usual, if not inevitable, result, in my experience is that legal costs go up and client satisfaction goes down.

45. I have considered all Mr Keen's submissions and have done so in the statutory framework which was outlined to me. In my judgment this is not a case in which permission to proceed with a derivative action should be given. Further continuance of the proceedings is not, in my judgment, sensible or proportionate. Finally, nothing I say in this judgment should have any impact upon whether or not there are any HMRC ramifications arising from what the personal defendants have done.