Hilary Term
[2018] UKPC 2
Privy Council Appeal No 0065 of 2015

JUDGMENT

Julien and others (Appellants) *v* Evolving Tecknologies and Enterprise Development Company Limited (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Kerr
Lord Reed
Lord Hughes
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

19 February 2018

Heard on 17 January 2018

Appellants
Peter Knox QC
John S Jeremie SC
(Instructed by Simons
Muirhead & Burton LLP)

Respondent
James Guthrie QC

(Instructed by Charles
Russell Speechlys LLP)

LORD BRIGGS:

Introduction

1. This appeal from the order of the Court of Appeal in Trinidad & Tobago raises two questions about the application of section 14 of the Limitation of Certain Actions Act 1997 (as amended) to a claim by a limited company against its former directors. Section 14, which is in materially identical terms to section 32 of the English Limitation Act 1980, provides (so far as is relevant) as follows:

> "**14.** (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either -
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> (a) the action is based upon the fraud of the defendant;
>
> (b) any fact relevant to the plaintiff's right of action was deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> (2) For the purposes of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time, amounts to deliberate concealment of the facts involved in that breach of duty.
>
> (3) …"

2. In bare outline, the factual context in which these two questions arise is as follows. In June 2005 the claimant company, Evolving Tecknologies and Enterprise Development Co Ltd ("Eteck"), which is the respondent to this appeal, made a US$5m investment in Bamboo Networks Limited ("Bamboo") which was, in due course,

wholly lost. The decision to make the investment was made by Eteck's then directors, the appellants in this appeal, who remained its directors until October 2010. In June 2011, at the instigation of its replacement directors, Eteck resolved to issue the present proceedings, claiming that the loss sustained by the making of its investment in Bamboo was caused by the negligence of its former directors in causing the company to undertake the transaction without first carrying out proper due diligence on Bamboo, its financial state, and its business, which the appellant directors have denied.

3. It is common ground that Eteck suffered an immediate loss upon making the investment in Bamboo in June 2005, so that the ordinary four-year limitation period for an action in tort expired both before the appellant directors were replaced, and well before the proceedings were issued, unless it was extended by section 14.

4. Eteck has throughout had a single shareholder, namely the Minister of Finance in his capacity as a corporation sole. The person filling that office changed as a result of the general election in May 2010, and it was this change that led to the commissioning of a legal audit into Eteck's operations, in July 2010, and to the replacement of its directors in October.

5. Besides defending the negligence claim on its merits, the appellants asserted that it was statute barred, and this met with the response from Eteck, based on section 14(2), that the appellants' breach of duty had been deliberate, in circumstances in which it was unlikely to be discovered for some time. It has always been common ground that the knowledge of, or ability to discover the alleged breach by Eteck's former directors cannot be attributed to Eteck, for the simple reason that they are the alleged wrongdoers and Eteck is the alleged victim. But the appellants asserted that the facts alleged to constitute the breach were always known, or discoverable, by Eteck's sole shareholder, namely the Minister of Finance, and that such knowledge or discoverability was attributable to Eteck, so as to negative any postponement of the running of time under section 14(1) for a claim brought against them by Eteck itself.

6. At the trial of a preliminary issue as to whether section 14(1) applied, in October 2013, the trial judge (Rampersad J), held that the question whether the alleged breach could have been discovered by the Minister of Finance was irrelevant to the question when time began to run against Eteck, at least for as long as the appellants remained its directors, in accordance with settled principles of company law. On the appellants' appeal the Court of Appeal (Bereaux JA and Rajnauth-Lee JA) affirmed the trial judge's decision that knowledge of the facts, or discoverability by Eteck's sole shareholder, was irrelevant because it was not attributable to the company. In addition, and as a separate basis for its dismissal of the appeal, the Court of Appeal also decided that, even if it was wrong in relation to attribution, the alleged breach was unlikely even to be discovered by the Minister of Finance for some time (within the meaning of section 14(2)), so that (on the assumption that the breach was deliberate, which remained to be established at

trial) there was deliberate concealment sufficient to postpone the running of time under section 14(1) to save the claim from being statute barred. At the end of a detailed analysis of the evidence, Rajnauth-Lee JA said this, at para 79:

> "Having examined the documents referred to above and the evidence before the trial judge, there being no trigger, I am satisfied that the respondent has discharged the burden of proving that there was no discoverability pursuant to section 14(2) of the Limitation Act. This should bring an end to this appeal."

7. The two questions raised before the Board reflect the twin bases upon which the Court of Appeal dismissed the former directors' appeal although, as will appear, the first question has been debated before the Board on significantly different grounds from those advanced in the courts below.

8. The first question may be stated as follows: where the running of time for limitation purposes is affected by either the knowledge or the discoverability of the alleged breach, or of the facts which constitute it, is the knowledge or discoverability of that breach by the company's sole shareholder attributable to the company, in the context of a claim by a company against its directors who, at the material time, were still in charge of the company's affairs, such that there could be no attribution to the company of their own knowledge? Since there is no suggestion that the applicable limitation or company law of Trinidad and Tobago differs materially from that of England, or of the other main common law jurisdictions, in a world in which companies now frequently have sole shareholders, particularly in group structures, this is a point of potentially wide application and real importance.

9. The second question, which arises only if the first is answered in the affirmative, is whether the focus of the Court of Appeal on the question whether there was any trigger sufficient to put the Minister of Finance on inquiry as to the existence of the breach, or the facts constituting the breach, involved an error of legal analysis which vitiated its conclusion that the breach was unlikely to be discovered for some time, even by the Minister of Finance.

10. This question is of no similar legal or public importance, since it arises mainly from the particular way in which the Court of Appeal sought to express its conclusion. Nonetheless, if answered in the negative, it is sufficient to require the dismissal of this appeal, regardless of the Board's opinion about the answer to the first question.

The facts

11. Both questions, and in particular the second, call for a more detailed description of the facts than the bare summary provided above. Most of them are uncontentious. Some of them, and in particular the assertion that the relevant breach was deliberate (although not alleged to have been dishonest) are required by the structure of the preliminary issue to be assumed. In fact, the appellants deny that there was any breach at all.

12. Eteck is a company wholly owned by the Minister of Finance who, under section 3 of the Minister of Finance (Incorporation) Act 1973 is a corporation sole. There is therefore, no change in the shareholder of Eteck merely because of a change in the identity of the person occupying the office of Minister of Finance.

13. In 2004, Eteck was looking for ways to develop an Information Technology ("IT") industry in Trinidad and Tobago, and it received a proposal inviting it to invest US$5m in Bamboo, in return for 14.9% to 22.1% of its issued shares, with a view to Bamboo setting up a business in Trinidad which would supply IT services. Bamboo had been incorporated in 1999 and, although a Cayman Islands company, it had offices in Hong Kong and China.

14. In October 2004, Mr Vernon Paltoo, a team leader of business development at the National Energy Company of Trinidad and Tobago, wrote a report for Eteck, which concluded that an investment in Bamboo would help the country expand its IT sector, and that Bamboo's financial projections were quite strong. The report recommended that a comprehensive due diligence of the company be done to assess its finances, capability and portfolio, along with the other analyses.

15. Eteck then pursued discussions with Bamboo and on 17 November 2004 by its chairman Mr Kenneth Julien (the 1st Appellant), entered into a memorandum of understanding with Bamboo, valid for six months, which provided for the parties to collaborate to establish the project, subject to a determination of its feasibility. The memorandum provided for a timetable which set 30 November 2004 as the date by which due diligence was to be completed and the Government's support obtained and 15 December 2004 as the date by which the contract was to be executed. A few days later, on 23 November 2004, Eteck's board ratified the chairman's execution of this memorandum.

16. Eteck's business manager, Mr John Soo Ping Chow, and a permanent secretary in the Ministry of Finance, Mr Jaggernath Soom, then visited Bamboo in Hong Kong and China to view its operations at first hand.

17. On 30 December 2004 the Ministry of Finance informed Mr Julien that its representative had concluded that Bamboo was "*in poor financial state with the Company being insolvent, the Company has a short track record and lacks a proper management structure*".

18. A copy of a report by the Ministry of Finance was enclosed, which noted Bamboo's corporate structure; its share capital; its board membership (just one director); its borrowings; and its losses since 1 January 2002 to 31 March 2004 (an accumulated loss of US$14,621,000). It noted that the draft financial statements for the period ending 31 March 2004 had been drawn up on the basis that the company was a going concern, but the auditors had proposed to qualify them, as the going concern basis was dependent upon the group (ie Bamboo and its subsidiaries) making profits in the future and upon the continuing financial support of its sole director. The report concluded with the passage in the letter set out above, but added "*However, government may consider investing in the subsidiary of Bamboo which is to be established in Trinidad & Tobago*".

19. Subsequently, the Government was sent a Dunn and Bradstreet report on Bamboo's Hong Kong subsidiary Bamboo Networks Ltd, which concluded that the likelihood of the company suffering financial distress over the next 12 months was 29.4%, and noted other problems as well.

20. Mr Julien arranged for Mr Soo Ping Chow to give a power point presentation to Eteck's board on 18 January 2005. This addressed the nature of Bamboo's business; its financial figures with full explanatory notes; its operations; the advantages of Eteck's proposed investment in it; and the way forward. It worked on the same figures as the Ministry of Finance, but noted that the financial position was improving year on year.

21. The board, having noted among other things that software companies like Bamboo had a pattern of initial losses, and that there was an entry price to this type of industry, resolved still to pursue the investment and to get Mr Soo Ping Chow to make his presentation also to the Minister of Finance to remove his doubts, and to make a presentation also to the Ministry of Trade and Industry to seek its approval on the basis of the board's recommendation.

22. On 18 January and 28 April 2005 Mr Soo Ping Chow sent two emails to Bamboo asking it for further information (it is not clear on the current evidence whether there was any response).

23. On 9 May 2005 Mr Soo Ping Chow made a presentation for Eteck to the Government's Finance and General Proposes Committee (the "F&GP Committee"), at which he was asked a number of questions by government Ministers.

24. On 12 May 2005, Cabinet agreed that in principle Eteck should make the proposed investment (noting that Bamboo was a Hong Kong based company), but should continue to hold discussions to address certain concerns, including (i) whether the US$5m was fair value for its share in Bamboo; and (ii) any relevant matters "of a legal or accounting nature including the latest audited financial statements and information". Further it decided that what it called the "shareholders agreement for implementing the project" should be submitted to Cabinet for approval.

25. An Eteck board meeting was called for 17 May 2005. For the board meeting, Ms Beverley John, Eteck's company secretary, sent on 16 May 2005 a report to the directors on the proposed investment. This summarised the basic terms of the deal, noting that the risk mitigating factors were that (a) Eteck would have the right to recover the US$5m if Bamboo did not fulfil its obligations; (b) there were timelines for fulfilment of its obligation to set the business up and to train staff; and (c) Eteck would have representation on Bamboo's board and on the board of the company which by now (it seems) it was intended to set up in Trinidad.

26. At the board meeting, the chairman gave a brief overview of the proposed investments and of the presentation made to the F&GP committee, and reported that it had gone before Cabinet for its approval, but that he was still awaiting its formal decision. He also mentioned Cabinet's (as yet unconfirmed) decision on 12 May 2005 that "the shareholders agreement for implementing the project" be put before it for approval.

27. The board after considering Ms John's 16 May 2005 note and discussing the investment, authorised the chairman to execute what the minutes refer to as the "Co-operation Agreement and the Investors/Shareholders Agreement".

28. On the following day, 18 May 2005, Mr Julien sent to the Cabinet Secretary a letter enclosing 30 copies of Ms John's 16 May 2005 note and of the "Cooperation (Shareholders) Agreement". The letter also attached (a) the project schedule, (b) a note on the litigation against Bamboo, (c) a summary of Bamboo's latest financial projections, (d) a note on its corporate governance, and (e) the curriculum for the training of software engineers in Trinidad and Tobago.

29. Mr Julien's letter referred to "the unconfirmed Minutes of the Cabinet Meeting" as requiring that the "Shareholders Agreement for implementing the project must be brought to Cabinet for the Approval of Cabinet". It asked Cabinet to note that the Agreement took into consideration all the expressed concerns of the F&GP; and that "pages" 2 and 3 (which may have been a mistake for "clauses" 2 and 3) highlighted the stringent conditions that Eteck had insisted upon, as directed by the Cabinet. The letter noted that the implementation of the project was already two months behind schedule,

but Eteck was hoping to recover the time lost by an aggressive marketing effort. In conclusion, the letter maintained that (i) the board had reviewed "all these matters in detail" (being the matters, it seems, referred to in the various attachments and in the letter itself) at its meeting on 17 May, and had decided, subject to Cabinet's final approval, to proceed with execution of the agreements; and (ii) the Cooperation Agreement had also been legally vetted.

30. On 1 June 2005 Mr Khalid Hassanali, who had been appointed Eteck's President at the board meeting on 17 May 2005, wrote to the Permanent Secretary of the Ministry of Trade and Industry (but not, it seems, to the Minister of Finance), addressing the further question of whether Eteck was getting fair value for its US$5m investment. He explained that in return Eteck was getting 19.7% of the company (8,333,333 shares), and that through nine months of discussion Eteck had concluded this was fair. He then set out a number of reasons for this conclusion. The letter concluded that the "major factors that contributed to the acceptance of the investment terms for [Bamboo's] Series C are the valuation by Tiger Technologies, a Fund that has a historical rate of return of more than 20% per annum, and the potential of the proposed expansion into the Energy Sector". The letter made no reference to the other concerns in Cabinet's 12 May 2005 minute, ie accounting and legal matters.

31. On the same day, 1 June 2005, the Minister of Trade and Industry prepared a "Note for Cabinet", which summarised the chairman's memorandum of 18 May 2005, which it called a "status report", and which it attached at appendix I. At appendix II it attached the Agreement and at appendix III it attached Mr Hassanali's letter of 1 June 2005, saying this showed that Eteck was now satisfied that US$5m was fair value for its shares. At appendix IV it attached a request from Eteck that the funds (ie of US$5m) would be available to it within the Public Sector Investment Programme for business development.

32. In its conclusion the Note recommended the Cabinet be asked:

> "(i) to note the documents submitted by [Eteck] in satisfaction of the conditionalities identified in Cabinet Minute 1271 of 12 May 2005 as they relate to
>
> a) the valuation of the shares;
>
> b) the provision of the most recent accounting and legal information on Bamboo Networks Ltd and

c) the submission of the Shareholders (Cooperation) Agreement.

ii) to authorise Eteck to make the investment within one (1) week to Bamboo Networks Ltd

iii) to adjust the midterm review of the [Public Sector Investment Programme] to include funding of [Eteck] for the following projects:

a) equity investment of US$5m in Bamboo Networks Ltd (Cabinet Minute No 1271 dated May 12, 2005 refers) ..."

33. On the following day, 2 June 2005, Cabinet considered this Note, and agreed that Eteck should invest the US$5m in Bamboo within one week. Further, for this investment, on 16 June 2005 it authorised Eteck to negotiate a short term loan of US$5m to be guaranteed by a letter of comfort (ie, presumably from the Government); and it asked the Ministry of Finance to make available the necessary funds for this arrangement in the 2005/2006 Public Sector Investment Programme to facilitate repayment of the loan. Eteck then took out a US$5m loan with First Caribbean International Banking, to whom the Minister of Finance provided a letter of comfort on 22 June 2005 and on or about 23 June 2005 it invested this sum in Bamboo.

34. On 27 June 2005, the Minister of Trade and Industry wrote to Eteck's President, informing him of the Cabinet's resolutions on 12 May 2005 and 16 June 2005 mentioned above.

35. In July 2005, Bamboo incorporated Bamboo Networks TT Ltd, as provided for by the Agreement. However, it eventually failed, and Eteck lost the whole of the US$5m.

36. After the change in government following the general election in May 2010, the new government authorised a legal audit into Eteck's operations on 1 July 2010 and on 20 October 2010 it replaced the appellants as directors with a new board. On 9 June 2011, the findings of the legal audit were presented to the new board, who resolved to bring these proceedings.

The Litigation

37. These questions have reached the Board by a slightly tortuous route. Although it will be necessary to look further at particular aspects of the way the case has been fought when dealing with the second question, the following will provide a sufficient overview. The company's claim was pleaded in negligence, not merely as a failure to conduct due diligence, but rather that the commitment of Eteck to the US$5m transaction, and the payment of the money, were both negligent because there had been no sufficient prior due diligence to justify taking those risks. Further, it was alleged that the advice to the Minister of Trade on 1 June 2005 that a valuation of the shares had been made was wrong, because there had been no such valuation.

38. The appellant directors denied negligence and pleaded limitation. In reply, Eteck relied on section 14, alleging that the breach was deliberate although not dishonest, and (at para 6) that

> "the breach of duty occurred in circumstances where it was unlikely to be discovered by Eteck and/or The Government of the Republic of Trinidad and Tobago until new Director(s) and/or Board of Directors were appointed and legal advice given as to whether action should be taken against the defendants. In the light of the foregoing facts and matters, the breach of duty occurred in circumstances in which it was unlikely to be discovered for some time within the meaning of section 14(2) of the Limitation Act."

39. The appellants responded with an application to strike out the claim on the basis that it was statute barred, for which purpose they needed to show that there was no real prospect that Eteck could rely on section 14, even if the alleged breach had been deliberate. The gist of the case advanced in the supporting evidence was that the extent of the due diligence carried out before the board committed Eteck to the transaction (and the Cabinet gave its approval) had been sufficiently explained to the government for the facts constituting the alleged breach to have been not merely discoverable, but actually known to the Minister of Finance by the time that the cause of action accrued in July 2005.

40. Rampersad J dismissed the strike out application on 24 July 2012, on the basis that the question whether the Minister of Finance knew of the extent of the due diligence carried out before board approval of the transaction could not be ascertained without a trial.

41. The Court of Appeal allowed the appellants' appeal, in December 2012, and ordered the judge to determine the limitation question (save for the issue whether the

breach was deliberate) as a preliminary issue. In its view the question to be determined at the hearing of the preliminary issue was not whether the Minister of Finance knew of the extent of the due diligence, but whether any shortcomings in it were discoverable: ie whether the breach had occurred in circumstances where it was unlikely to be discovered (by Eteck) for some time. If it was discoverable in that sense, then the defendants would have an unanswerable limitation defence, regardless whether the breach was or was not deliberate, and they ought not to be put to a full trial for the determination of that question, since to do so would deprive them of a main intended benefit of the Limitation Act, namely not to be vexed with stale claims.

42. Thus framed, the preliminary issue was decided, both at first instance and on appeal, in the manner summarised above, no significant further evidence having been adduced for the purpose of addressing discoverability as opposed to actual knowledge on the part of the Minister of Finance.

Question 1 - Attribution

43. The appellants' case that the knowledge or discoverability of the breach by the Minister of Finance ought to be attributed to Eteck was, both at first instance and before the Court of Appeal, pursued on the basis that, as a shareholder in the company, the Minister could vindicate Eteck's right to recover damages for negligence against its directors by the bringing of a derivative action, or by replacing the board and appointing new directors who could cause the company to bring its own proceedings. The fact that the Minister was the company's sole shareholder was mentioned, but not treated as decisive. It was submitted that any shareholder who was in a position to bring a derivative action, or to replace the board, would have his knowledge of, or ability to discover, the breach attributed to the company for the purposes of section 14.

44. While Mr Knox QC for the appellants did not abandon this submission before the Board, he focused on a narrower analysis, namely that a sole shareholder should have his knowledge (or ability to discover) a breach of duty by the directors attributed to the company, because of "a fundamental principle of company law, and a primary rule of attribution, that the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company." For this he relied upon the well-known decision of the English Court of Appeal in *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, per Lawton LJ at p 269B-D, and the decision of the Board (on appeal from New Zealand) in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, per Lord Hoffmann at 506F-G.

45. There undoubtedly is such a general principle, both in English company law and in the law of many other common law jurisdictions which adopt similar company law structures including, in particular, Canada, from whose company law much of the company legislation of Trinidad and Tobago may be said to have been derived: see in relation to Canada, *Attorney General for the Dominion of Canada v Standard Trust Company of New York* [1911] AC 498 and, more recently, *Eisenberg (formerly Walton) v Bank of Nova Scotia and Ridout* [1965] SCR 681. For his part, Mr Guthrie QC for the respondent did not suggest that the law of Trinidad and Tobago differed materially from English company law in this respect.

46. Fundamental though this principle is within company law, the Board has not been shown (and has not discovered) any case in which it has been applied, for limitation purposes, so as to attribute to the company a sole shareholder's knowledge of, or the ability to discover, a breach of duty owed to the company by its directors. Nothing daunted, Mr Knox submitted that, even if there was no general rule of attribution for that purpose, the policy underlying the Limitation Act fully justified such a rule, as a special rule of attribution, in accordance with Lord Hoffmann's guidance in the *Meridian Global* case, beginning at p 507E, that, where primary rules of attribution provide no satisfactory solution:

> "In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

47. Mr Knox submitted that the Limitation Act, including section 14, was plainly intended to apply to claims by companies, and that its policy was to prevent the bringing of stale claims, where those with both the ability and the interest to cause the company to bring a claim had the requisite knowledge, or where the facts were discoverable by them by the exercise of reasonable diligence.

48. Notwithstanding its novelty, this is a powerful argument. It does conform to the general policy of the Limitation Act. Although section 14 is designed to prevent the running of time in favour of those guilty of deliberate concealment of the kinds described in subsections (1) and (2), it postpones the running of time only until the victim of the concealed breach knows about the facts, or could with reasonable diligence discover them. Where the directors' knowledge of, or ability to discover, the breach is not attributable because they are the wrongdoers and the company is the victim then, unless knowledge or discoverability by the entire body of shareholders is attributable,

it may be said that there is no knowledge or discoverability which can be attributable to the company for the purposes of making section 14 work in relation to it.

49. Furthermore, it is clear that the principle enshrined in the *Multinational Gas* case is sufficient to bind the company to the ratification by 100% of its shareholders of the acts of its directors of which it could otherwise complain. If the company is to be bound by shareholder ratification, why should it not be similarly bound by their knowledge of the facts, or their ability to discover them with reasonable diligence, where they have the power not merely to bring a derivative action but to procure that the company itself takes the requisite proceedings to vindicate its rights against the directors?

50. Finally, if the way in which the *Multinational Gas* principle works is (as described by Lawton LJ in that case) that the unanimous act of the shareholders is treated as the act of the company, then it may be a short jump to treat the knowledge of a sole shareholder as the knowledge of the company, about something (namely a claim against its directors) where the usual basis of attribution is disapplied.

51. There are however a number of equally powerful factors which militate against this development of the principle. The first is that the general principle whereby unanimous shareholder decisions are treated as the decisions or acts of the company is not a principle which springs from the existence of a sole shareholder. Rather, it arises where the totality of the shareholders (who may be few or many) meet, formally or informally, and resolve unanimously upon a relevant matter. The act of the company is that which is constituted by their decision, whether to direct that the company do something, or to ratify an earlier decision of the directors that it should do so. True it is that in the *Meridian Global* case Lord Hoffmann spoke of the knowledge of shareholders acting unanimously as being, in principle, capable of attribution to the company, but he was dealing with a case of criminal liability, where the relevant *actus reus* needed to be accompanied by the appropriate *mens rea*: see p 507C. In fact, everything said by Lord Hoffmann about the attribution to the company of the acts or knowledge of its shareholders was, strictly, obiter, because the question in that case was whether the knowledge of senior managers who were not directors should be attributed.

52. Section 14 of the Limitation Act is concerned not with the knowledge of claimants at a particular moment in time when taking some positive step, but rather with their knowledge, or their means of discovering the relevant facts, exercising due diligence, within some period after the occurrence of the breach giving rise to a cause of action.

53. This is not a concept easily applicable to a body of shareholders, who have no reason to be unanimous about matters concerning the company otherwise than when making some relevant decision which, by virtue of their unanimity, is treated by the law

as an act of the company. It is one thing to say that shareholders making a unanimous decision may have the type of knowledge, constituting an intent that the thing resolved upon should be done, sufficient to be attributable to the company as *mens rea*. It is quite another thing to say that shareholders, who may or may not be unanimous when asked to make a decision about the company, should have attributed to the company the knowledge of some of them, or even all of them, about the facts relevant to a wrong done to the company by its directors, or the ability, with reasonable diligence, to discover them during some period of time.

54. Some, but not all, of these difficulties may be surmountable where the company has a sole shareholder, rather than a body of shareholders who may, or even frequently do, act unanimously. The problem that they may have different views from time to time plainly disappears, at least where the single shareholder is an individual or a corporation sole. But a number of other problems remain. First, the ordinary basis upon which the knowledge of directors or agents of a company is attributed to the company is that they owe a duty to the company to report relevant knowledge about its affairs. In sharp contrast, it is a cardinal principle of company law that shareholders do not owe such duties to their company. Shareholders are, in principle, entitled to leave their company to make its own inquiries about its affairs and, in particular, owe no duty of reasonable diligence to inform themselves about facts which might give rise to a claim by the company against wrongdoers, even against its directors.

55. The absence of any such duty was a powerful factor leading the courts below to reject the more generally based submissions about the attribution of shareholder knowledge. Mr Knox submitted that, in the limitation context, that absence of such a duty on even a sole shareholder made no difference, because the policy behind the Limitation Act was concerned with the prosecution of stale claims by those with an interest in them, rather than by those with a duty to sue. But this submission misses the point, because it fails to respect the separate identities of the company and its sole shareholder. True it is that the company need have no more than an interest in bringing proceedings for section 14 to be applicable to it. But section 14 applies to the company as potential claimant rather than to its shareholder. The attribution question is nonetheless powerfully affected, in this context negatively, by the absence of any duty of the shareholder to report its, or his, knowledge to the company.

56. For these and other reasons it is difficult to treat the attribution to a company of the knowledge of its own shareholders about facts relating to a claim by the company against its directors as a general rule of attribution. The general rule is that it is the knowledge of the company's directors that is attributed to it and, in appropriate cases, the knowledge of its agents. There is no general rule that, where (as is here common ground) there can be no such attribution of the knowledge of the company's directors, then attribution of shareholder knowledge somehow follows automatically.

57. The alternative submission, which treats the knowledge of a sole shareholder as attributable in relation to a breach of duty to the company by its directors as a special rule of attribution for the purpose of making section 14 of the Limitation Act work in relation to the company has its own distinct problems. First, it is not obvious why it should be limited to a sole shareholder rather than, for example, to any single shareholder with the requisite majority sufficient to enable the shareholder to cause the company to bring its own proceedings, whether or not by the route of replacing the delinquent directors with others prepared to do so. And why should it not extend to a body of shareholders (with the requisite knowledge) capable of constituting themselves as a sufficient majority for that purpose? Or even a minority capable of bringing a derivative action on behalf of the company?

58. The last of those examples may be easily disposed of. In a derivative action the company is not the claimant for the purposes of section 14 or otherwise, even though the action is brought for the company's benefit. This was a primary reason why, correctly in the Board's view, the courts below rejected the notion that the ability to bring a derivative action was sufficient to enable shareholder knowledge (or their ability to discover the facts) to be prayed in aid under section 14. But the other difficulties of defining such a special rule of attribution in terms which would not be exorbitant, or unfair in different factual contexts, remain. Shareholders, and even majority shareholders, are in general entitled to assume that the directors of their company will take care to ensure that available claims are not allowed to become so stale as to be statue barred. It is no part of a majority shareholder's function, still less duty, to exercise any kind of reasonable diligence in that regard, and the decision of such a shareholder (prevailing by majority over a dissentient minority) would not be the act of the company within the meaning of the *Multinational Gas* principle. Mr Knox was not, on the board's inquiry, inclined to offer some clear basis of distinction between a special rule of attribution applicable to sole, rather than majority, shareholders. He simply submitted that the case for doing so in relation to a sole shareholder was stronger because of the "own acts" principle of company law.

59. An alternative approach may be to avoid the identification of a simple bright-line rule of attribution for the purpose of section 14, to uphold the general principle that it is concerned with the company's knowledge, or ability to discover the facts, but to admit the possibility, on particular facts, that shareholder knowledge may be sufficient. Thus, a sole active shareholder, who habitually controls the affairs of the company might have his knowledge, or ability to discover the facts attributed to the company, but a sleeping sole shareholder content to leave the company to be managed by its directors, would not.

60. That kind of flexible approach might well address some of the difficulties described above, but it would make it hard to resolve a limitation issue without a full trial, and would thereby deprive the benefit of the statute to defendants who ought not even to be vexed with the trial of a stale claim, as the Court of Appeal observed.

61. Finally, there remains the large policy objection noted by the trial judge, namely that there is no obvious reason why time should run in favour of the directors of a company who have committed a deliberate breach of duty, or deliberately concealed a breach of duty, for as long as they choose to retain control of the company as its board. There is much to be said for adhering to the simple rule, based upon the separate personality of the company from even a sole shareholder, that shareholder knowledge of a breach of duty owed to the company by its directors, or the ability to discover the facts, is simply not to be attributed to the company at all, at least for as long as the allegedly delinquent directors retain control of it.

62. The Board would have found it difficult to reach a clear determination of this important question, even if it had been necessary to do so. Not only are the rival arguments evenly balanced, but the Board does not approach the question (as is usual) in a purely appellate capacity, since the "own acts" point was not submitted to, or dealt with by, either of the courts below. Had it been necessary to decide the point, the Board would on balance have been reluctant to disturb the decision of the Court of Appeal on the attribution question, for the reasons given above, treating the arguments against doing so as outweighing the arguments in favour. Nonetheless since, as will shortly appear, the Board considers that the Court of Appeal was in any event correct in its determination of the second question, it is unnecessary for the attribution question to be finally decided. It would be better to leave that question to a case in which it would be determinative, and where it had been fully argued in the courts below.

Question 2 - the absence of a trigger

63. Even if the knowledge of the Minister of Finance was attributable to Eteck, the Court of Appeal nonetheless concluded that the breach was not discoverable by the Minister for some time and so fell within the meaning of section 14(2) of the Limitation Act. The appellants challenged this conclusion on four grounds.

64. The first was that the Court of Appeal had been wrong in law to equate the statutory question: "was the breach of duty unlikely to be discovered for some time" with the question whether the evidence disclosed some trigger putting the Minister of Finance on a course of inquiry which would have been likely to disclose the breach of duty. This, it was submitted, wrongly constrained what should have been a more general forensic inquiry, and tended to place the burden of proof on the appellants to demonstrate discoverability, rather than on the respondent to demonstrate non-discoverability.

65. As to the burden of proof, the Court of Appeal made it clear that they regarded the burden under section 14(2) as lying on Eteck throughout, namely to demonstrate by reference to the evidence before the court that the breach of duty was unlikely to be

discovered for some time. Clearly the Court of Appeal did consider it of primary relevance to ask whether the evidence disclosed some trigger sufficient to put the Minister of Finance on inquiry as to the existence of the alleged breach of duty, namely a lack of reasonable due diligence.

66. In the Board's view the Court of Appeal was perfectly entitled to ask itself that question, as a forensic tool, rather than as an invariable legal requirement in the section 14(2) context. The context was that, as the evidence showed, the Government (including the Minister of Finance) had requested Eteck to conduct certain specific items of due diligence before pursuing the proposed investment and had received back from Eteck reports broadly to the effect that the requested items of due diligence had been undertaken. Leaving aside the alleged misstatement about the share valuation, Eteck's case was not that the directors had failed to have carried out the due diligence specifically requested by Government, despite reporting that they had carried it out, but rather that the directors had failed to ensure that full due diligence was carried out, appropriate to the potential risk inherent in making the investment in question.

67. The Court of Appeal was therefore entitled to ask itself the forensic question: did the evidence disclose anything in the nature of a trigger pointing to a line of inquiry by the Minister of Finance into those other aspects of the allegedly requisite due diligence, and to conclude that, if there was not such a trigger, then the alleged breach of duty was, on the face of it, unlikely to be discovered by the Minister for some time. This is because, although the Minister raised his own specific concerns about due diligence, he was under no duty as shareholder to investigate whether the directors had failed to carry out other aspects of due diligence with sufficient care, sufficient to justify the making of the investment. That was a matter which he was entitled to leave to them, unless put on inquiry that all was not well.

68. The second ground put forward was that non-discoverability had never been pleaded by Eteck, as the basis for invoking section 14(2). This is, in the Board's view, simply wrong. The passage in Eteck's reply quoted at para 38 (above) plainly includes a plea that the breach of duty was not likely to be discovered by the Government until a new board of directors was appointed. That plea necessarily includes an allegation of non-discoverability by the Minister of Finance, as an organ of Government.

69. Thirdly, the appellants say that at no time did Eteck seek to adduce evidence in support of its case of non-discoverability. Rather it concentrated on an evidential case that the Government did not know of the alleged breach until after the appointment of new directors. When discoverability was identified as the key issue by the Court of Appeal (when directing the trial of a preliminary issue) Eteck then failed to address the real issue by any evidence directed to that point.

70. Again, the Board is unable to accept this submission. True it is that the thrust of Eteck's evidence was directed at showing that the Minister did not know of the alleged lack of due diligence until after the appointment of the new board of directors. But an allegation that a failure to do something by the directors was not known by the Minister is a sufficient factual basis for an assertion that the breach of duty was unlikely to be discovered for some time, in the context of the case that the duty itself lay on the directors rather than on the shareholder, and that the particular failings in due diligence alleged to have constituted the breach of duty were other than those about which the directors reported to the Government.

71. More generally, the Board's view is that there was an amply sufficient evidential basis for the Court of Appeal's conclusion that the alleged breach was unlikely to have been discovered by the Minister of Finance for some time, even though the deployment of Eteck's evidence did not use those precise words in its formulation.

72. The final ground of appeal in relation to this second question was simply that, on its own review of the evidence, the Board ought to come to the opposite view in relation to discoverability than that reached by the Court of Appeal. The main argument under this ground was that, viewed as a whole, the evidence showed that Eteck had made a full report about the due diligence which had been carried out before the directors approved the investment so that, if it was in law insufficient, this was sufficiently apparent to the Minister of Finance for the alleged breach to have been discoverable straight away.

73. For the reasons already given, the Board does not accept that analysis. The Court of Appeal evidently conducted a detailed review of the available evidence. The Board's has carried out its own review of the facts, as summarised above. They show that the Court of Appeal was, in the Board's view, entitled to reach the conclusion about discoverability which it did, in the conduct of a forensic analysis which disclosed no error of law.

Disposition

74. The Board therefore dismisses this appeal.