

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

3 **CAUSE NUMBER: FSD 11 OF 2013 (AJEF)**

4 **B E T W E E N:**

5 **NEDGROUP TRUST (JERSEY) LIMITED**

6 (As trustee of the Brian Gilbertson Discretionary Settlement, suing as
7 shareholder of the Fourth Defendant, Pallinghurst (Cayman) General
8 Partner LP (GP) Limited)

9 **PLAINTIFF**

10 **AND:**

11 (1) **RENOVA INDUSTRIES LIMITED**

12 (a company incorporated under the laws of the Commonwealth of the
13 Bahamas)

14 (2) **VLADIMIR VIKTOROVICH KUZNETSOV**

15 (3) **VIKTOR FELIKSOVICH VEKSELBERG**

16 (4) **PALLINGHURST (CAYMAN) GENERAL PARTNER LP (GP)**
17 **LIMITED**

18 (5) **PALLINGHURST (CAYMAN) GENERAL PARTNER LP**

19 (6) **PALLINGHURST RESOURCES MANAGEMENT LP**

20 **DEFENDANTS**

21 Coram: Mr. Justice Angus Foster
22 Hearing Dates: Thursday, 27th and Friday, 28th February 2014
23 Appearances: For the Plaintiff: Mr. Michael Bloch, QC (of the English Bar) instructed
24 by Mr. David Butler and Miss Jessica Williams of Harneys
25 For the 1st to 3rd Defendants: Mr Richard Millett, QC (of the English Bar)
26 instructed by Mr James Eldridge of Maples and Calder
27
28

29 **RULING**

30
31
32 **1. Introduction**

33
34 1.1 This Ruling concerns an application by the plaintiff pursuant to GCR O.15,
35 r.12A (2) for leave to continue a multiple derivative action. The first to
36 third defendants have given notice of intention to defend and strongly
37 oppose the application.

1 1.2 The action is very closely related to the litigation: *Renova Resources Private*
2 *Equity Limited v Gilbertson and Four Others* [2012] 2 CILR 416 (“the
3 Project Egg litigation”/“the Project Egg action”). The Project Egg action
4 involved the same named parties or closely related persons as the present
5 action and the same investment fund and company/exempted limited
6 partnership structure known as the Pallinghurst Structure. The Project Egg
7 action was also a multiple derivative action brought on behalf of the same
8 company by the other 50% shareholder. That action principally concerned
9 breaches of fiduciary duty by Mr. Brian Gilbertson (“Mr. Gilbertson”) as a
10 director of the company in light of his acquisition of the rights to the well
11 known Fabergé brand by diverting them from the Pallinghurst Structure.
12 The present action concerns the acquisition and subsequent sale for its own
13 benefit by the first defendant of a shareholding in an Australian mining
14 company and whether or not that acquisition was made as another
15 investment of or for the same investment fund as part of the Pallinghurst
16 Structure.

17
18 1.3 The background to the present action is fully set out in the judgment
19 referred to above (“the Project Egg Judgment”). There were also several
20 other significant contested applications to the court in the Project Egg
21 action, some of which are also reported. The principal such application
22 which is most relevant for these purposes was the application by the plaintiff
23 in the Project Egg action, *Renova Resources Private Equity Limited*
24 (“Renova Resources”), for leave to continue that multiple derivative action
25 on behalf of the same company: see the Ruling in *Renova Resources Private*
26 *Equity Limited v Gilbertson and Four Others* [2009] CILR 268, (“the
27 Renova leave to continue Ruling”).

1 2. The Parties

2
3 2.1 I shall describe the involvement of some of the parties in more detail later
4 but, apart from the first defendant, all of the other five defendants were also
5 named parties in the Project Egg action.
6

7 2.2 The plaintiff is the trustee of the Gilbertson family trusts and in particular
8 the Brian Gilbertson Discretionary Settlement in Jersey, Channel Islands.
9 The plaintiff was formerly called Fairbairn Trust Limited and was referred
10 to as “Fairbairn” in the Project Egg litigation. In order to avoid confusion I
11 shall also refer to the plaintiff as “Fairbairn” in this Ruling. Autumn
12 Holdings Asset Inc. (“Autumn”), which was the fifth defendant and a
13 counterclaimant in the Project Egg action, is wholly owned by Fairbairn and
14 is a special purpose vehicle acquired by Fairbairn for purposes of the
15 payment for Mr. Gilbertson’s acquisition of the Fabergé rights. Mr.
16 Gilbertson was the principal defendant and counterclaimant in the Project
17 Egg litigation and according to the Project Egg Judgment he was the
18 directing mind and will of Autumn, through Fairbairn in its capacity as
19 trustee of the Gilbertson family trusts.
20

21 2.3 The first defendant, Renova Industries Limited (“RIL”) is a company
22 incorporated in the Bahamas and is a member of the Renova Group of
23 companies (“Renova”). RIL was not itself a party to the Project Egg action
24 but its associated company Renova Resources was, as I have already pointed
25 out, the plaintiff in that action and Renova was frequently referred to in the
26 Project Egg litigation.
27

28 2.4 The second defendant, Mr. Vladimir Kuznetsov (“Mr. Kuznetsov”) is or was
29 at all material times the Chief Investment Officer of Renova. Mr.
30 Kuznetsov was a party to the Project Egg action by virtue of being the
31 second defendant to the counterclaim by Mr. Gilbertson and Autumn.

1 Maples and Calder. By order dated 9th July 2013 Henderson J. granted such
2 leave.

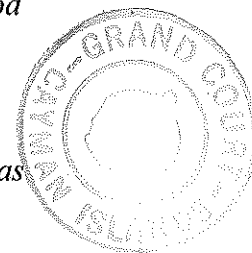
3
4 3.3 The amended writ was served on 15th July 2013 and the statement of Claim
5 was served on 2nd September 2013 some 8 months after the writ was issued.

6
7 3.4 Fairbairn's summons in the present application for leave to continue the
8 action was filed on 23rd September 2013, which was the last possible date
9 under the GCR for filing the application. The first supporting evidence was
10 served on 15th November 2013.

11
12 4 The test for leave to continue a derivative action

13
14 4.1 The present action is brought derivatively by Fairbairn as a 50% shareholder
15 of the Company. Pursuant to GCR O.15, r.12A(8) on the hearing of an
16 application to continue such a derivative action the court may –

- 17
18 *“(a) grant leave to continue the action, for such period*
19 *and upon such terms as the Court may think fit;*
20 *(b) subject to paragraph (11), dismiss the action;*
21 *(c) adjourn the application and give such direction as*
22 *to joinder of parties, the filing of further evidence,*
23 *discovery, cross examination of deponents and*
24 *otherwise as it may consider expedient.”*

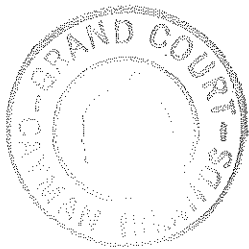


25
26 4.2 The appropriate test for the grant of leave to continue a derivative action
27 was considered in some detail in the Renova leave to continue Ruling at
28 para. 31 as follows:

29
30 *“The only issue is, or should be, whether there is a prima*
31 *facie case, first, that the claim falls within the exception*

1 to the rule in *Foss v Harbottle* [(1843) 2 Hare 461; 67 E.R. 189]
2 and, secondly, on the merits against the defendant. The purpose of
3 this “filter” as Lord Millett, N.P.J. described it, [in *Waddington*
4 *Limited v Chan Chun Hoo Thomas and Others*, Hong Kong Court
5 of Final Appeal, 8th September 2008 (unreported)], is to satisfy the
6 court that there are reasonable grounds for the plaintiff’s claim
7 and that it is not vexatious or frivolous or has no real prospect of
8 success...

9
10 32 In my opinion, the appropriate test for this court to adopt in
11 considering an application for leave to continue a derivative
12 action is the *prima facie* case test, that is, where a defendant in a
13 derivative action has given notice of intention to defend, the
14 plaintiff must satisfy the court that the company has a *prima facie*
15 case against the defendant (and that the action falls within the
16 applicable exception to the rule in *Foss v Harbottle*).



17
18 It was agreed that the present action falls within the applicable exception to
19 the rule in *Foss v Harbottle* (supra). Accordingly, the second issue in this
20 regard is whether the Company, acting by Fairbairn, has a *prima facie* case
21 against the first and/or the second and/or third defendants on the merits.

22
23 4.3 The standard of a *prima facie* case was also considered in the Ruling on
24 Renova Resource’s application for leave to continue its action as follows:

25
26 “33 There does not appear to have been any precise analysis in the
27 English case law of the standard of a *prima facie* case in this
28 context. In *Prudential Assur. Co. Ltd. v. Newman Indus. Ltd. (No.*
29 *2)* [[1981] Ch. 257; on appeal [1982] Ch. 284], in the passage
30 which I have already quoted, it was made clear that the right to
31 progress a minority action is not to be equated with the absence of

1 grounds for a strike-out in ordinary litigation. It has also been
2 made clear that a prima facie case is more than a good arguable
3 case. It is also clear that the hearing of such an application for
4 leave “must not be allowed to turn into a mini-trial, but the Court
5 must nevertheless have sufficient evidence before it is able to make
6 a careful assessment of the merits” – see Supreme Court Practice
7 1999, para. 15/12A, at 259.



10 34 Counsel for the plaintiff accepted that the plaintiff must do
11 more than merely show that the case cannot be struck out but he
12 also submitted that the plaintiff does not have to prove its case on
13 the evidence as if this were a trial, which in my view must be right.
14 However, he also argued that the appropriate question is whether,
15 if the defendants were to choose not to defend, the claim would be
16 more likely than not to succeed on the pleaded case and the
17 material before the court. That seems to me to amount to
18 submitting in effect that the court should proceed as if the pleaded
19 case were true and ignore the evidence submitted by the
20 defendants, which does not accord with my understanding of the
21 authorities.

22 The purpose of requiring the plaintiff to obtain leave to continue
23 the derivative action, as I understand it, is to prevent the expense
24 and time of (and to protect the defendants against) vexatious or
25 unfounded litigation which has little or no prospect of success or
26 which is clearly brought by an aggrieved shareholder for his own
27 reasons rather than in the interest of the company. The phrase
28 “prima facie” has various shades of meaning but literally means
29 “at first sight”. Given that there is not to be a mini-trial of the
30 plaintiff’s case, it seems to me that I must form a view of the
31 plaintiff’s case based on my first impressions, having regard to my

1 the Company that it was agreed between the Company, as the ultimate
2 general partner of the Master Fund, and RIL that RIL would acquire the
3 shares in Consmin (“the Shares”) for the benefit of the Master Fund.
4 Fairbairn also claims that the subsequent acquisition of the Shares by an
5 Australian stock broking company instructed by Sean Gilbertson was as
6 nominee for RIL pursuant to that agreement and that the Shares were to be
7 and were held for the benefit and on behalf of the Master Fund. Fairbairn
8 contends that Mr. Kuznetsov, who was a director of the Company, and Mr.
9 Vekselberg both knew of and approved of this agreement.

10
11 5.3 During January 2007 the relationship between Mr. Gilbertson and Mr.
12 Vekselberg broke down in relation to Project Egg as explained in detail in
13 the Project Egg Judgment. Subsequently, at a meeting in May 2007 in
14 London between Mr. Gilbertson, Mr. Vekselberg and Mr. Kuznetsov, Mr.
15 Gilbertson, it is now contended by Fairbairn, was informed that Renova
16 would keep the Shares in lieu of costs which it had incurred in relation to
17 the establishment of the Pallinghurst Structure, and because Mr. Gilbertson
18 “took Fabergé”. It is Fairbairn’s claim that from that time RIL was in
19 breach of the agreement that the Shares would be, and on Fairbairn’s case
20 had been, acquired for the benefit and on behalf of the Master Fund. In
21 December 2007 RIL sold the Shares for a net profit of the AUD equivalent
22 of approximately US\$2.32M, which it kept for itself.

23
24 5.4 The relief which Fairbairn now seeks against RIL on behalf of the Company
25 is damages for breach of contract, breach of trust and breach of agency. It
26 also seeks an account of the profit made by RIL on the sale of the Shares
27 and damages for conspiracy by lawful or unlawful means by RIL, Mr.
28 Kuznetsov and Mr. Vekselberg. Relief is also claimed against each of Mr.
29 Kuznetsov and Mr. Vekselberg for damages, as well as for the said alleged
30 conspiracy, for inducement of the alleged breach of contract, breach of

1 agency and breach of trust by RIL as well as against Mr. Vekselberg for
2 dishonest assistance of breach of trust by RIL.

3
4 5.5 The evidence which Fairbairn relied upon in support of its case was an
5 affidavit by Sean Gilbertson (who was also a principal witness in the Project
6 Egg action) and also two affidavits by Ms Debbie Lumsden, a newly
7 appointed director of Fairbairn. Ms Lumsden had sworn her first affidavit
8 in support of Fairbairn's application for leave to serve its amended writ out
9 of the jurisdiction. The Defendants relied in opposition upon an affidavit by
10 Ms. Evgenia Loewe, a New York admitted attorney who is head of the
11 Foreign Litigation Department at Renova.

12
13 6 The case on the merits

14
15 6.1 Since it is well established that it is not appropriate to conduct a mini-trial in
16 such a case and I consider that I should form a view of the plaintiff's case
17 based on first impressions, I shall in this judgment only summarise the
18 principal evidential points made in relation to the merits, rather than going
19 into every detail.

20
21 6.2 There is no dispute that in September 2006 RIL paid a total of
22 AUD1,663,093 of its own money for the Shares. It is also accepted that
23 approximately a year later, in September 2007, RIL sold the Shares for a
24 profit of AUD2,569,587.08 (approximately USD2.32m.) and that RIL kept
25 this profit for itself.

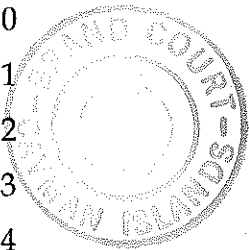
26
27 6.3 Fairbairn's case is largely based on various email exchanges as well as two
28 specific meetings. There is no dispute that the possible investment in
29 Consmin by the Master Fund was originally proposed by Mr. Gilbertson and
30 was the subject of discussion at a meeting on 25th and 26th July 2006 in
31 Frankfurt attended by Mr. Gilbertson, Sean Gilbertson, Mr. Kuznetsov and

1 others. There was discussion at that meeting of a possible acquisition of up
2 to 4.99% of the share capital of Consmin at a price of up to AUD2.00 per
3 share. However, as emphasized on behalf of RIL, Mr. Kuznetsov and Mr.
4 Vekselberg, who I shall refer to together for present purposes as “the
5 Defendants”, the documentation relating to the Pallinghurst Structure,
6 known in the Project Egg litigation as “the long form documentation”, had
7 not been finally approved or executed by Renova and was still being
8 reviewed. Accordingly, as stated by Sean Gilbertson in an e-mail to Mr.
9 Gilbertson on 31st August 2006 the Master Fund was not “officially up and
10 running”. Sean Gilbertson made it clear that he wanted Renova to fund the
11 proposed purchase of the Shares “in the meantime”. It seems to me that
12 “the meantime” must have meant pending the approval and execution of the
13 long form documentation.

14
15 6.4 Also on 31st August 2006 Sean Gilbertson sent out a draft resolution of the
16 “Executive Committee” of the Company confirming the intended
17 acquisition of the Shares for Mr. Kuznetsov, as a director of the Company,
18 to sign. In fact, because the long form documentation had not been
19 executed the “Executive Committee” did not legally exist as such. Leading
20 Counsel for the Defendants also pointed to several inconsistencies between
21 the draft resolution as sent out by Sean Gilbertson and the final version as
22 signed by him, apparently on 28th August 2006, and by Mr. Kuznetsov on
23 15th September 2006. These inconsistencies were not explained by Sean
24 Gilbertson.

25
26 6.5 There was also e-mail correspondence at about this time between Sean
27 Gilbertson, and Mr. Denis Derjitski of the Renova treasury department and
28 also between Sean Gilbertson and the Australian stock brokers, Bell Potter.
29 Fairbairn and the Defendants each rely on different passages in these e-
30 mails, in the case of Fairbairn to support its contention that the Shares were
31 to be and were acquired by RIL through Bell Potter on behalf of and as

1 agent of or in trust for the Master Fund and, in the case of the Defendants, to
2 dispute that contention and to support their own case that the Shares were
3 acquired by RIL on its own account and conditionally on the long form
4 documentation being executed, which it never was. For example, Fairbairn
5 relies on an e-mail from Sean Gilbertson to Mr. Derjitski in which he said
6 that the Shares would for the time being be held by Bell Potter's nominee
7 company on behalf of Renova as agent for the Pallinghurst Fund so as to
8 keep Renova's and Pallinghurst's names out of the market. However, the
9 Defendants rely on the fact that Sean Gilbertson did not say anything to Bell
10 Potter about the Master Fund or Pallinghurst or that Renova or RIL was
11 supposedly acting as agent of the Master Fund in respect of the Shares. On
12 the contrary, Bell Potter, it is said, understood that Sean Gilbertson was
13 acting as the authorized representative of Renova, not as representative of
14 the Master Fund, of which they knew nothing.



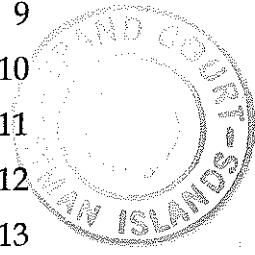
15
16 6.6 As I have already mentioned, and as is clear from the Project Egg Judgment,
17 relations between Mr. Gilbertson on the one hand and Mr. Vekselberg on
18 the other hand broke down over Project Egg in January 2007, only some 3
19 months after RIL purchased the Shares. As a result the long form
20 documentation was never executed. On 25th January 2007 Renova
21 instructed Bell Potter to remove Sean Gilbertson as its authorized
22 representative in relation to the Bell Potter Share acquisition account. The
23 Defendants rely on the fact that there is no evidence that Mr. Gilbertson or
24 Sean Gilbertson, who were aware of this, objected to it, which, they argue,
25 was not consistent with the contention that RIL was the agent or trustee of
26 the Master Fund in respect of the Shares. Furthermore, on 12th February
27 2007 RIL was listed as a shareholder of Consmin to the knowledge of Mr.
28 Gilbertson and Sean Gilbertson but again there was no objection on their
29 part and no contention by them that the listed shareholder should have been
30 recorded as the Master Fund or as RIL as nominee for the Master Fund.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

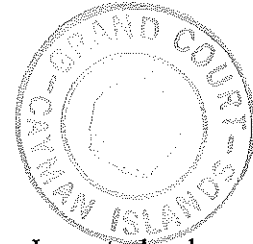
6.7 On 5th May 2007, Mr. Gilbertson met Mr. Vekselberg and Mr. Kuznetsov at Claridges in London in an unsuccessful attempt to resolve the differences between them. According to Mr. Gilbertson at that meeting the matter of the Shares was raised. He contends that Mr. Kuznetsov said that Renova would be keeping the Shares in satisfaction of Renova's costs of setting up the Pallinghurst Structure and because Mr. Gilbertson "took Fabergé", the latter implication being, according to Fairbairn, that the Shares were kept by Renova as a kind of tit-for-tat rather than because they considered that they were entitled to them. Mr. Kuznetsov was cross-examined about the Shares by leading counsel for Mr. Gilbertson and Autumn (now leading counsel for Fairbairn) at the trial of the Project Egg action. Mr. Kuznetsov's evidence was to the effect that the Shares were kept by Renova because their possible acquisition for the Master Fund had been conditional on the approval and execution of the documentation relating to the Master Fund (the long form documentation) and it never was executed. He said that the Shares were purchased by Renova at its own risk. That evidence was not challenged at the time. Mr. Vekselberg said he had no recollection of any discussion of the Shares at the meeting and Mr. Kuznetsov said it was his decision that the Shares should be kept by Renova.

6.8 As stated in the paragraph from the Renova leave to continue Ruling cited above, in considering whether Fairbairn has established that the Company has a prima facie case against the Defendants or any of them the standard applicable is more than that of a good arguable case. That, of course, was the standard applicable on Fairbairn's application in the present action for leave to serve its amended writ out of the jurisdiction. The appropriate standard in the present application is accordingly higher than the standard which was applied in that application.

6.9 It was argued on behalf of Fairbairn that its claim on behalf of the Company that there was an agreement that the Shares would be acquired by Renova



1 on behalf of and as agent or trustee of the Master Fund is made out prima
2 facie on the evidence. It was submitted that by selling the Shares and
3 keeping the resulting profit for itself RIL was in breach of contract and/or of
4 agency and/or of trust. On the other hand, it was argued for the Defendants
5 that the claim is unfounded and not of sufficient strength to justify the grant
6 of leave to continue it. They contend that RIL bought the Shares with its
7 own money and at its own risk and that the proposal to transfer them to the
8 Master Fund was only if and when the long form documentation was
9 approved and executed. Once the parties fell out and it was clear that the
10 long form documentation would never be executed RIL was entitled to
11 retain the Shares which it had purchased with its own money and at its own
12 risk.



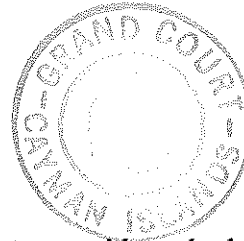
13
14 7 Is the claim in the interests of the Company?

15
16 7.1 In determining whether there is a prima facie case I must also be satisfied
17 that the claim is in the interests of the Company. The claim against RIL in
18 respect of the profit made on its sale of the Shares is for approximately
19 US\$2.32m. The derivative claim on behalf of the Company in the Project
20 Egg Litigation was for in excess of US\$85m. On the approach adopted on
21 behalf of Mr. Gilbertson in the Project Egg litigation, under the Pallinghurst
22 Structure the Company would receive some 25% of any recovery made by
23 the Master Fund. In the present case that would therefore amount to
24 approximately US\$750,000 for the Company. In the context that is a
25 relatively small amount. Fairbairn seeks an indemnity from the Company
26 for its costs of these proceedings. I shall consider that in more detail later in
27 this Ruling but if the Company was required to so indemnify Fairbairn, it is
28 hard to see how, given the size of the claim and the likely cost of pursuing
29 it, there would be any significant benefit to the Company. In my view it is
30 questionable whether the claim is in the interests of the Company. In fact, I

1 am satisfied that the present claim has not been brought genuinely in the
2 interests of the Company but for Mr. Gilbertson's own reasons.

3
4 7.2 My assessment, in light of all the circumstances, including the Project Egg
5 Judgment, is that this claim has been brought in furtherance of Mr.
6 Gilbertson's dispute with Mr. Vekselberg, which has a long history and
7 extends to the conflict over the Pallinghurst Structure. In my opinion Mr.
8 Gilbertson, through Fairbairn, is using the Company to further pursue his
9 personal fight with Mr. Vekselberg. That is not in the interests of the
10 Company.

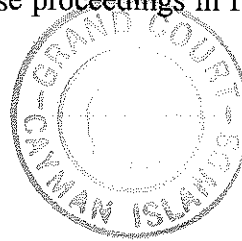
11
12 8 Is the claim bona fide?



13
14 8.1 It is also appropriate, in this context, to consider whether the claim which
15 Fairbairn seeks leave to bring on behalf of the Company is bona fide. In
16 these circumstances it is relevant to consider the parties and others involved.
17 In the Project Egg Judgment it was held that Fairbairn, as trustee of the
18 Gilbertson family trust and the sole shareholder of Autumn, was subject to
19 the directing mind and will of Mr. Gilbertson. The former director of
20 Fairbairn, Mr. Thomas, basically did as Mr. Gilbertson wished. It was
21 argued, in my opinion with justification, that the situation was unlikely to
22 have changed in the last 18 months. It was pointed out too that in the
23 present proceedings Fairbairn is represented by the same legal team that
24 represented Mr. Gilbertson and Autumn in the Project Egg litigation.

25
26 8.2 Although Ms Lumsden says Fairbairn "would not be seeking to pursue this
27 claim unless it believed that it is in the financial interest of the Trust to do
28 so", in light of previous findings it seems to me most improbable that Mr.
29 Gilbertson has not at least prompted and more likely pressed Fairbairn to
30 pursue this claim. Ms Lumsden did not say how pursuing the claim is in the
31 financial interest of the Trust. The financial interest of the Trust, being in

1 the region of US\$375,000 seems relatively nominal, indeed possibly non-
2 existent if it has to meet its own, and possibly others' costs of the litigation.
3 Even if the claim were to be successful Fairbairn would inevitably incur
4 significant costs which would not be recoverable on a taxation. In my
5 assessment the more probable position in all the circumstances is that Mr.
6 Gilbertson is behind the bringing of these proceedings in furtherance of his
7 feud with Mr. Vekselberg.



8
9 Abuse of Process

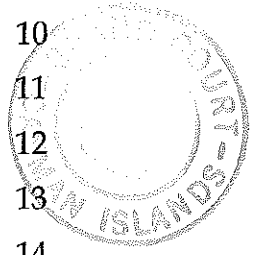
10
11 9.1 The Defendants contend that the present action amounts to an abuse of
12 process and that the principle in *Henderson v Henderson* applies. In
13 summary that will prevent parties and their privies from litigating matters
14 which arose in earlier litigation and which could and should have been
15 litigated in that earlier litigation. In *Henderson v Henderson (1843) 3 Hare*
16 *100* Sir James Wigram V-C said:

17 *"..... where a given matter becomes the subject of litigation in,*
18 *and of adjudication by, a Court of competent jurisdiction, the*
19 *Court requires the parties to that litigation to bring forward their*
20 *whole case, and will not (except under special circumstances)*
21 *permit the same parties to open the same subject of litigation in*
22 *respect of matter which might have been brought forward as part*
23 *of the subject in contest, but which was not brought forward, only*
24 *because they have, from negligence, inadvertence, or even*
25 *accident, omitted part of their case. The plea of res judicata*
26 *applies except in special cases, not only to points upon which the*
27 *Court was actually required by the parties to form an opinion and*
28 *pronounce a judgment, but to every point which properly belonged*
29 *to the subject of litigation, and which the parties, exercising*
30 *reasonable diligence, might have brought forward at the time."*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

9.2 I was also referred to the Judgment of Lord Kilbrandon in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, who said:

“But there is a wider sense in which the doctrine [of res judicata] may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V-C in Henderson v Henderson.”

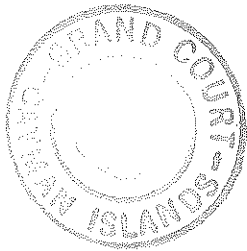


That, of course was a case in the Privy Council and therefore binding on this court. The slightly wider form of the rule in that case has been applied by this court in *Re Swiss Oil Corp* [1988-89] CILR 277 and in *H Limited v B and F Limited* [1994-95] CILR 343, although the circumstances of those cases were not the same as in the present proceedings.

9.3 However, the principle has been more recently re-stated by the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 in which Lord Bingham said at page 31:

“..... Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30



been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the

1 Fund in the Fabergé rights and the present litigation concerns the proposed
2 investment of the Master Fund in the Shares, although the latter investment
3 was, as I have already explained, in fact also the subject of evidence and
4 comment in the Project Egg action.

5
6 10.2 Fairbairn relies on the fact that it was not a party to the Project Egg action.
7 But it seems to me that there are two answers to that. Firstly, the real
8 plaintiff in both actions is the Company. Both the Project Egg action and
9 this action are derivative actions brought on behalf of the Company; in each
10 case it was and is the Company's claim. Admittedly in each case the action
11 is brought on behalf of the Company by a different 50% shareholder, in the
12 Project Egg action by Renova Resources and in the present action by
13 Fairbairn. Nonetheless, in my view it is the substance not the form that
14 really matters and in each case the real plaintiff is the Company, there is no
15 difference in that respect.

16
17 10.3 The second answer to the non-party point arises from the relationship
18 between Fairbairn and Mr. Gilbertson and Autumn, the latter two of whom
19 were, of course, both parties in the Project Egg action. The strict
20 relationship between Fairbairn and Mr. Gilbertson is that of trustee and
21 beneficiary. As trustee, Fairbairn should be acting for the benefit of Mr.
22 Gilbertson as beneficiary. Mr. Gilbertson has a beneficial interest in the
23 present action through Fairbairn as shareholder of the Company. As such
24 Mr. Gilbertson has an interest in the outcome of the present proceedings.
25 However, as I have already explained, in practice the relationship goes
26 much further than that. As found in the Project Egg Judgment, Mr.
27 Gilbertson is, in the context of the trust relationship, the directing mind and
28 will of Fairbairn and thus also of Autumn. Autumn is the wholly owned
29 subsidiary of Fairbairn and Fairbairn, or its affiliated company, Fairbairn
30 Corporate Services Limited, is the director of Autumn. Autumn was
31 acquired (it was an "off the shelf" BVI company) by Fairbairn specifically

1 for the purpose of making the payment for Mr. Gilbertson's acquisition of
2 the Fabergé rights, the economic benefit of which had been intended as an
3 investment of the Master Fund. It does not seem to me that in the
4 circumstances Fairbairn, the plaintiff in these proceedings, is for these
5 purposes independent of Mr. Gilbertson or of Autumn, who were both
6 defendants and the counterclaimants in the Project Egg litigation.
7

8 10.4 Although not named as a party, I consider that Fairbairn was nonetheless
9 very much involved in the Project Egg litigation. It was not only an equal
10 shareholder in the Company with the plaintiff in that action but in paragraph
11 67 of Mr. Gilbertson's and Autumn's defence and counterclaim they
12 pleaded as follows:-
13



14 *"In any event, Fairbairn Trust (as 50% shareholder in its capacity*
15 *as trustee of the Gilbertson family discretionary settlement) has the*
16 *right (which is hereby reserved) to bring and seek the court's leave*
17 *to continue derivative claims for damages and/or equitable*
18 *compensation against Mr. Vekselberg, Mr. Kuznetsov, Renova*
19 *Holding and [Renova Resources Private Equity Ltd] in respect of*
20 *their liability to the Company and/or the Master Fund as aforesaid*
21 *under paragraphs 64 and 66.1 above or otherwise howsoever*
22 *arising."*
23

24 It would appear from this that Fairbairn was able to look to Mr. Gilbertson
25 to plead for it and to seek to reserve the rights which it claimed. Those
26 rights, although specific claims were not identified, seem likely to have
27 encompassed the right to bring the present derivate action in respect of
28 Project Charlie.
29

30 10.5 In these circumstances, in my opinion, the degree of identity between Mr.
31 Gilbertson and Autumn on the one hand and Fairbairn on the other hand is

1 such that it is appropriate that Fairbairn as plaintiff in the present
2 proceedings, even though not a named party in the Project Egg action,
3 should be treated as a party common to both actions for these purposes and
4 subject to the *Henderson* principle.
5

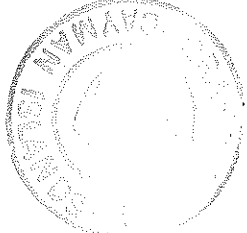
6 11 Should the present claims have been heard together with the claims in the
7 previous action?
8

9 11.1 It also seems to me almost self-evident in the circumstances here that the
10 claims which Fairbairn now makes in the present proceedings should have
11 been heard and determined together with the claims in the Project Egg
12 action. As I have already mentioned, and in my view most significantly, the
13 acquisition of the Shares, which is the subject of the present proceedings,
14 was itself the subject of evidence and comment at the trial of the Project Egg
15 action. Mr. Kuznetsov was cross-examined about it by leading counsel for
16 Mr. Gilbertson and Autumn, who is the same leading counsel now
17 representing Fairbairn in the present proceedings. Mr. Vekselberg was also
18 asked about the Shares at the Project Egg trial and leading counsel for Mr.
19 Gilbertson and Autumn made reference to the Shares in both his written and
20 his oral closing submissions. It is obvious that Mr. Gilbertson and Fairbairn
21 knew all of the facts on which Fairbairn now seeks to rely well before the
22 Project Egg action was even commenced. All of the relevant
23 communications and meetings, and the acquisition and the sale of the Shares
24 had occurred by December 2007. Indeed the alleged breaches of which
25 Fairbairn complains were known to Mr. Gilbertson at the meeting in London
26 on 5th May 2007. There is no obvious reason why the claims which are
27 made in the present proceedings could not have been made at the time of
28 and in conjunction with the claims made in the Project Egg litigation and
29 tried at the same time and in my view they plainly should have been. Apart
30 from Fairbairn and RIL, who were anyway very closely identified with the
31 parties to the Project Egg action as I have explained, all of the parties are the

1 same. All of the relevant individuals, Mr. Gilbertson, Sean Gilbertson, Mr.
2 Vekselberg, Mr. Kuznetsov and Mr. Thomas of Fairbairn gave evidence
3 both by witness statement and orally at the trial of the Project Egg action
4 and could easily have given evidence also on the Project Charlie issues, as
5 indeed Mr. Kuznetsov and Mr. Vekselberg in fact anyway did at the trial.
6

7 11.2 As far as discovery is concerned, if the Project Egg and the Project Charlie
8 claims had been dealt with together the necessary searches for relevant
9 documentation could easily have been extended to include Project Charlie.
10 The additional time and costs in doing so would have been inconsequential.
11 Similarly, in my opinion, the length of the Project Egg trial would not have
12 been materially extended if the claims regarding Project Charlie had been
13 tried at the same time. In light of the fact that the whole circumstances and
14 background are common to both Projects, the inclusion of the Project
15 Charlie issues in the Project Egg trial would in my view, have added at most
16 another day and quite possibly less, to the length of the trial. In the context
17 of a 5 week trial that is insignificant.
18

19 11.3 Furthermore, not only were all the witnesses relevant to the present claim
20 present and cross-examined at the Project Egg trial but so were all the
21 relevant legal representatives present. As I have already mentioned, the
22 same leading counsel who represented Mr. Gilbertson and Autumn in the
23 Project Egg litigation now also represents Fairbairn in the present
24 proceedings. The same leading counsel who represented Renova Resources,
25 Mr. Kuznetsov and Mr. Vekselberg now also represents RIL and continues
26 to represent Mr. Kuznetsov and Mr. Vekselberg in the present proceedings.
27 The same English solicitors are involved and the same Cayman Islands
28 attorneys. The same judge is assigned to the present action as was assigned
29 to the Project Egg action and heard the trial and produced the Project Egg
30 Judgment.



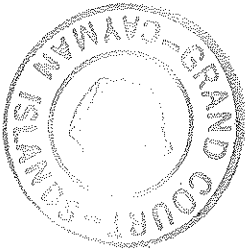
1 11.4 It would not only have been convenient and saved costs for the parties to
2 have the Project Charlie claims tried at the same time as the Project Egg
3 claims but it would also have been in the interest of the administration of
4 justice. As Lord Bingham said in *Johnson v Gore Wood and Co* (supra), the
5 public interest “*that there should be finality in litigation and that a party*
6 *should not be twice vexed in the same matter..... is re-enforced by the*
7 *current emphasis on efficiency and economy in the conduct of litigation, in*
8 *the interest of the parties and the public as a whole”.* By commencing a
9 separate action and requiring another trial in relation to matters which could
10 and should have been heard in the previous trial considerable additional
11 time and inconvenience is caused to the court, both the judiciary and the
12 administration. It is not, in my opinion, in the interests of the administration
13 of justice for such unnecessary duplication of time and effort to be required,
14 nor is it in the public interest.

16 11.5 The fact that the Project Charlie claims were not tried at the same time as
17 the Project Egg action will also cause considerable inconvenience and
18 additional unnecessary costs to the Defendants. Mr. Vekselberg is based in
19 Russia, and Mr. Kuznetsov in Switzerland, from where they each travelled
20 to Cayman to give evidence at the Project Egg trial in April/May 2012, just
21 over 2 years ago. To require them to return, if necessary, for a further trial
22 in relation to Project Charlie seems to me a considerable inconvenience and
23 to involve unnecessary duplication of costs. Mr. Gilbertson and Sean
24 Gilbertson are based in London as are both the leading counsel involved and
25 the English Solicitors whose representatives attended the Project Egg trial
26 and who would no doubt attend the trial of the present action. In light of the
27 probable difficulties in availability of all involved and timetabling such a
28 trial, even if only for a few days, it would be unlikely to take place before
29 late 2015 at the earliest. The costs and inconvenience of all of this would be
30 considerable.

1 11.6 It would, in my view, with appropriate case management, have been
2 possible to have ensured that the claims relating to Project Charlie were
3 tried and determined at the same time as the claims relating to Project Egg,
4 given the overwhelming desirability of that. Even if it was not procedurally
5 possible to join Fairbairn and RIL as parties to the Project Egg action, and I
6 express no view on that, it surely would have been possible, if not to
7 consolidate the two actions if they had to have been brought separately, at
8 least to give appropriate directions regarding co-ordination of pleadings,
9 discovery and timetabling and to ensure that they were tried at the same
10 time to avoid duplication of time and cost. I do not doubt that it could have
11 been done and I consider that it should have been done.

12
13 11.7 It does seem to me that the bringing of the present proceedings raising
14 claims which could and should have been heard at and resolved following
15 the trial of the Project Egg action, does involve unfair and unjust vexation
16 and harassment of Mr. Vekselberg and Mr. Kuznetsov. There is no good
17 reason, in my view, why they should again be subjected to allegations of
18 conspiracy and dishonesty when such allegations could and should have
19 been heard and dealt with at the trial of the Project Egg action. Allegations
20 of conspiracy in relation to Project Egg were made and ultimately either
21 abandoned or not ultimately pursued. It seems to me unjust and unfair in
22 such circumstances that the same allegations should now be repeated, albeit
23 in relation to another proposed investment of the Master Fund, some 2 years
24 later. No one, however sophisticated or successful wishes to be accused of
25 dishonesty or conspiracy or should be exposed to such allegations more than
26 once in relation to the same or similar matter yet such accusations are now
27 made against Mr. Vekselberg and Mr. Kuznetsov all over again. In my
28 opinion that is unjust and unfair and should only be allowed in special and
29 unusual circumstances. That is not the case here.

1 11.8 Leading counsel for Fairbairn submitted that for Mr. Kuznetsov and Mr.
2 Vekselberg to be subjected to a second action does not amount to
3 harassment and he pointed out also that RIL was not a party to the first
4 action (the Project Egg action) anyway. In my opinion the validity of those
5 submissions must be considered in light of the particular circumstances.
6 The circumstances here are that Mr. Kuznetsov and Mr. Vekselberg flew to
7 Cayman from Switzerland and from Russia respectively to be cross-
8 examined in a foreign language on their witness statements at the Project
9 Egg trial. Both Mr. Kuznetsov and Mr. Vekselberg are Russian and Mr.
10 Vekselberg required the assistance of an interpreter at the trial. Clearly
11 having to do that would have required not only time and inconvenience but
12 also some personal anxiety and distress. It would also have involved
13 significant cost to them both direct and indirect. Had the claims now made
14 in relation to Project Charlie been tried at the same time, their cross-
15 examination may have been extended but, in my opinion, only by a short
16 time, and that would have been an end of the matter. If the present action is
17 allowed to proceed all that may well have to be repeated.



18
19 11.9 As far as RIL is concerned, it is a Renova company and although not a
20 named party in the Project Egg action, the involvement of Renova in the
21 Project Egg litigation, which is explained in considerably more detail in the
22 Project Egg Judgment, was significant. Mr. Vekselberg is the principal
23 beneficiary and chairman of Renova and Mr. Kuznetsov is a senior
24 executive. As I have already said, in considering the circumstances in this
25 context, it seems to me that the court should look at the substance not the
26 form. In my view to seek to litigate again against Renova, by which for
27 these purposes I include RIL, in respect of a matter which could and should
28 have been tried with the Project Egg claims some time ago also amounts to
29 inequitable conduct and harassment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

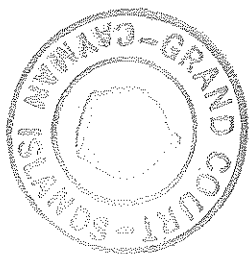
11.10

It was also submitted on behalf of Fairbairn that Mr. Kuznetsov and Mr. Vekselberg were put on notice in the Project Egg action that such a claim as the present one may be brought derivatively by Fairbairn on behalf of the Company. This was based on the pleading to which I have already referred to above (see para. 10.4 above). Renova Resources, Mr. Kuznetsov and Mr. Vekselberg responded in their Reply and Defence to Counterclaim that any such application by Fairbairn for leave to bring such a derivative action would be resisted. It was argued for Fairbairn that they did not suggest that any such claim by Fairbairn should be brought in the Project Egg litigation, as they now do. Ms Lumsden for Fairbairn stated that if they had done so Fairbairn would have considered it, the implication being that Renova, Mr. Kuznetsov and Mr. Vekselberg are themselves to blame for the present claim not having been brought before now. I did not find this argument persuasive. The Reply that any such application by Fairbairn would be resisted does not, in my view, constitute a consent, still less a proposal, that the claims in relation to Project Charlie should be deferred until the Project Egg action was concluded. Nor does there seem to me to be any basis for finding that Fairbairn relied upon the response to the reservation of rights by Mr. Gilbertson on its behalf as a reason or justification for deferring the bringing of its present claim at this time. If it was desirable and appropriate to have the Project Charlie claim by Fairbairn heard and dealt with at the same time as the Project Egg claim, as, in my opinion, it obviously was, Mr. Gilbertson/Fairbairn should have taken steps in that respect and appropriate orders and/or case management directions could have been made. Whether or not the Defendants would have opposed Fairbairn being granted leave to continue such a claim, as they pleaded in their reply, on the basis that there was no prima facie case on the merits is neither here nor there. It was Fairbairn's proposed claim and it could and should have brought the claim at that time so it could be dealt with, if allowed, at the same time as the Project Egg claim.



1 11.11 It was also contended for Fairbairn that having the present claims tried at the
2 same time as the Project Egg action would have exposed the Trust to
3 substantially greater costs. I do not accept that. Indeed for the reasons
4 which I have already explained, by having the Project Egg and the Project
5 Charlie claims tried together a likely significant duplication of time and
6 costs would have been avoided. Insofar as necessary to avoid Fairbairn
7 being liable for costs arising in relation to the Project Egg claim it would
8 have obviously been open to the court to make an appropriate order limiting
9 its costs to only those incurred in respect of its claims regarding the Shares.

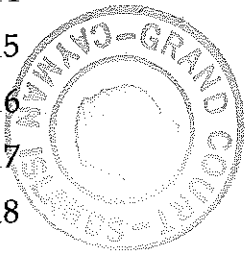
10
11 11.12 There was significant debate between leading counsel concerning the
12 apparent delay in bringing these proceedings. There is no obvious
13 justification for Fairbairn waiting until the last minute to commence the
14 present action. All the relevant facts were known to them at least by early
15 2008 and Mr. Gilbertson and Autumn expressly purported to reserve
16 Fairbairn's right to bring a derivative action in the name of the Company as
17 I have already explained. Leading counsel for Mr. Gilbertson and Autumn
18 cross-examined Mr. Vekselberg and Mr. Kuznetsov about the Shares in
19 April and May 2012 at the trial of the Project Egg action. No satisfactory
20 explanation was given for the fact that the present action was not
21 commenced until almost a year later. Leading counsel for Fairbairn simply
22 relied on the fact that the present action was commenced within the
23 limitation period and the application for leave to serve out was within the
24 provisions of the relevant rules.



25
26 11.13 Leading counsel for the Defendants submitted that it is to be inferred that
27 Fairbairn has deliberately delayed the present proceedings as far as possible
28 because it wished to know the outcome of the appeal against the Project Egg
29 Judgment before bringing the present action. Unfortunately for it the
30 outcome of the appeals is not yet known and accordingly Fairbairn was
31 constrained to commence the present proceedings because the relevant

1 limitation period was about to expire. Leading counsel for the Defendants
2 contended that the allegations which Fairbairn now makes are diametrically
3 the opposite of the allegations advanced by Mr. Gilbertson and Autumn in
4 the Project Egg action and which they continued to put forward at the
5 hearing of the appeal. This inconsistency would have caused difficulty for
6 Fairbairn in the present action until the conclusion of the Project Egg case as
7 a result of the end of the appeal process.

8
9 11.14 That difference in the allegations made in the two actions was largely
10 accepted by leading counsel for Fairbairn but he contended that a party is
11 permitted to run legally inconsistent cases in the alternative and that there is
12 nothing inherently wrong with the inconsistencies which the Defendants
13 now allege. However, if that is correct there would seem to me to be no
14 reason why Fairbairn's present claims relating to Project Charlie could not
15 have been tried at the same time as Renova Resources' claims relating to
16 Project Egg. In my view there is some force in the submissions of leading
17 counsel for the Defendants regarding the probable reason for the delay in
18 bringing the present proceedings. It was also submitted that this delay has
19 caused further unfair vexation and unfairness to Mr. Kuznetsov and Mr.
20 Vekselberg by unreasonably and inappropriately prolonging the time over
21 which the latest allegations of fraud and conspiracy have been left
22 unresolved.



23
24 11.15 In my view such delay of proceedings for what amount to purely tactical
25 reasons is not compatible with the interests of justice. The overriding
26 objective behind the GCR is to enable the court to deal with every cause or
27 matter in a way that is not only just and economic but also expeditious.
28 Delaying proceedings is not desirable or appropriate either having regard to
29 the administration of the court's business generally. It is not in the public
30 interest.

1 12 The Nurcombe Defence

2
3 12.1 The Defendants also relied on the principle established by the English Court
4 of Appeal in *Nurcombe v Nurcombe and another* [1985] 1 All ER 65,
5 namely that the court will not allow a derivative action in the name of a
6 company by a person who it considers is not a proper person to bring the
7 claim. At page 71 Browne-Wilkinson LJ said:

8
9 *“The Court of Appeal [in Towers v African Tug Co [1904] 1 Ch*
10 *558] relied on the fact that only a person having a personal*
11 *interest could bring a minority shareholder’s action and (at 571*
12 *per Cozens-Hardy LJ):*



13
14 *‘When you get that fact clearly established it seems to me*
15 *impossible to avoid taking the next step – that all personal*
16 *objections against the individual plaintiff must be gone into*
17 *and considered before relief can be granted.’*

18
19 “ *In my judgment that case established that behavior by the minority*
20 *shareholder, which, in the eyes of equity, would render it unjust to*
21 *allow a claim brought by the company at his instance to succeed,*
22 *provides a defence to a minority shareholder’s action. In practice,*
23 *this means that equitable defences which would have been open to*
24 *defendants in an action brought by the minority shareholder*
25 *personally (if the cause of action had been vested in him) would*
26 *also provide a defence to those defendants in a minority*
27 *shareholder’s action brought by him.*
28 *Since the bringing of such an action requires the exercise of the*
29 *equitable jurisdiction of the court on the grounds that the interests*
30 *of justice require it, the court will not allow such an action to be*
31 *used in an inequitable manner so as to produce an injustice.*

1 *Towers v African Tug Co* shows that ‘all personal objections
2 against the individual plaintiff’ must be considered. It is for this
3 reason that, in my judgment, a court of equity will not allow a
4 minority shareholder to succeed in a minority shareholder’s action
5 where there are equitable defences which, as between the
6 shareholder personally and the defendants, the defendants could
7 properly rely on in equity.....”
8

9 It is the Defendants’ case that in light of the reality that it is Mr. Gilbertson
10 who is behind Fairbairn in bringing these proceedings the conduct of
11 Fairbairn as plaintiff makes it inequitable to allow its claim to proceed.
12

13 12.2

14 I have already addressed the relationship between Mr. Gilbertson and
15 Fairbairn and the extent of Mr. Gilbertson’s influence over Fairbairn in
16 respect of the Gilbertson family trusts. The Defendants point to the fact that
17 in the Project Egg litigation Mr. Gilbertson has been found to have been in
18 serious breach of his fiduciary duties as a director of the Company on behalf
19 of which Fairbairn now seeks to bring the present proceedings. They argue
20 that Mr. Gilbertson would not be a proper person to bring the present claims
21 and that in the circumstances Fairbairn is neither.

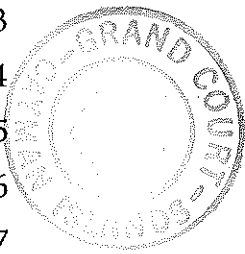
22 12.3

23 The Defendants also rely on the fact that Fairbairn, as already explained,
24 owns Autumn. But Autumn is pursuing an appeal against the order made on
25 the Project Egg Judgment, which appeal is plainly against the interests of
26 the Company whose interests Fairbairn now proposes to represent in
27 bringing the present action. It is argued that Fairbairn cannot be a proper
28 person to represent the Company’s interests while at the same time, through
29 its wholly owned subsidiary, of which its affiliated company is director, it is
 adopting a position which is overtly hostile to the Company’s interests.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

12.3 It should also be borne in mind that the level of potential economic benefit to the Company, still less to Fairbairn, even if the present action was allowed to proceed and was successful, is very small. That is in my view a further reason to question the conduct of Fairbairn in bringing this present action and the motives behind its doing so.

12.4 Leading counsel for Fairbairn argued that the Defendants' submissions based on the *Nurcombe* principle did not add anything to their submissions on abuse of process generally. It is correct that there is inevitably considerable overlap in that respect in the circumstances of the present case. However, *Nurcombe* is concerned with equitable defences which would be open to the defendants in an action brought by the shareholder personally if the cause of action had been vested in him. It is in that context that the conduct of Fairbairn (as procured by Mr. Gilbertson) is to be considered in determining whether the action is being used in an inequitable manner. My view is that the action is being brought by an inappropriate plaintiff and is being used to further the personal objectives of an inappropriate individual, without obvious regard to the interest of the Company. It seems to me in all the circumstances of this case that the action is indeed being used in an inequitable manner and, adopting the *Nurcombe* principles, I should not allow that to happen.

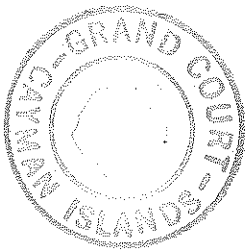


13 Indemnity

13.1 By its summons seeking leave to continue the present action Fairbairn also applied, pursuant to GCR O.15, r.12A(13), for an order that it be indemnified out of the assets of the Company in respect of its costs of the action. The sub-rule provides that "*the Court may grant such indemnity upon such terms as may in the circumstances be appropriate*".

1 13.2 In the Renova leave to continue Ruling, although Renova Resources did not
2 apply for such an indemnity from the Company for its costs of the Project
3 Egg action, there was some consideration of the relevant test applicable to
4 such an application. Reference was made to the comments of Buckley LJ in
5 *Wallersteiner v Moir (No. 2) [1975] 1 QB 373*, when he said at pp. 403-405:

6
7 *In all the instances mentioned the right of the party seeking*
8 *indemnity to be indemnified must depend on whether he has acted*
9 *reasonably in bringing or defending the action, as the case may*
10 *be: see, for example, as regards a trustee, In re Beddoe, Downes v*
11 *Cottam [1893] 1 Ch 557. It is true that this right of a trustee, as*
12 *well as that of an agent, has been treated as founded in contract. It*
13 *would, I think, be difficult to imply a contract of indemnity between*
14 *a company and one of its members. Nevertheless, where a*
15 *shareholder has in good faith and on reasonable grounds sued as*
16 *plaintiff in a minority shareholder's action, the benefit of which, if*
17 *successful, will accrue to the company and only indirectly to the*
18 *plaintiff as a member of the company, and which it would have*
19 *been reasonable for an independent board of directors to bring in*
20 *the company's name, it would, I think, clearly be a proper exercise*
21 *of judicial discretion to order the company to pay the plaintiff's*
22 *costs. This would extend to the plaintiff's costs down to judgment,*
23 *if it would have been reasonable for an independent board*
24 *exercising the standard of care which a prudent business man*
25 *would exercise in his own affairs to continue the action to*
26 *judgment. If, however, an independent board exercising that*
27 *standard of care would have discontinued the action at an earlier*
28 *stage, it is probable that the plaintiff should only be awarded his*
29 *costs against the company down to that stage”.*



1 In the Project Egg Ruling I also concluded, in light of this authority that the
2 test to be adopted in considering whether a shareholder plaintiff in a
3 derivative action should have an indemnity for its costs from the company
4 concerned should involve consideration of whether a hypothetical
5 independent board of directors would be likely to approve the incurring of
6 such costs by the company.
7

8 13.3 In the present case I am of the view that the shareholder (Fairbairn) is not
9 acting in good faith or in the interests of the Company, rather in the interests
10 and at the behest of Mr. Gilbertson. I am not therefore satisfied that an
11 independent board of directors, acting reasonably, would have authorized
12 the Company to incur the costs, including the risk of liability for the
13 Defendants' costs, of this action in this case. In my opinion such a board of
14 directors would not have taken the risk in respect of the costs in light of the
15 low potential return in respect of this claim. I think it fair, however, to say
16 that leading counsel for Fairbairn did not anyway press the application for
17 an indemnity particularly strongly and he made it clear that Fairbairn would
18 proceed with the action, if given leave to do so, even if it was not granted an
19 indemnity. Furthermore, I understood that the Company has no assets, other
20 than the present claim and any recoveries from the Project Egg litigation,
21 which may be limited depending on the outcome of the appeal in that case,
22 so the Company may not in practice be in a position to meet or at least to
23 fully meet, any such indemnity in any event. In all the circumstances, in the
24 exercise of my discretion in this respect I would decline to order that
25 Fairbairn should have an indemnity from the Company for its costs of the
26 present action if it were given leave to proceed.
27

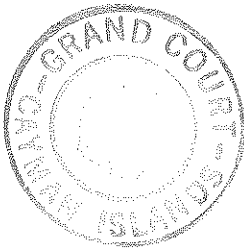
28 14 Conclusions
29

30 14.1 I have concluded on the basis of the evidence put before me that Fairbairn's
31 claims in relation to the Shares do not reach the necessary standard of a

1 prima facie case with all which that entails, such as to justify the court
2 granting leave to continue these proceedings. I find the Defendants' case
3 that the Shares were purchased by RIL at its own risk and that any
4 understanding otherwise was subject to a reasonable and likely condition
5 which was never met, to be far more convincing and probable. In light of
6 the evidence overall I am not satisfied that Fairbairn has more than a very
7 weak case on the merits. Nor am I satisfied that the claim is brought bona
8 fide or in the interests of the Company. In the exercise of my discretion in
9 all the circumstances I would not grant leave to Fairbairn to continue the
10 present proceedings further.

11
12 14.2 I should add that, lest there be any doubt about my conclusion concerning
13 Fairbairn's claims generally, I have particularly come to the view that the
14 claims against the Defendants for conspiracy, whether by lawful or unlawful
15 means, and the claims against Mr. Kuznetsov and Mr. Vekselberg for
16 dishonesty, are not established to the requisite standard in any event. Even
17 at the hearing of Fairbairn's application for leave to serve its amended writ
18 out of the jurisdiction, the Hon Judge hearing the application expressed the
19 view that the claims for conspiracy were "weak" and that, of course, was on
20 the lesser standard of a good arguable case for the claims.

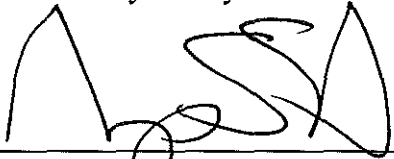
21
22 14.3 However, I have also concluded, not as a matter of discretion but as a matter
23 of my judgment, for the reasons which I have explained above that in all the
24 circumstances the present proceedings amount to an abuse of process under
25 the *Henderson* principle as explained more recently in the *Johnson v Gore*
26 *Wood* case. All the disputes between Mr. Gilbertson and Mr. Vekselberg
27 concerning the Pallinghurst Structure could and should have been heard and
28 determined at one and the same time. It would have brought appropriate
29 and desirable finality to the litigation between them. The present
30 proceedings simply prolong what has all the appearance of a vendetta and
31 that should, in the public interest, be brought to an end. The process of this



1 Court is, in my view, being misused and that should not be allowed. I have
2 also concluded that the action should be dismissed pursuant to the
3 *Nurcombe* principles. The conduct of Mr. Gilbertson through Fairbairn is
4 such as to bar equitable relief. There has been an unacceptable delay in
5 bringing this action and Fairbairn is, in the circumstances, not a proper
6 person to bring these proceedings. It would be inequitable, in my judgment,
7 to allow Fairbairn to proceed with this action, notwithstanding that the cause
8 of action is vested in the Company.
9

10 14.4 I therefore rule that the present action should not be allowed to continue. I
11 also order that the action should be dismissed as an abuse of process.
12

13 Dated this 22nd day of July 2014

14 
15
16
17 **The Hon. Mr. Justice Angus Foster**
18 **JUDGE OF THE GRAND COURT**

