



Neutral Citation Number: [2017] EWHC 2195 (Ch)

Case No: C30LS697

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY

Leeds Combined Court Centre
1 Oxford Row, Leeds LS1 3BY
Date: 4 September 2017

Before :

HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

Between :

**WILTON UK LIMITED (SUING ON BEHALF OF
ITSELF AS SHAREHOLDER IN BANKS MOUNT
OSWALD LIMITED, THE FIFTH DEFENDANT)**

Claimant

- and -

- (1) JOHN MICHAEL SHUTTLEWORTH**
- (2) GRAHAM SMITH**
- (3) HARRY JAMES BANKS**
- (4) THE BANKS GROUP LIMITED**
- (5) BANKS MOUNT OSWALD LIMITED**

Defendants

Mr Gregory Pipe (instructed by **Clarion Solicitors Limited**) for the Claimant
Mr James Ayliffe QC (instructed by **Ward Hadaway**) for the first to fourth defendants
The fifth defendant did not appear and was not represented
Hearing dates: 15 August 2017

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.

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HIS HONOUR JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE
CHANCERY DIVISION)

His Honour Judge Davis-White QC :

Introduction

1. The issue that I have to determine is as to the validity, potential validity, or otherwise, of service of a claim form and particulars of claim in a CPR Part 7 claim. Service took place in proceedings brought as a derivative claim pursuant to Chapter 1 of Part 11 of the Companies Act 2006 (“CA 2006”). The circumstances were that permission of the Court to continue the proceedings had not been first obtained in accordance with, and as required by, s261 CA 2006 and CPR r19.9A. The period of four months during which service of the claim form was permitted has now long expired. The claim is now statute barred by the Limitation Act 1980 so that new proceedings cannot now successfully be commenced. Is the service that occurred valid; if not, can the court now retrospectively validate it?
2. The argument before me has focussed on three main possibilities: (a) that service is invalid and incapable of being validated at this stage by the Court; (b) that service is valid, unless and until the court sets it aside and (c) that service is invalid, but the court has jurisdiction to validate it by the grant of permission, with retrospective effect, to continue the proceedings.
3. If I decide that the position is either the second or third of the possibilities outlined above, then there will have to be a further hearing to determine how the court should exercise its jurisdiction on the facts of this case.
4. These issues arise in the context of an application by the first to fourth defendants dated 3 April 2017 seeking a declaration that the court has no jurisdiction to try the current Part 7 claim and setting aside service of both the claim form and particulars of claim. There is also before me an application by the claimant dated 9 November 2016, issued at the same time as the claim form. It asked the court for permission to continue the proceedings. However, it was, at the claimant’s request, not originally listed for a hearing. There is also a further application dated 22 June 2017 before me seeking permission to continue the claim up and until determination of the two applications of the claimant and an order that the claim form and particulars of claim are deemed served on 8 March 2017.
5. These three applications were listed for a day’s hearing before me. The time estimate was inadequate. Having heard argument on the issues that I am now giving judgment on, I had to adjourn the remaining issues arising under the application to be argued on another date. The first to fourth defendants invited me to give judgment on the points of law that I am now dealing with on the basis that if I decided the matter one way then the entire proceedings will come to an end and there will be no need for the resumed hearing. If, on the other hand, I decided that, as a matter of law, service was, or was capable of being rendered, valid, then the parties would know that sooner rather than later and any further judgment would take less time to prepare. The claimant initially invited me not to give judgment on the relevant issues at this stage. It was suggested that my assessment of the law might alter once I had heard argument on matters going to the exercise of my discretion (if there was one). On further reflection, the claimant indicated that it did not strongly oppose the course of my

giving judgment before hearing further argument on the applications. Having considered the matter I am satisfied that my judgment is on a self-contained area and that it is appropriate to hand it down at this stage, largely for the reasons advanced by the first to fourth defendants (the “Relevant Defendants”) as outlined above. Accordingly, this is a judgment on a preliminary issue within the applications.

6. Before me, Mr Pipe appeared for the claimant and Mr Ayliffe QC for the Relevant Defendants. I am grateful to both of them for their submissions, both written and oral.

The Part 7 Claim

7. In brief terms, the claim relates to an opportunity to acquire and develop the site of the Mount Oswald Golf Club in Durham (the “**Site**”).
8. The claimant company, Wilton UK Limited (“**Wilton**”) is indirectly owned (by way of a holding company, Wilton UK Holdings Limited) by a Mr David Wilkes (“**DW**”) and a Mr Trevor Charlton (“**TC**”). In about early 2006, TC and DW became aware that the owner of the Site, North of England Estates Limited (“**NEE**”) was interested in selling the Site. They did not have the financial resources to purchase and develop the site and so looked for a joint venture partner. However, they made what they assert to be valuable contact with NEE which was of value to a potential joint venture partner.
9. Ultimately, in their search for a joint venture partner, DW and TC made contact with directors of companies within the Banks’ group of companies. The third defendant, Mr Banks, was the group chairman of the Banks’ companies and the managing director of the fourth defendant, Banks Group Limited (“**BGL**”). He held the controlling equity shareholding in BGL. He was also a director of the other Banks’ group companies referred to below. The first defendant, Mr Shuttleworth (from about August 2008, managing director of Banks Property Limited (“**BPL**”)) was one of the persons with whom the claimant says that TC and DW were in negotiations over a joint venture.
10. There is a dispute as to when arrangements were made and whether particular arrangements or understandings were in any event contractually binding or of legal effect. The claimant says that a joint venture agreement was entered into in about August/September 2006. The Relevant Defendants deny this, though as I understand it they do not deny that there were ongoing negotiations about entry into a joint venture agreement.
11. In October 2006 a conditional contract, which the parties have referred to as “option 1” for convenience (“**Option 1**”) was entered into by NEE and BGL under which, in certain circumstances, NEE would become bound to sell the Site to BGL for £18 million. The price of the Option 1 was £350,000. Under the final terms of Option 1, BGL was obliged to apply for planning permission in respect of the Site. If such permission was not obtained by October 2007 (later extended by agreement to 23 April 2010), either party could terminate Option 1.
12. An application for planning permission and the finalisation of entry into formal agreements giving effect to a joint venture between TC and DW on the one hand, and the Banks’ group of companies on the other hand, were pressed on with.

13. By August 2008, the details of implementation of the joint venture were agreed. The joint venture company was to be the fifth defendant, Banks Mount Oswald Limited (“**BMO**”), for whose benefit the current proceedings are sought to be continued. BMO was to be owned 50% by the claimant and 50% by another Banks’ company, BPL. Each of the claimant and BPL would have the right to appoint 2 directors to the board of directors of BMO. Until planning permission was granted BPL would have the right to appoint one of its directors as chair and such chair would have a second casting vote at board and general meetings. BGL was to enter a sub-sale agreement with BMO, effectively giving BMO the benefit of Option 1. BMO would in turn reimburse BGL for the costs incurred to date on the project. The claimant and BPL would each lend 50% of the sums required to enable BMO to do this. The further seeking of planning permission and the other development works would be carried out under contract with and for BMO. That work would be undertaken by another Banks’ group company, Banks Development Limited (“**BDL**”). Separate agreements were entered into to give effect to these arrangements on 7 August 2008, including a shareholders’ agreement, a sub-sale agreement, loan agreements and a services agreement.
14. Economic conditions became hostile. The deadline for obtaining planning permission under Option 1 passed without permission having been obtained. NEE terminated the Option.
15. Both TC and DW on the one hand and the Banks’ group on the other hand remained interested in a joint venture to acquire and develop the Site. As with Option 1, negotiations to acquire an option from NEE and the negotiation of detailed joint venture terms continued in parallel.
16. The negotiations with NEE were ultimately successful. BGL entered into a new option agreement with NEE on 16 November 2010. For a price of £5 million it acquired a right exercisable within 4 years from 31 January 2011 to acquire the Site for a price of £10 million (less the option fee price of £5 million).
17. Negotiations over a detailed suite of documents for the implementation of a joint venture agreement did not reach a successful conclusion. Again, TC/DW were expected to come up with 50% of the relevant funding. The Banks’ group decided that a deadline should be set for the putting in place of funding from TC/DW. By letter dated 28 February 2011 addressed to BMO, BGL required reimbursement from BMO of the expenses it had incurred. On 1 April 2011 BGL sent a letter to BMO stating that it intended to exploit Option 2 for its own purposes. There is a dispute between the Banks’ group of companies on the one hand and TC/DW on the other as to whether the former, or connected individuals, effectively wrongfully obstructed the fund raising efforts of TC/DW.
18. Planning permission for the Site was subsequently acquired. The Site was developed. The project ultimately proved highly successful. BGL has made and is continuing to make substantial profits from the development.

Derivative claim proceedings

19. On 1 June 2015 letters of claim were sent by the claimant’s solicitors to the Relevant Defendants.

20. The claim ultimately advanced as a derivative claim (the “**Derivative Claim**”) was based, broadly, on the proposition that, in breach of fiduciary duties owed to BMO, a corporate opportunity of BMO had been wrongfully diverted from it by a number of its directors, specifically the 1st and 2nd defendants and the third defendant as a shadow/de facto director. There are a number of other causes of action also pleaded but I need not go into the details of those for present purposes. The broad defence of the first to fourth defendants is that there was no diversion of a corporate opportunity from BMO. BMO’s only corporate opportunity was in relation to the exploitation of Option 1.
21. The Derivative Claim was commenced by Claim Form dated 9 November 2016. On the same day, an application notice was issued by the claimant seeking an order that it be granted permission pursuant to s261 CA 2006 to continue the claim and an order that the time for the provision of particulars of claim to the fifth defendant, BMO (the company in whose favour the Derivative Claim was sought to be brought) be extended to 6 weeks from the date of the application. The application notice was supported by a witness statement of DW in which he said, among other things, that further information was being gathered, that his witness statement therefore set out only a summary of the claims and their background and that detailed particulars of claim and evidence were to follow. In the circumstances, Wilton requested that the court should not determine the application until the further documentation had been filed. Until the defendant’s application dated 3 April 2017 the application for permission was taken no further.
22. Separately a personal claim for breach of what is said to be a contractually binding joint venture agreement was advanced in separate proceedings by TC, DW and Wilton UK Limited (the “**Direct Claim**”). That claim was commenced by claim form dated 14 November 2016.
23. The claim form in the proceedings before me expired four months after issue, in the sense that service had to be within 4 months of issue (see CPR r.7.5). The particulars of claim are dated 8 March 2017. They were served on that date. At that point the claimant’s application for permission to continue the proceedings had not been pursued further.
24. Acknowledgements of service dated 21 March 2017 were filed by each of the first to fourth defendants.
25. On 3 April 2017, the first to fourth defendants issued the Notice of Application that I have referred to seeking an order under CPR r11(1) and (6) declaring that the court had no jurisdiction to try the claim and setting aside service of the claim form and the particulars of claim.
26. By consent order made in the Direct Claim on 3 May 2017 the time for the Relevant Defendants to file a defence in the Direct Claim was extended by agreement to a date after determination of the two then extant applications that I have referred to.
27. By application dated 22 June 2017 the claimant issued the further application that I have mentioned seeking orders that the claimant have permission to continue the claim in the proceedings and that the claim form and particulars of claim “are deemed served”.

The statutory regime and the CPR

28. As is well known the CA 2006 ushered in a new statutory derivative action as regards UK registered companies. Instead of the old rule in *Foss v Harbottle*, the circumstances in which shareholders are entitled to bring proceedings for the benefit of the company in which they are shareholders, effectively enforcing causes of action vested in the company, is regulated by statute which gives a discretion to the court. (This is subject to the point that not all derivative proceedings fall within the statutory regime. For example, “double” or “multiple” derivative proceedings fall outwith the statutory regime: see *Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] EWHC 348 (Ch); [2013] Ch 551; *Abouraya v Sigmund* [2014] EWHC 277 (Ch); [2015] B.C.C. 503).
29. Under the statutory regime, the court’s discretion is exercised in a two- stage process. First, the court considers whether there is a prima facie case to permit the proceedings to proceed. This is normally considered on a “without notice” basis. If that hurdle is passed, the court then convenes an inter-partes hearing at which it applies the relevant statutory tests to decide whether to permit the proceedings to continue and to what stage. At that point it can decide that one or more of the defendants who are not the company be joined to the application.
30. The statutory provisions are contained in Chapter 1 of Part 11 of the Companies Act 2006. So far as relevant to these proceedings they are as follows:

CHAPTER 1

DERIVATIVE CLAIMS IN ENGLAND AND WALES OR NORTHERN IRELAND

260. 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.*

261 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.*

262 Application for permission to continue claim as a derivative claim

[Deals with the situation where a company has commenced a claim which could be brought as a derivative claim]

263 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—*
- (a) *amend subsection (2) so as to alter or add to the circumstances in which permission (or leave) is to be refused;*
 - (b) *amend subsection (3) so as to alter or add to the matters that the court is required to take into account in considering whether to give permission (or leave).*
- (6) *Before making any such regulations the Secretary of State shall consult such persons as he considers appropriate.*
- (7) *Regulations under this section are subject to affirmative resolution procedure.*
31. S261 CA 2006 sets out the requirement to seek permission of the court to “continue” a derivative action. It does not in terms say how or when such permission is to be sought. Nor, in terms, does it say what is the effect of not seeking and obtaining permission. The further details with regard to seeking permission is one of procedure governed by, and set out in, the CPR.

32. CPR Part 19 provides, so far as relevant, as follows:

“Derivative claims – how started

19.9

(1) This rule –

- (a) applies to a derivative claim (where a company, other body corporate or trade union is alleged to be entitled to claim a remedy, and a claim is made by a member of it for it to be given that remedy), whether under Chapter 1 of Part 11 of the Companies Act 2006 or otherwise; but*
- (b) does not apply to a claim made pursuant to an order under section 996 of that Act.*

(2) A derivative claim must be started by a claim form.

(3) The company, body corporate or trade union for the benefit of which a remedy is sought must be made a defendant to the claim.

(4) After the issue of the claim form, the claimant must not take any further step in the proceedings without the permission of the court, other than –

- (a) a step permitted or required by rule 19.9A or 19.9C; or*
- (b) making an urgent application for interim relief.*

Derivative claims under Chapter 1 of Part 11 of the Companies Act 2006 – application for permission

19.9A

(1) In this rule –

‘the Act’ means the Companies Act 2006;

‘derivative claim’ means a derivative claim under Chapter 1 of Part 11 of the Act;

‘permission application’ means an application referred to in section 261(1), 262(2) or 264(2) of the Act;

‘the company’ means the company for the benefit of which the derivative claim is brought.

(2) When the claim form for a derivative claim is issued, the claimant must file –

- (a) an application notice under Part 23 for permission to continue the claim; and*
- (b) the written evidence on which the claimant relies in support of the permission application.*

(3) *The claimant must not make the company a respondent to the permission application.*

(4) *Subject to paragraph (7), the claimant must notify the company of the claim and permission application by sending to the company as soon as reasonably practicable after the claim form is issued –*

- (a) *a notice in the form set out in Practice Direction 19C, and to which is attached a copy of the provisions of the Act required by that form;*
- (b) *copies of the claim form and the particulars of claim;*
- (c) *the application notice; and*
- (d) *a copy of the evidence filed by the claimant in support of the permission application.*

(5) *The claimant may send the notice and documents required by paragraph (4) to the company by any method permitted by Part 6 as if the notice and documents were being served on the company.*

(6) *The claimant must file a witness statement confirming that the claimant has notified the company in accordance with paragraph (4).*

(7) *Where notifying the company of the permission application would be likely to frustrate some party of the remedy sought, the court may, on application by the claimant, order that the company need not be notified for such period after the issue of the claim form as the court directs.*

(8) *An application under paragraph (7) may be made without notice.*

(9) *Where the court dismisses the claimant's permission application without a hearing, the court will notify the claimant and (unless the court orders otherwise) the company of that decision.*

(10) *The claimant may ask for an oral hearing to reconsider the decision to dismiss the permission application, but the claimant –*

- (a) *must make the request to the court in writing within seven days of being notified of the decision; and*
- (b) *must notify the company in writing, as soon as reasonably practicable, of that request unless the court orders otherwise.*

(11) *Where the court dismisses the permission application at a hearing pursuant to paragraph (10), it will notify the claimant and the company of its decision.*

(12) *Where the court does not dismiss the application under section 261(2) of the Act, the court will –*

- (a) *order that the company and any other appropriate party must be made respondents to the permission application; and*

- (b) *give directions for the service on the company and any other appropriate party of the application notice and the claim form.*

Derivative claims – costs

19.9E

The court may order the company, body corporate or trade union for the benefit of which a derivative claim is brought to indemnify the claimant against liability for costs incurred in the permission application or in the derivative claim or both.

Derivative claims – discontinuance and settlement

19.9F

Where the court has given permission to continue a derivative claim, the court may order that the claim may not be discontinued, settled or compromised without the permission of the court.

33. The provisions of CPR 19 are supplemented by the Practice Direction, *Practice Direction 19C-Derivative Claims*. So far as relevant it provides as follows:

Application of this practice direction

1 *This practice direction –*

(a) *applies to –*

(i) *derivative claims, whether under Chapter 1 of Part 11 of the Companies Act 2006 or otherwise; and*

(ii) *applications for permission to continue or take over such claims; but*

(b) *does not apply to claims in pursuance of an order under section 996 of that Act.*

Claim form

2

(1) *A claim form must be headed ‘Derivative claim’.*

(2) *If the claimant seeks an order that the defendant company or other body concerned indemnify the claimant against liability for costs incurred in the permission application or the claim, this should be stated in the permission application or claim form or both, as the case requires.*

Application for order delaying notice

3 If the applicant seeks an order under rule 19.9A(7) delaying notice to the defendant company or other body concerned, the applicant must also –

(a) state in the application notice the reasons for the application; and

(b) file with it any written evidence in support of the application.

Form to be sent to defendant company or other body

4 The form required by rule 19.9A(4)(a) to be sent to the defendant company or other body is set out at the end of this practice direction. There are separate versions of the form for claims involving a company, and claims involving a body corporate of another kind or a trade union.

Early intervention by the company

5 The decision whether the claimant's evidence discloses a prima facie case will normally be made without submissions from or (in the case of an oral hearing to reconsider such a decision reached pursuant to rule 19.9A(9)) attendance by the company. If without invitation from the court the company volunteers a submission or attendance, the company will not normally be allowed any costs of that submission or attendance.

(Sections 261, 262 and 264 of the Companies Act 2006 contain provisions about disclosing a prima facie case in applications to continue a derivative claim.)

Hearing of applications etc.

6

(1) Where a permission application to which this practice direction applies is made in the High Court it will be assigned to the Chancery Division and decided by a High Court judge.

(2) Where such an application is made in a county court it will be decided by a circuit judge.

Discontinuance of derivative claim

7 As a condition of granting permission to continue or take over a derivative claim, the court may order that the claim is not to be discontinued, settled or compromised without the court's permission. Such a condition may be appropriate where any future proposal to discontinue or settle might not come to the attention of members who might have an interest in taking over the claim.

34. Mr Pipe for the claimant submits that (a) service is valid unless and until set aside pursuant to CPR 3.10(1)(a); alternatively, that (b) service is invalid but is capable of being validated retrospectively by the court. On the assumption that CPR r3.10 applies, Mr Ayliffe QC, for the Relevant Defendants, contests both these propositions. However, he has a separate initial submission which is that the matter is one governed

by the CA 2006 and not simply one of procedure under the CPR. It is, he says, to the provisions of the CA 2006 that one must look to determine the effect of proceeding with a claim without having obtained permission, even if the details of how one seeks permission are laid down in the CPR.

35. CPR 3.10 provides as follows:

“General power of the court to rectify matters where there has been an error of procedure:

3.10 *Where there has been an error of procedure such as a failure to comply with a rule or practice direction –*

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error.”

Is the error in this case solely a failure to follow the CPR, such that CPR 3.10 might apply?

36. In my judgment, Mr Ayliffe QC is correct to say that this is a case where statute and not just the CPR requires the obtaining of permission from the court before derivative proceedings may be continued with. True it is that the detailed procedure and the timing of the application for permission are set out in the CPR. However, CA 2006 lays down that permission is required and that the court must deal with the matter by a two-stage process. Accordingly, I do not consider that there is scope for the operation of CPR r3.10 in this case. The defect is not simply one under the CPR but is a breach of statute such that CPR r3.10, which is limited to dealing with procedural errors under the CPR, cannot apply. The failure is to comply with the statute, albeit the detailed manner of compliance is set out in the CPR.

37. Accordingly, in my judgment, the question that arises is whether as a matter of statutory construction, the defect is treated as one that creates an irregularity but does not invalidate at all the steps taken to effect service and, if the steps are invalid, whether or not retrospective permission can be obtained under CA 2006.

38. Mr Ayliffe QC’s primary submissions were (a) that the failure to obtain permission to continue meant that service was not valid; and (b) that retrospective permission could not be obtained under the CA 2006. In this respect he relied upon *Seal v Chief Constable of South Wales Police* [2007] UKHL 31; [2007] 1 WLR 1910. In that case the Mental Health Act 1983 (the “MHA”) required leave of the High Court to be obtained prior to the institution of civil proceedings in respect of acts purporting to be done in pursuance of the Act. Following arrest the claimant had been removed to a place of safety purportedly pursuant to s136 MHA. He had commenced proceedings against the police authority for damages for, among other things, misuse of s136. However, he had not first obtained the necessary leave of the court. The claim was struck out as a nullity. The claimant, whose claim was now outside the limitation period for commencing claims, appealed. The matter eventually reached the House of

Lords where the claimant's ground of appeal was that the requirement for leave was directory rather than mandatory and that the situation could be remedied by a subsequent grant of leave with a stay of the proceedings in the meantime.

39. The House of Lords, by a majority, upheld the decision of the original judge that the proceedings were a nullity. The starting point was the words of s 139(2) that "*No civil proceedings shall be brought...*". Although the language was "*emphatic*", Lord Bingham pointed out that in two other areas, s285(3) of the Insolvency Act 1986 and s 17 of the Charitable Trusts Act 1853, proceedings brought without permission were not held to be a nullity (see respectively *Re Saunders (A Bankrupt)* [1997] Ch 60 and *Rendall v Blair* 45 Ch D 139). The variation in language between the three sections was "*not so marked, as without more, to warrant a radically different conclusion, and the welcome tendency to prefer substance to form must generally discourage the invalidation of proceedings for want of compliance with a procedural requirement.*" (see paragraph [7]).
40. S17 of the Charitable Proceedings Act 1853 provided:
- "Before any suit, petition, or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced, presented, or taken, by any person whomsoever, there shall be transmitted by such person to the said board, notice in writing of such proposed suit, petition, or proceeding, and such statement, information, and particulars as may be requisite or proper, or may be required from time to time, by the said board, for explaining the nature and objects thereof; and the said board, if upon consideration of the circumstances they so think fit, may, by an order or certificate signed by their secretary, authorize or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity, either for the objects and in the manner specified or mentioned in such notice, or for such other objects, and in such manner and form, and subject to such stipulations or provisions for securing the charity against liability to any costs or expenses, and to such other stipulations or provisions for the protection or benefit of the charity, as the said board may think proper; and such board, if it seem proper to them, may by such order or certificate as aforesaid require and direct that any proceeding so authorized by them in respect of any charity shall be delayed during such period as shall seem proper to and shall be decided by such board; and every such order or certificate may be in such form and may contain such statements and particulars as such board shall think fit; and (save as herein otherwise provided) no suit, petition, or other proceeding for obtaining any such relief, order, or direction as last aforesaid shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the said board. Provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity."*
41. S285(3) of the Insolvency Act 1986 provides:

“(3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall—

(a) have any remedy against the property or person of the bankrupt in respect of that debt, or

(b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose.

This is subject to sections 346 (enforcement procedures) and 347 (limited right to distress).”

42. Lord Bingham went on to say, also in paragraph [7]:

*“I do not think the answer to a question such as this should ordinarily turn on a detailed consideration of the language used by Parliament in one provision as compared with that used in another. The important question is whether, in requiring a particular condition to be satisfied before proceedings are brought, Parliament intended to confer a substantial protection on the putative defendant, such as to invalidate proceedings brought without meeting the condition, or to impose a procedural requirement giving rights to the defendant if a claimant should fail to comply with the requirement; but not nullifying the proceedings: see *R v Soneji* [2006] 1 AC 340, para 23. To answer this question a broader inquiry is called for.”*

43. I should add that in the context of the provision that I am considering the protection is there primarily for the company in question, whose rights are sought to be enforced by the shareholder, rather than the other defendants.

44. Lords Carswell and Brown agreed with Lord Bingham. The minority, Lord Woolf and Baroness Hale, also adopted, and enlarged upon, the general principle that Lord Bingham recognised, and that I have cited above to the effect that the preference of *“substance to form must generally discourage the invalidation of proceedings for want of compliance with a procedural requirement.”*

45. Lord Brown went on to express some additional views and considered that the (obiter) result in *Rendall v Blair* was to be explained by the *“statutory context of the condition there and more importantly its legislative history”*.

46. Lord Bingham relied heavily on the legislative history of the provision in the MHA. In paragraph [15] of his speech he said:

“[15] While, as already noted, the restriction on access to the court in section 141 [the predecessor to s139(2) of the MHA] was the subject of criticism before 1982, the House has been referred to no judicial opinion and no scholarly commentary suggesting that failure to obtain the required leave was a procedural irregularity which might be cured rather than a flaw which rendered the proceedings null. When Parliament legislated in 1982–1983 there was, as it would seem, a clear consensus of judicial, professional and academic opinion that lack of the required consent rendered proceedings null, and Parliament must be taken to have legislated on that basis.”

47. The *Saunders* decision also largely turned upon the legislative history. In that case, retrospective permission to bring proceedings initially commenced without such permission was considered to be within the jurisdiction of the court. As Lindsay J said at page 70B-C:

“the position [as at 1982, after which two cases decided that failure to obtain permission of the court resulted in the proceedings being a nullity] was that, whilst none of the cases can be regarded as an authoritative discussion on the questions involved, it could be seen that habitually our courts and experienced judges and counsel over a period of more than 100 years, and in a manner that by 1893 could be described as a practice, had chosen not to treat proceedings begun without leave as ipso facto nullities and that the logical difficulty inherent in giving leave to commence after proceedings had already begun without that leave was neatly surmounted by giving instead leave to continue and taking that leave sufficiently to sanction the further conduct of the proceedings in question.”

48. He went on to refer to the fact that:

“ There was a practice in England dating back at least to In re Wanzer Ltd. [1891] 1 Ch. 305, a practice recognised to be such at least as early as Reg. v. Lord Mayor of London, Ex parte Boaler [1893] 2 Q.B. 146, that proceedings in insolvency begun without the stipulated leave should not be regarded as irretrievably null but rather as existing and capable of redemption by the late giving of leave. Judges and counsel of great experience in England, from In re Wanzer Ltd. in 1891 to In re Hutton (A Bankrupt) [1969] 2 Ch. 201, treated retrospective leave in insolvency as a thing capable of being granted and as requiring no particular discussion.” (at page 82B-C).

“...the legislature in England can be expected to have observed at least the course of judicial decisions in England. Even without the persuasive analysis to such a conclusion in Nazir Ahmad v. Peoples Bank of Northern India Ltd. 29 A.I.R. 1942 Lah. 289 that the language used in English insolvency provisions had come, by 1913, to have a recognised legal meaning in England, I am entitled to expect the legislature in England to have had that long recognised meaning in mind when it came to legislate in 1986: see the corresponding conclusions in Oceanic Life Ltd. v. Insurance and Retirement Services Pty. Ltd., 11 A.C.S.R. 516 and Stewart v. Intercity Distributors Ltd.[1960] N.Z.L.R. 944. (at page 82E-F)

49. Lindsay J also relied upon the facts that:-

- (1) Clear words had not been used by Parliament that leave was a strict condition precedent to valid proceedings being issued. Without such words, the provision should be regarded as directory (at page 82D-E).
- (2) A strictly literal construction of the statute would result in “*some absurdity*” (at page 82H). In this, he was referring back to the consequences of there being a nullity on a divorce decree or the consequences in the context of boundary disputes

(see page 72C-D). He was probably also referring to the injustices and inconveniences that he identified at pages 77-78D.

- (3) The possibility of retrospective leave did not jeopardise the purposes of the section (at page 83C).
- (4) The considerations outlined by Sholl J in *In re Testro Bros. Consolidated Limited* [1965] V.R. 18. There Sholl J had said:

“But with all respect, I do not feel able to adopt the view that this court is prevented by the statute from recognising and sanctioning, even retrospectively, its own proceedings, more especially when the principal, and it may be the sole, effect of its order will be to save costs, and the re-issue, re-service, and re-delivery of documents identical with the existing documents. If the court is of opinion that leave, had it been applied for, would have been given, why should it not decide, if it wishes, to treat as regular and effective, proceedings over which ex concessis it has jurisdiction, and dispense with the need merely to repeat them.”

Of this passage Lindsay J commented:

“The reference to “ex concessis,” I apprehend, is a reference back to the early English cases I have referred to where stays of unauthorised proceedings were spoken of, the court thereby recognising jurisdiction over the proceedings. Sholl J. held, as had Bowen L.J. in relation to the Charitable Trusts Act 1853 in Rendall v. Blair, 45 Ch.D. 139, that the provision was directory only.”

50. Some of the cases, including *Re Saunders*, talk in terms of a provision being either “mandatory” or “directory”. This is however a shorthand description to identify the consequences of breach of the provision. As Lord Woolf said in the *Seal* case, it may be more helpful to analyse the matter from the administrative law perspective. Parliament expects the regulation it has laid down as being followed and to that extent the provision is mandatory. However, the question very often is what is the consequence if the mandatory requirement is not fulfilled. In this respect, he referred to the decision of Lord Hailsham in *London & Clydeside Estates Limited v Aberdeen District Council* [1980] 1 WLR 182 at 189-90 and his own judgment in *R v Secretary of State for the Home Department ex p. Jeyanthan* [2000] 1 WLR 354. Both parties to the appeal in the *Seal* case apparently recognised the latter as being authoritative (see *Seal* at paragraph [33]). In this context the following passage from *ex p Jeyanthan* summarises the position neatly:

“The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is characterised as directory then it is usually assumed that it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void as being made without jurisdiction and of no effect. The position is more complex than this and

this approach detracts from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the provision is directory or mandatory. The requirement is never intended to be optional if a word such as 'shall' or 'must' is used ... In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises." ([2000] 1 W.L.R. 354 at 358–359).

51. The general issue was also addressed in *R v Soneji* [2006] 1 AC 260, in the context of the requirements of the Proceeds of Crime Act 2002. There, Lord Steyn, giving the leading speech, said:

"[14] A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. A brief review of the earlier case law is to be found in Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286 , 1294D–1295H."

52. In the next paragraph, having cited from Lord Hailsham's speech in the *Aberdeen* case, he went on to say:

*"This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament *ex hypothesi* did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament."*

53. In these circumstances, I consider that a brief review of the history and experience of the operation of the rule in *Foss v Harbottle* are appropriate factors to consider and take into account before looking more widely at the considerations pointing one way or another to the answer to the issues before me.

The procedural history of the derivative action

54. The modern procedural history of the rule in *Foss v Harbottle* is probably best started with the well-known case of *Prudential Assurance Co Ltd v Newman Industries Limited (No 2)* [1982] Ch 204. In that case, derivative proceedings had been brought for the benefit of Newman Industries by the Prudential Assurance Company Limited against (among others) Mr Martlett and Mr Laughton, two directors of Newman Industries. At that stage the procedural position was that it was for the defendant to make an application to raise the *Foss v Harbottle* point. Further, the point could be raised by any defendant and not simply the company for whose benefit the claim was said to be brought by the claimant (or plaintiff). In that case the application was brought by the (alleged) wrongdoing defendant directors and not the company, though the company supported it. The Court of Appeal dealt with the procedural aspect of *Foss v Harbottle* as follows:

“By their summons issued on May 10, 1979, Mr. Bartlett and Mr. Laughton invoked the rule in Foss v. Harbottle. After some 2½ days of argument Vinelott J. dismissed the summons on June 18, 1979, not on the ground that the plaintiffs were entitled to bring a derivative action but on the ground that it was more convenient to decide that issue after the action had been tried. For reasons which we explain later we have no doubt whatever that that was a wrong decision.” (at page 211B-C).

They then went on to say:

“... as we have already said, we have no doubt whatever that Vinelott J. erred in dismissing the summons of May 10, 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivative action. It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. Such an approach defeats the whole purpose of the rule in Foss v. Harbottle and sanctions the very mischief that the rule is designed to prevent. By the time a derivative action is concluded, the rule in Foss v. Harbottle can have little, if any, role to play. Either the wrong is proved, thereby establishing conclusively the rights of the company; or the wrong is not proved, so cadit quaestio. In the present case a board, of which all the directors save one were disinterested, with the benefit of the Schroder-Harman report, had reached the conclusion before the start of the action that the prosecution of the action was likely to do more harm than good. That might prove a sound or unsound assessment, but it was the commercial assessment of an apparently independent board. Obviously the board would not have expected at that stage to be as well informed about the affairs of the company as it might be after 36 days of evidence in court and an intense examination of some 60 files of documents. But the board clearly doubted whether there were sufficient reasons for supposing that the company would at the end of the day be in a position to count its blessings; and clearly feared, as counsel said, that it might be killed by kindness. Whether in the events which have happened Newman (more exactly the disinterested body of shareholders) will feel that it has all been well worth while, or must lick its wounds and render no thanks to those who have interfered in its affairs, is not a

question which we can answer. But we think it is within the bounds of possibility that if the preliminary issue had been argued, a judge might have reached the considered view that the prosecution of this great action should be left to the decision of the board or of a specially convened meeting of the shareholders, albeit less well informed than a judge after a 72-day action.” (page 221B-G)

55. The question that then arose was what was the proper procedural manner for a defendant to raise the *Foss v Harbottle* issue: was it by way of application to strike out or on an application for determination of a preliminary point of law. Knox J resolved that an application to strike out under RSC Ord 18 r 19 or the inherent jurisdiction of the court, was not so procedurally defective a route that the court would refuse to determine the issue (*Smith v Croft (No 2)* [1988] Ch 114).
56. This resulted in a change to the then Rules of the Supreme Court. By SI 1994 No. 1975 a new rule 12A was inserted into RSC Ord 15. It provided that in certain types of derivative proceedings (a derivative action as defined, and covering company derivative proceedings), the plaintiff had to apply to the court for leave to continue the action once the defendant had given notice of intention to defend (RSC Ord 15 r12A(2)). The application had to be served on all defendants (not just the company) each of whom could show cause against the application (RSC Ord 15 r12A(4)). However, this requirement did not prevent the plaintiff seeking interlocutory (or as it would now be, interim) relief pending determination of its application for leave to continue and that the time for serving a defence did not run until the court had given leave to continue (RSC Ord 15 r 12A(6) and (7)). In the event that no application for leave had been made in time then the defendant could apply to dismiss the action or any derivative claim brought within it.
57. In September 1997, in the lead up to the CA 2006, the Law Commission of England and Wales reported on shareholder remedies and the rule in *Foss v Harbottle* (“*Shareholder Remedies*” Law Com No 246. Cmnd 3769). In brief, it recommended that a new derivative action should be available to shareholders given the uncertainty, complications and unwieldy nature of the rule in *Foss v Harbottle* and the costs that could be incurred in litigating its application on the facts of particular cases (see paragraph 6.4; 6.10-6.15).
58. It considered that the details should be spelled out in rules of court but that the basis of the action should be set out in statute for two main reasons. First, because of the need for statute to deal with the position in Scotland (where the matter was one of jurisdiction rather than just procedure) and the desirability of consistency in the laws of both jurisdictions and secondly, so as to put it on a similar footing to the unfair prejudice remedy, to draw attention to its availability and to create the Companies Act as a more complete code (see paragraphs 6.16 to 6.21). Interestingly the proposed new s458A of the Companies Act 1985 set out in Appendix A to the report said nothing about leave of the court. That was purely to be dealt with by the CPR (then also in the process of being developed). The proposed Scottish equivalent (s458B) did refer to leave of the court being required “to raise” a derivative action. This followed the recommendations of the Scottish Law Commission set out in Appendix D to the English Report. As is made clear, what was envisaged was that leave would

be required to bring the proceedings just as it was (and is) required to bring proceedings against a company where an administrator or provisional liquidator has been appointed or the company has gone into compulsory winding up (see Appendix D paragraphs 46 to 51).

59. So far as the position in England and Wales was concerned, the Law Commission recommended that the rules provide that notice to the company should be given prior to the institution of derivative proceedings. Any failures in that respect could be the subject of an application by the defendant to strike out and the court would then have wide powers to strike out the claim, stay the proceedings, waive any defects in the notice, dispense with the need for service or make such other order as it thought fit. The claimant was then required to apply for leave to continue the proceedings. That application was to be made at the case management conference fixed by the court on issue of the proceedings or at such other time as the court ordered. If this was not done a defendant could apply to strike out. At the time it was envisaged that a case management conference would not generally take place before close of pleadings.
60. The matter was considered further by the Company Law Steering Group, set up in connection with what became the CA 2006. In its "*Modern Company Law for a Competitive Economy: Developing the Framework*" (March 2000), the Group consulted on the derivative action but, in the context of the requirement for leave, broadly adopted the Law Commission's proposals including that "*derivative claims should be subject to tight judicial control at all stages*" and that there should be "*a requirement to obtain leave of the court to proceed beyond the preliminary stages*" (see paragraphs 4.130-4.132).
61. In the Steering Group's final consultation: "*Completing the Structure*" (November 2000), the issue of whether the discretion to permit derivative proceedings to continue should be set down in statute or by rules of court was considered further. It was thought that there was a case for leaving the matter to the court's discretion without making more specific provision than that recommended.
62. In my judgment what can be derived from this history is that (a) control by the court over derivative actions has been historically a procedural matter and the procedure has varied over time but the key is that the court is involved or can be involved at an early stage; (b) the precise moment at which the court has to be involved is a matter for the CPR. It may now be earlier than originally suggested by the Law Commission. However, the purpose of there being, and the policy underlying, rules about derivative actions do not of themselves require that such proceedings cannot be issued without court permission or that no steps at all should be taken in proceedings, once issued, without such permission; (c) the key thought processes underlying the proposals to change the rule from that in *Foss v Harbottle* was, subject to certain rules now crystallised in the CA 2006 itself, to make the court the body responsible for determining whether leave should be given. Accordingly, an ability for the court retrospectively to validate steps where leave has not been obtained is consistent with such court control; and (d) although it is true that limits on derivative proceedings are, as a matter of policy, designed primarily for the protection of the company in question, there is also some protection for the other defendants to the proceedings who are substantively being pursued for alleged wrongs. This last point is reflected in the facts of the *Prudential* case, where the application to stop the proceedings was

made by the defendant directors, and by the approach of the Law Commission and Steering Group which was that all defednants should have an ability to play a role in the filter process as to whether derivative proceedings should be permitted to continue.

63. The main things that the company may need protection against, and for which the rules are devised, are the risks of publicity (which may become greater as the proceedings advance); the risk of a liability to costs (see *Wallersteiner v Moir (no 2)* [1975] QB 373), which might include a risk of liability to the defendants if they are entitled to be subrogated to the claimant's right to an indemnity and the more general possibility that the commercial best interests of the company are judged by the appropriate company organ to be better served by not pursuing proceedings rather than pursuing them. As regards costs indemnities, although the court always has a discretion, and although CPR r19.9E governs the position, it may be that if the claimant has acted reasonably then it is effectively, and as a matter of principle, entitled to an indemnity. In *Wallersteiner*, Lord Denning's language is consistent with the discretion being exercised in accordance with principle such that it may be that it almost gives rise to an entitlement:

“...the minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of the agency. This indemnity does not arise out of a contract express or implied, but it arises on the plainest principles of equity. It is analogous to the indemnity to which a trustee is entitled from his cestui que trust who is sui juris: see Hardoon v. Belilios [1901] A.C. 118 and In re Richardson, Ex parte Governors of St. Thomas's Hospital [1911] 2 K.B. 705 . Seeing that, if the action succeeds, the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf. If the action succeeds, the wrongdoing director will be ordered to pay the costs: but if they are not recovered from him, they should be paid by the company. and all the additional costs (over and above party and party costs) should be taxed on a common fund basis and paid by the company: see Simpson and Miller v. British Industries Trust Ltd. (1923) 39 T.L.R. 286 . The solicitor will have a charge on the money recovered through his instrumentality: see section 73 of the Solicitors Act 1974 .

But what if the action fails? Assuming that the minority shareholder had reasonable grounds for bringing the action - that it was a reasonable and prudent course to take in the interests of the company - he should not himself be liable to pay the costs of the other side, but the company itself should be liable, because he was acting for it and not for himself. In addition, he should himself be indemnified by the company in respect of his own costs even if the action fails. It is a well known maxim of the law that he who would take the benefit of a venture if it succeeds ought also to bear the burden if it fails. Qui sentit commodum sentire debet et onus.” (pages 391-392)

64. The first question is whether the failure to seek and obtain permission to continue invalidates the subsequent steps (in this case service of claim form and particulars of claim). I do not regard the need for permission to be one that can be ignored in the

sense that all steps taken without permission will be valid unless and until set aside by the court. In my judgment, that would give insufficient weight to the need to seek permission and not sufficiently protect the company or the other defendants to the proceedings. On the other hand, I see no reason at all why, exercising its discretion, the court should not have power to validate with retrospective effect steps taken in the proceedings without permission. Such power would be entirely consistent with the policy underlying the filtering role of the court. It would enable (e.g.) the company (or in appropriate circumstances, another shareholder) to adopt proceedings where it wanted to in circumstances where (e.g.) a claim form and the limitation period had expired prior to its adoption and where service of the claim form (without permission) had otherwise been served within the time limits concerned. Such a result would also be more consistent with the more general position laid down in cases such as *Re Saunders*. It also has to be recognised that the need to seek permission could arise at a later stage of the proceedings than immediately post issue. If, for example, permission were only granted up to a certain stage of the proceedings, further permission would thereafter be needed. There could easily be a (forgivable or not very serious) mistake to obtain the same. It would be odd if subsequent steps were necessarily and irretrievably void for want of such permission.

65. The result in the *Seal* case is, in my view, more out of the ordinary and explained by the particular legislative and case history, and possibly its subject matter, rather than the starting point applying to cases where permission of the court is needed in connection with steps in litigation. Although the House disagreed as to the result in that case I do not understand (save to the extent indicated about access to the courts) that there was real disagreement about the applicable general legal principles: just the result of their application to the statute in question. Accordingly, I hold that the failure to obtain permission does invalidate steps thereafter taken but that the court does have jurisdiction retrospectively to validate the same. The principles applicable in exercising that jurisdiction, both generally and to the facts of this case remain the subject of further submissions.

If the matter is one solely regulated by the CPR and not by statute: does CPR 3.10 apply?

66. In case I am wrong in my assessment that the matter is one governed by statute and not the CPR, I now go on to consider how CPR r.3.10 would operate. This is on the hypothesis that the matter is purely one of procedure under the CPR and not a question of statute.
67. In connection with CPR r3.10 Mr Pipe relies upon *Golden Ocean Assurance and World Mariner Shipping SA v Martin* [1990] 2 Lloyds Rep. 215; *Phillips v Nussberger* [2008] UKHL 1; [2008] 1 WLR 180 and *Integral Petroleum SA v SCU-Finanz AG* [2014] EWHC 702 (Comm). Mr Ayliffe QC relies on *Vinos v Marks & Spencer plc* [2001] 3 All ER 784.
68. The *Golden Ocean Assurance* case was dealt with by Lord Brown (with whose speech Lords Bingham, Rodger and Mance and Baroness Hale agreed) in the *Nussberger* case at paragraphs 31 to 33. In the *Nussberger* case the question was whether England or Switzerland was first seized of proceedings for the purposes of determining whether the English court should decline jurisdiction and impose a stay

pursuant to article 21 of the Lugano Convention. That itself turned on whether the English proceedings had been served on the respondents by the time the Swiss proceedings were issued. The English claim form had been erroneously stamped as “not for service out of the jurisdiction”. This was noted at some point in Switzerland where service of documents in the case took place. As regards one of the respondents, Mrs Nussberger, the English claim form was removed from the package of documents served. However, a German translation of the claim form and the English version of the particulars of claim and a German translation of those particulars were included within the package of documents served. As regards another respondent, Galerie Nefer AG, no documents were served because of an error on the part of the Swiss Post Office. Lord Brown said:

“[31] I have already set out the relevant rules. It seems to me at least arguable that even without resort to r.6.9 the court could simply order under paragraph (b) of r.3.10 that the respondents are to be regarded as properly served, certainly for the purposes of seisin. The “error of procedure” here was, of course, the omission of the English language claim form from the package of documents served: there was in this regard “a failure to comply with the rule (r.7.5).” But that, says paragraph (a) of r.3.10, “does not invalidate any step taken in the proceedings unless the court so orders”. The relevant “step” taken here was service of the proceedings out of the jurisdiction.

[32] It seems to me that this was essentially the view taken by the majority of the Court of Appeal (McCowan LJ and Sir John Megaw, Lloyd LJ dissenting) in Golden Ocean Assurance Ltd v Martin (The Goldean Mariner) [1990] 2 Lloyd’s Rep. 215. Several defendants were there served out of the jurisdiction with copies of the writ, but in each case the wrong copy, addressed not to him but to a different defendant. Another defendant, by an oversight, was served with no writ at all, only a form of acknowledgment of service. The court’s procedure at that time was governed by the RSC and the rule in point was O.2. r.1. For present purposes I can see no material differences between that rule and CPR r.3.10. All three members of the court accepted that O.2. r.1 was a most beneficial provision, to be given wide effect. The majority held that service, the step in the proceedings which had plainly been attempted, was to be regarded as valid in the case of all of the above defendants. In the case of the defendants served with the wrong copy writs, Lloyd LJ accepted that the court had a discretion: “The service was grossly defective. But service, or purported service, it remained.” Unlike the majority, however, he would not have exercised that discretion in the claimant’s favour. As to the defendant served only with an acknowledgment of service, Lloyd LJ thought it “an omission which is so serious that...[i]t cannot be described as a failure to comply with the requirements of the Rules by reason of something left undone....The service of the form of acknowledgment cannot make up for the absence of the writ.” The majority thought otherwise. There was, be it noted, no rule at that time akin to r.6.9. For my part I regard the errors and omissions committed in the process of effecting service there as if anything more, rather than less, serious than the error here (given the documents that were served here).

[33] The Court of Appeal thought The Goldean Mariner “simply not in point” because “there was no question in that case of the retrospective validation of an ineffective attempt to serve the writ operating to affect, let alone to alter, the priority between English and foreign proceedings under an international Convention”. With

respect, I cannot accept this reasoning. The question in the The Goldean Mariner, just as the question here, is whether the “attempt to serve the writ” was or was not “ineffective”. It was held there to have been, not ineffective, but effective. That was not a “retrospective validation”. Why should service not similarly be declared to have been effective here? The question is purely one for our domestic law, just as the question of when an English court is seised of proceedings is purely one for domestic law (and, indeed, the question of precisely what documents have to be served to achieve effective service out of the jurisdiction under the Hague Convention is purely one for domestic law).

69. The provisions of CPR r6.9, referred to by Lord Brown, were as follows:

“6.9 (1) *The court may dispense with service of a document*”

The current version of this power is to be found in CPR 6.16 which provides:

“*Power of court to dispense with service of the claim form*

6.16

(1) The court may dispense with service of a claim form in exceptional circumstances.”

70. Lord Brown went on to consider the Court of Appeal’s judgments in the instant case before him:

“[34] *As I have said, therefore, it may not be necessary to invoke r.6.9 at all in order to declare the service of documents effected on 19 January 2005 to have been valid and effective. But assume, as both courts below clearly thought, that it is necessary for the court actually to dispense with service of the claim form under r.6.9 before the service in fact effected can be declared valid. Is that within the court’s power? The court below concluded not, on the basis that an order under r.6.9 would by its very nature involve the retrospective validation of what ex hypothesi would otherwise fall to be regarded as ineffective service. And this essentially is the argument by which the respondents now seek to uphold the Court of Appeal’s judgment.*

[35] *There are, however, as it seems to me, two complete answers to this argument. The first is this. In making the order pursuant to rule 6.9, Peter Smith J was not thereby declaring valid and effective service which had previously been ineffective; rather he was holding the previous service to have been valid and declaring that it was unnecessary to have served the English language claim form to make it so. It was in this sense that he was dispensing with service. There was no more question here, therefore, than in the The Goldean Mariner of “retrospective validation”. The second answer is that even if a dispensing order under r.6.9 was properly to be regarded as retrospectively validating what would otherwise have been ineffective service, in my judgment it would have been within the court’s power to make such an order. True, its effect would then be to alter the jurisdictional precedence under an international Convention. But if, as is uncontested, your Lordships could now overrule Dresser (just as the Court of Appeal in Dresser itself departed from the ruling at first instance that English courts are seised of*

*proceedings at the date of issue), the question of seisin being purely one for the national court, so too can an English court, applying its own procedural rules to dispense with service of a particular document, make an order which is effective retrospectively to validate what would otherwise have been an invalid form of service. I do not believe that this conclusion involves any exception to the Dresser rule: the rule surely is that the English court is seised of proceedings at the date of effective service, whatever that date may eventually be declared to have been. If, however, it does constitute an exception, so be it: to this limited extent I would if necessary qualify the decision in *The Sargasso*.*

[36] So much for the court's power to dispense with service under r.6.9. Should the court in its discretion exercise such power? That the court would do so in a purely domestic context is surely clear beyond argument, and this notwithstanding that the exercise of the power would operate to defeat a prospective Limitation Act defence. Is it, however, appropriate to make an order which has the effect of altering the priority of the seisin of proceedings under an international Convention?

[37] On any view the power is one to be exercised sparingly and only in the most exceptional circumstances. It is difficult to suppose, for example, that it could ever properly be exercised if there had been no process of service whatever. Consider in this regard article 27(2) of the Lugano Convention:

“A judgment shall not be recognised... (2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence.”

There can be no question here but that the respondents were served with “an equivalent document”: they had not only the German translation of the omitted claim form but the detailed particulars of claim (in both English and German) as well.

[38] In my judgment the circumstances here were indeed exceptional, the call on the exercise of the court's discretion compelling. As stated, the respondents plainly suffered no prejudice whatever by the failure to serve the original claim form but rather sought to exploit it, to steal a march on the appellants. And the essential faults here were those of the Swiss authorities: of the judge or his clerk at the Zurich court (however well-intentioned) in mistakenly removing the form from the package of documents for service and the Swiss Post Office in failing to find Nefer's post-box (in each case substantially delaying notification of the problem to the appellants). If, moreover, the respondents are correct in their arguments under articles 21 and 22 of the Lugano Convention that, if the Swiss court here is properly to be regarded as first seised of the proceedings as between the appellants and the respondents, then neither the English court (in respect of the appellants' claim against the English defendants) nor the Swiss court (in respect of the respondents' claim against the appellants) has even a discretion to stay those respective claims, that would provide yet a further compelling reason for declaring the English court to be first seised of the whole action.

*[39] In short, the facts of this case could hardly be further from those of *Knauf UK GmbH v British Gypsum Ltd* [2002] 1 WLR 907 which involved a naked attempt to use CPR r.6.8 to subvert the Brussels Convention. I for my part have no doubt that discretion under r.6.9 should (if necessary) be exercised here in the appellants' favour and that the service effected on the respondents on 19 January 2005 should be declared valid and effective. If your Lordships share my view, it follows that none of*

the other issues needs to be considered. Given, moreover, that a completely new regime has now been put in place both by the EU (see the Jurisdiction and Judgment Regulation No. 44/2001 of 22 December 2000) and by the Lugano Convention states (see the new Lugano Convention signed on 30 October 2007 and expected shortly to be ratified)—whereby the time of seisin is defined autonomously instead of by the member states themselves—it is surely inappropriate to review cases like Dresser and The Sargasso which will imminently lose all relevance.”

71. As I read the decision in *Nussberger* the House of Lords favoured on the facts the solution that the service in question was effective under CPR r3.10, despite the fact that there had been a procedural irregularity. In this respect there would be no question of a retrospective validation of an ineffective step in the proceedings (service). There could simply have been an order confirming the validity of service under CPR 3.10(a) without invoking r6.9, and to the extent r 6.9 was invoked under r3.10(b), it could have been invoked simply to declare (or make clear) that it was unnecessary to serve an English language claim form to make it valid. In either event, there would have been no “retrospective validation”. However, if necessary and as the courts below had appeared to consider it necessary, the House would have held that there was an ability retrospectively to validate the position, which power it would have exercised (see especially paragraph [35] of Lord Brown’s speech).
72. In the *Integral* case the issue was the validity of a default judgment, purportedly obtained in default of defence, and that in turn turned on the question of whether e-mailing the particulars of claim to a French Avocat with an address in Paris amounted to service so as to start the time running for service of a defence. There were in fact two defects: first the conditions under the CPR for use of the Avocat’s email address had not been met, and, secondly, the time for service had, by the time of purported service by email, expired. Popplewell J determined that the service was effective under CPR r3.10. Accordingly, the default judgment was not defective or liable to be set aside on the ground that the requirement of expiry of the period for serving a defence with no defence having been filed had not been met:-

“[34] Returning to the facts of the instant case, in my view the error of procedure in serving the Particulars of Claim by e-mail was a failure to comply with a rule or practice direction which falls within CPR 3.10. Accordingly under CPR 3.10(a) such service is a step which is to be treated as valid, so as to commence time running for the service of the defence, and disentitle SCU-Finaze in this case to bring itself within CPR 13.2. In reaching that conclusion I have taken into account the following considerations.”

73. In reaching his conclusion Popplewell J considered the *Nussberger* decision and cited the paragraphs I have referred to above. Among other things he went on to say:

“[24] A number of observations fall to be made. First, these remarks about CPR 3.10 were not part of the ratio of the decision, which upheld the order dispensing with service under CPR 6.9, which it had been assumed in both courts below was necessary (see[34]). What was said about the effect of CPR 3.10 was no more than it was “at least arguable” that it applied. Nevertheless these were considered statements and the language in which they were expressed suggests more than mere arguability.

....

[29] Sixthly, Lord Brown's observations at [31] that CPR 3.10 was engaged were addressed to the position not only of Mrs Nussberger, on whom there had been service by a permitted method of a package of documents which included the German translation of the claim form and particulars of claim in both languages, but also to the position of Nefer, the third defendant, on whom there had been no service at all. In this he went further than the majority in *The Goldean Mariner*, where there had at least been some service, of the acknowledgment of service form if not the writ. I have some difficulty in treating an "error of procedure" in CPR 3.10 as encompassing circumstances where there is no purported service of any document of any kind, particularly where CPR 3.10(a) automatically validates subsequent steps in the proceedings if CPR 3.10 is engaged. I would be inclined for my part to treat the remedy in such case as lying, if at all, with the discretionary power to dispense with service under CPR 6.9. Nevertheless the reference by Lord Brown in [31] to CPR 3.10(b) applying to the third defendant, Nefer, is indicative of the view of the Judicial Committee that CPR 3.10 is a beneficial provision to be given very wide effect indeed."

74. If, and I am far from sure that this is the case, Popplewell J was saying that to the extent that the invocation of CPR rule 6.9 was necessary in the *Nussberger* case, then it would have been on the basis that it had retrospective effect outside rule 3.10, I respectfully disagree. It seems to me clear from paragraph [35] of Lord Brown's speech that he considered that no order at all was necessary to validate the relevant step of service. However, if an order under CPR r.6.9 was necessary, there were two possibilities and the first was that it did not render effective that which had previously been ineffective. I take it that on this scenario Lord Brown saw the order under CPR r6.9 as also an order effectively under CPR r3.10(b). Insofar, however, as the order did retrospectively validate the relevant step in the proceedings, then Lord Brown considered there was jurisdiction to make such a retrospective order and that it was correct to make such an order. It may be that, in many cases, the only difference between these two different approaches is to place the onus of applying to the court to validate (or invalidate) on one party rather than another and that at the time the matter comes before the court it does not greatly matter which analysis is correct. However, as I will go on to explain, there is in my view the potential for a very real difference in effect between the two different analyses.
75. In *Vinos v Marks & Spencer*, the Court of Appeal had to consider, among other things, whether service of a claim form after expiry of the four month period for service, was nevertheless valid by reason of CPR r3.10. However, CPR r7.6 set out circumstances in which the court could extend the four month period for service. Those circumstances did not apply in the case in question. The limitation period had expired a week after the claim form was issued, so that it was too late to commence new proceedings. Lord Justice May said:

" [20] The meaning of rule 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run out "only if" the stipulated conditions are fulfilled. That means that the court does not have power to do so otherwise. The discretionary power in the rules to extend time periods – rule 3.1(2)(a) - does not apply because of the introductory words. The general words of Rule 3.10 cannot extend to enable the court to do what rule 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this

extension of time. What Mr Vinos in substance needs is an extension of time – calling it correcting an error does not change its substance. Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored. It would be erroneous to say that, because Mr Vinos’ case is a deserving case, the rules must be interpreted to accommodate his particular case. The first question for this court is, not whether Mr Vinos should have a discretionary extension of time, but whether there is power under the Civil Procedure Rules to extend the period for service of a claim form if the application is made after the period has run out and the conditions of rule 7.6(3) do not apply.”

76. Lord Justice Peter Gibson said:

“ [27] A principle of construction is that general words do not derogate from specific words. Where there is an unqualified specific provision, a general provision is not to be taken to override that specific provision. Rule 7.6 is a specific sub-code dealing with the extension of time in all cases where the time limits in rule 7.5 have not been or are likely not to be met. The sub-code sets out in some detail what the claimant must do if he wants an extension of time and the circumstances in which the court may exercise the discretion conferred on it to extend the time: rule 7.6(3). That the circumstances specified in sub-paragraphs (a), (b) and (c) of rule 7.6(3) are the sole relevant conditions for the discretion to be exercisable seems to me to be made crystal clear by the words “only if”. It is plain that the general power in paragraph 3.1(2)(a) to extend time cannot override rule 7.6. Nor, in my judgment, could the general power in rule 3.10 to remedy a failure to comply with a rule be pressed into service to perform the like function of, in effect, extending time. Even though rule 3.10 differs from rule 3.1(2) in not having wording to the effect of “except where the rules provide otherwise”, that is too slight an indication to make rule 3.10 override the unambiguous and

restrictive conditions of rule 7.6(3).”

77. On the other hand, in *Cardiff County Council v Lee Flowers* [2017] 1 WLR 1751, the Court of Appeal had to consider the situation where a landlord had failed to apply to the court for permission before seeking a warrant of possession, as required by CPR r83.2. The court held that this was a procedural defect which the court was empowered to cure under CPR r3.10 by dispensing with the need for a prior permission application.

78. In that case the court also considered dicta of Lord Justice Dyson in an earlier case: *Steele v Mooney* [2005] EWCA Civ 96. As regards this case, Lady Justice Arden said as follows:

“[19] CPR 3.10 was further considered by this Court in Steele v Mooney [2005] EWCA Civ 96, another case under CPR 7.6. In that case the claimant solicitors had applied for an extension of time in which to serve particulars of claim for damages for personal injury but their application had not included

permission to serve the claim form itself. This Court considered CPR 7.6(2) and importantly stated that, in general, where there was a very good reason for failure to serve the claim form within the specified period, an extension of time would usually be granted (see Hashroodi v Hancock [2004] 1WLR 3206).

[20] *Ms Walters relies on paragraph 27 of the judgment of Lord Justice Dyson (giving the judgment of the court) in which he drew a distinction between making an application which contained an error of procedure and erroneously not making an application at all. He added “it is important for the proper application of the Vinos principle to bear this distinction in mind”. Ms Walters submits that in the present case the respondent made no application at all for permission and therefore CPR 3.10 was inapplicable.*

...

[28] *In this case, however, what the respondent did was make an application by virtue of issuing Form N325, which requested the issue of a warrant. It was the wrong form of application. But its application was clearly connected with, and in error for, the application for permission under CPR 83.2 which it ought to have made. So this is not a case within the Vinos principle as explained by Lord Justice Dyson in paragraph 27 of his judgment. In my judgment, this is a case where the discretion under CPR 3.10 arises.*

[29] *Ms Walters places much emphasis on the word “must” in CPR 83.2. It is indeed imperative language but that sub-Rule does not indicate that if there is an error of procedure the court cannot, in any appropriate case, remedy it. The wording is quite different from that for instance of CPR 7.6(3) considered in Vinos.*

[30] *I have already set out the wording of CPR 3.10. The Rule expressly states that an error of procedure does not invalidate any step in the proceedings unless the court so orders. That means that the issue of the warrant was not invalid unless the court so ordered. The issue of the warrant was therefore voidable and not void, as the judge correctly held. CPR 3.10 also states that the court may remedy the error. Here it has remedied the error by hearing the appellant’s application to discharge the warrant, and, having rejected that application, validating the warrant despite the error in procedure. I appreciate that there was no such application as is required by CPR 83.2. That application may be made by an application under CPR 23 but CPR 23.3(2)(b) states that the court can dispense with the making of an application in that form. What matters therefore is the substance and not the form of the application”*

79. In my judgment, if this permission to continue derivative proceedings is one where the CA 2006 is to be treated as having no application and the matter is to be viewed as governed solely by the CPR, then the failure to seek permission prior to serving the claim form on the Relevant Defendants falls on the *Vinos* side of the line and retrospective permission (if available) would need to be obtained and CPR r3.10 has no operation. However, I consider that there would be power under the CPR to grant such retrospective permission. Essentially the same reasoning as I have considered above in relation to the need for permission under CA 2006 would apply, but with the

added weight that the matter would, on the hypothesis I am considering, solely be a matter of procedure which the court should lean in favour of holding would not amount to an irretrievable nullity if not followed.

Disposition

80. In my judgment, service in this case was not valid but the court has jurisdiction to validate it retrospectively. This is so whether the default is to be viewed as a default under the CA 2006 (which is my preferred view of what it is) or a procedural error under CPR Part 19. I therefore formally adjourn the applications before me for further argument. As I understand it the parties have been unable to agree a form of order in the period between provision of a draft of this judgment and its formal handing down. My preliminary view is that I would extend the time for filing a notice of appeal in relation to this judgment so that the 21 days starts at the same time as the period for filing a notice of appeal on the final resolution of the applications starts to run. I would also reserve the costs to the adjourned hearing of the applications. A further hearing should be set as soon as possible for the purposes of determining the same, which hearing can be a telephone hearing or, if the parties agree, I will deal with the formal order on the basis of written submissions on the papers without a further hearing. In the event that agreement is not reached by 4pm on 8 September 2017 (a) that the matter should be determined on the papers by way of written submissions and (b) as to a timetable for sequential service of written skeleton arguments for such determination, then a hearing to determine all consequential matters (including issues relating to permission to appeal) should be set for the first available date with a time estimate of 30 minutes. I direct that for such hearing skeleton arguments should be sequential, the claimant's skeleton argument being filed and served 4 clear days before the hearing and the first to fourth defendants' skeleton argument being served 2 clear days before the hearing.